

Equality Commission

FOR NORTHERN IRELAND



**Section 75 Statutory Equality and Good Relations Duties
Acting on the evidence of public authority practices**

Report for Consultation

October 2017

Equality Commission for Northern Ireland

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Foreword

The statutory equality and good relations duties on public authorities in Section 75 of the Northern Ireland Act 1998 are a vital part of the legal framework in Northern Ireland. It is as important as ever that public authorities pay due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations.

It is hard to believe that it is almost 20 years since the Good Friday/Belfast Agreement and the Northern Ireland Act 1998. Much in the landscape has changed in the intervening period. But what has remained constant, recognising some progress, is the need to continue to address inequalities in Northern Ireland. Some of these are enduring inequalities and some are more recently emerging – it is imperative that public authorities effectively mainstream equality and good relations considerations in the planning and delivery of public policy and the public services for which they are responsible.

The Commission has a role to keep the effectiveness of the Section 75 duties under review. The duties were intended to transform the practices of public authorities so that considerations of equality of opportunity and good relations are central to policy making and implementation. We have gathered evidence of practices amongst public authorities fulfilling their statutory equality and good relations duties.

Our consideration of public authorities' practices is timely, not only as we are 20 years on, but also because of the real and concrete opportunities to embed fully equality and good relations considerations through the approach taken to the current draft Programme for Government, which has a specific focus on delivering better outcomes for individuals.

This report presents the evidence gathered and makes recommendations on how to address a number of issues identified. The Commission agreed that there is sufficient evidence of issues for public authorities to address as a matter of priority, to ensure the effective implementation of their statutory equality and good relations duties. These issues have been presented to and discussed with a range of stakeholders; and the Commission is already addressing them through its advisory work.

It is clear that cultural and institutional change is required to fully embed the legislative requirements, and to ensure a focus on the impacts and consequences of policies and decisions on the lives of people in Northern Ireland. We have highlighted leadership, in particular, as core to the effective delivery of the statutory equality and good relations duties. We are fully committed to engaging with leaders across the public sector to encourage renewed focus on such delivery.

One of the actions identified is a review of our use of investigation powers, scheduled in the current business year. On completion of this, the Commission will consider the overall position in relation to its function to 'keep under review the effectiveness of the duties imposed by Section 75'.

We are publishing this report now for consultation on the issues, recommendations and proposed actions; we welcome your comments. We are also using the findings to focus on the issues identified and on the delivery of our statutory remit relating to the duties.

Dr Michael Wardlow
Chief Commissioner

Summary

- The Commission has a considerable body of evidence available on the operation of the Schedule 9 requirements of the Northern Ireland Act 1998. The Schedule 9 requirements are there to enable public authorities to fulfil their statutory equality and good relations duties set out in Section 75, and to enable enforcement of those duties.
- This report sets out the evidence that the Commission considered during the course of the 2016-17 business year. The evidence has presented a picture of how the duties are being implemented by public authorities.
- This picture has been drawn from: detailed consideration of the evidence gathered; the Commission's understanding from experience in advising public authorities and others; the Commission's understanding of the wider political and economic context for public services in Northern Ireland; and other sources such as from the use of our investigation powers. A number of reviews commissioned during the period; analysis of other research and relevant sources that are referenced in this report, as well as stakeholder engagement, have also contributed.
- As a result of examining public authority practices, the Commission is concerned about the effective implementation of the Section 75 duties by public authorities.
- The Commission has identified a number of issues from this, which it believes are fundamental to the effective implementation of the duties by public authorities.
- The Commission will continue to provide advice and information on the statutory equality and good relations duties, and fulfil its functions as set out in Schedule 9. It will focus on addressing the issues identified below.

Issues identified in public authorities' implementation of the Section 75 duties

- **Leadership.** While recognising the circumstances of reduced resources, leadership continues to be imperative within public authorities to ensure the maintained focus on equality matters, as well as ensuring good governance and the mainstreaming of equality considerations throughout the business of the authority.
- **Ownership.** The evidence, and our experience in providing advice, suggests that public authorities do not, in all instances, see the purpose of having an Equality Scheme as assisting in fulfilling their statutory equality and good relations duties.
- **Understanding and/or misinterpreting the purpose and scope of the duties.** The evidence clearly suggests that Equality Schemes continue to be seen by public authorities as processes in themselves; they are not seen as contributing equality of opportunity and good relations considerations to decision making.

- The evidence also suggests there are different understandings of, or expectations of, what is required in fulfilling the duties (i.e. to have “due regard/regard to...”) amongst different stakeholders.
- **Definitions of key terms and expectations.** It remains the case, reflected in the evidence of practice, that there is an issue in the continuing differences among stakeholders in what is understood by the terms “equality of opportunity” and “good relations”.
- **Transparency and accountability.** The requirements of Schedule 9 provide for a model for the duties described as “responsive” (in the context of legislation and regulation that can be reflexive and/or responsive)¹. The evidence also suggests that some public authority practices have moved away from the responsive approach², with limited opportunities for stakeholder involvement in decision making through use of the Equality Scheme processes, and limited information presented in assessments when public authorities present equality assessments as screening templates.
- **Data development.** Equality Scheme commitments have not driven a data development agenda in the public sector, despite the requirements in Schedule 9 for particular monitoring arrangements and the Commission’s longstanding advice.
- **Accountability and risk.** Evidence suggests that the perceived risks of not fulfilling the statutory equality and good relations duties, and/or non-compliance, are probably small.

Issues identified in the Commission’s powers and duties in Schedule 9

- **Complaints.** There are specific requirements on the Commission in relation to complaints. The range and nature of complaints to the Commission has consistently reflected particular issues on policies and practices that are of concern to the complainant, which are not always clearly associated with what Equality Scheme arrangements provide for.
- **Investigations** are adversarial, given the statutory requirement that they are considered in relation to a belief of non-compliance by a public authority with an equality scheme. They have mostly been driven by particular circumstances. They have provided some learning for public authority practices, but can be limited in the ripple effect of the findings, particularly when arising from a paragraph 10 complaint.

¹ Conley, H., [A review of available information on the use of impact assessment in public policy formulation and in contributing to the fulfilment of statutory duties](#) (ECNI, 2016).

² Identified through a number of events that have been held for those with lead responsibility for equality matters within public authorities.

Recommendations

- The Commission recommends to public authorities that:
 - senior leaders and decision-makers in organisations routinely seek assurance within their organisations that they are fulfilling the duties to have due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations;
 - those responsible for providing information for decision-making on a function or policy should ensure they provide sufficient information, from their equality assessments, for the appropriate consideration (i.e. due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations) to be given in particular decisions;
 - the importance of the statutory equality and good relations duties are restated, given the wider political and economic context, as well as reconfirming the necessity of fulfilling the duties within the organisation – they continue to be a statutory requirement;
 - the shift of focus from process to outcomes should continue. Equality Schemes are to enable public authorities to fulfil the Section 75 duties – to give the appropriate consideration to the need to promote equality of opportunity and desirability of promoting good relations - when they deliver their functions. Through giving the appropriate consideration, a public authority will ensure that the decisions they take will be mindful of the “consequences on the lives of people”³; and
 - they ensure their consideration of the need to promote equality of opportunity, and desirability of promoting good relations, is evidence based and the data is available to support the consideration. There is a clear link between the consideration needed to meet the Section 75 duties and the data development agenda that is required for the Outcomes Based Accountability approach to the draft Programme for Government. This should drive the collection and use of equality data.

Proposed actions

- The Commission has identified a number of actions that it proposes in support of these recommendations:
 - To set the agenda and debate in highlighting the importance of the duties and their continuing relevance to, and assistance in the development of, public policy and service delivery in Northern Ireland.
 - To engage specifically with politicians, senior leaders in public authorities and decision makers to re-confirm their roles and responsibilities.

³ [Section 75 of the Northern Ireland Act: A Guide for Public Authorities](#) (ECNI, 2010), page 10.

- To convey and communicate one of the most important issues and success factors – leadership. While recognising the circumstances of reduced resources, leadership continues to be imperative within public authorities to ensure the maintained focus on equality matters, as well as the mainstreaming of equality considerations throughout the business of the authority.
- To prioritise its advisory activities on public authority practices in screening and Equality Impact Assessment (EQIA), to ensure that these central methodologies are used to greatest effect by public authorities in consistently providing meaningful equality assessments of the policy objectives and policy goals under consideration at any given time.
- To use the issues identified in this report and review its approach to investigations generally in the forthcoming period.
- The Commission will continue to engage with all stakeholders with roles to play with respect to ensuring that public authorities are fulfilling their statutory equality and good relations duties in Section 75.

1. Introduction

- 1.1. This report presents evidence the Commission has gathered from recent practices by public authorities in the implementation of their Section 75 duties, alongside our assessment of those practices. It includes some examination of the wider context, including the political and economic environment, which has informed our understanding.
- 1.2. The Commission has a duty in Schedule 9 of the Act to “to keep under review the effectiveness of the duties imposed by Section 75”⁴. The Commission does this in a number of ways - through its continuing work to provide advice and guidance, as well as through specific review activities, such as the strategic review of the effectiveness of the Section 75 duties it undertook in 2006-8⁵.
- 1.3. The value and purpose in keeping the effectiveness of the duties under review is set out in the Commission’s draft Corporate Plan for 2016-19:

“We know the strengths in using our legislative framework as a driver for change: whether in the workplace; in the provision of goods, facilities and services; or the mainstreaming of equality and good relations considerations through public policy and public services. We remain in a unique position to evidence and argue for what that framework needs to be, and know that this can shape the wider discourse.”⁶

- 1.4. The draft plan also set out that, in the 2016-17 Business Plan, action would be taken to:

“Examine the evidence we have of current practice in public authorities of fulfilling their statutory equality and good relations duties in order to prepare for a formal effectiveness review of these duties.”

- 1.5. This report compiles the findings of the examination of evidence of current practices within public authorities and wider context in the following chapters:
 - The Section 75 statutory equality and good relations duties: background;
 - Fulfilling the statutory equality and good relations duties in Section 75;
 - Evidence of public authority practices;
 - Mainstreaming and action measures;
 - Public sector equality duties in Britain and the Republic of Ireland;
 - The Commission’s role to consider complaints and investigate;
 - Issues and opportunities identified.

⁴ Northern Ireland Act 1998, [Schedule 9](#), paragraph 1(a).

⁵ [Section 75: Keeping it Effective](#) (ECNI, 2008).

⁶ [Draft Corporate Plan 2016-19](#) (ECNI, 2015), page 10.

- 1.6. As has been set out in the Foreword, the report presents the issues that the Commission has identified and agreed arising from this work. It concludes with a chapter setting out recommendations and proposed actions to address these issues.

Your comments and response to this consultation report

- 1.7. The Commission would welcome comments, particularly on the **issues identified, recommendations and proposed actions associated to them.**

- 1.8. We would welcome your comments on this report on or before:

Wednesday 31 January 2018.

- 1.9. If you would like any further information, information in an alternative format, or to submit your response, please contact us, as follows:

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- 1.10 You can also access a summary of this report and a response form as a Word document on our website, as well as complete an online survey to submit your response.

2. The Section 75 statutory equality and good relations duties: background

2.1. This section highlights points relating to the background and purpose of the Section 75 duties, what the legislation provides for and how the duties fit within the current context and environment for public service delivery. It also provides a reminder of what the duties are.

The statutory equality and good relations duties on public authorities in Section 75

2.2. Section 75 of the Northern Ireland Act 1998 (the Act) requires public authorities, which are designated for the purposes of the Act⁷, to comply with two statutory duties.

2.3. The first duty is the *Equality of Opportunity* duty, which requires public authorities in carrying out their functions relating to Northern Ireland to have due regard to the need to promote equality of opportunity between the nine equality categories of: persons of different religious belief; political opinion; racial group; age; marital status or sexual orientation; men and women generally; persons with a disability and persons without; and persons with dependants and persons without.

2.4. The second duty, the *Good Relations* duty, requires that public authorities in carrying out their functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion and racial group⁸.

2.5. These duties are statutory requirements; the vast majority of public authorities in Northern Ireland are bound by them⁹. These public authorities must pay the **appropriate amount of regard** to the “statutory goals”¹⁰ set out above when they are carrying out their functions in Northern Ireland.

2.6. These wide reaching requirements on public authorities are given practical effect through Schedule 9 of the Act, which sets out what a public authority must do to show how it will **fulfil** these duties. The central requirement is that a

⁷ See designation as explained in [A Guide for Public Authorities](#) (ECNI, 2010), page 26.

⁸ [A Guide for Public Authorities](#) (ECNI, 2010), page 7.

⁹ [List of Public Authorities designated for the purposes of section 75 of the Northern Ireland Act 1998](#), (ECNI, 2017).

¹⁰ “Statutory goals” is used as a generic term in this report for what a public authority is required to give the right amount of regard to in the legislation. It reflects legal language used and refers specifically to “the **need** to promote equality of opportunity” and the “**desirability** of promoting good relations” [emphasis added]. Using it as a single term for the goals of both duties **does not** lose the different emphasis given in those goals between need and desirability.

public authority must have an Equality Scheme, which will show its arrangements for how it proposes to fulfil the duties imposed by Section 75 to the relevant functions¹¹.

The Commission’s advice on the importance of the Section 75 duties

- 2.7. The Commission advises and provides guidance, particularly to public authorities, on Equality Schemes and the duties. The main source of advice is the *Section 75 – Guide for Public Authorities* (the Guide)¹² which says in a section called “*Why the duties are important*”:

“The Section 75 statutory duties aim to encourage public authorities to address inequalities and demonstrate measurable positive impact on the lives of people experiencing inequalities, through paying due regard to the need to promote equality of opportunity and paying regard to the desirability of promoting good relations.

Section 75 is a policy tool and its use should facilitate better public policy making and outcomes by focusing particular attention on the promotion of equality of opportunity and good relations. Its effective implementation should improve the quality of life for all of the people of Northern Ireland.

...

Those with responsibility for public policy should remember the reality of inequality, to have it in mind in the decisions they take, and to adjust or modify those decisions so that they can reduce its consequences on the lives of people.”¹³

Origins of and developments in the implementation of the Section 75 duties

- 2.8. The statutory equality and good relations duties set out in Section 75 of the Northern Ireland Act 1998 were part of the political agreement at that time – through the Belfast/Good Friday Agreement (the Agreement) itself to the subsequent legislation. Their inclusion in the Northern Ireland Act 1998, as well as the enforcement framework that became Schedule 9, were part of the political and public policy debate at the time, and led to the creation of the Equality Commission itself.
- 2.9. The inclusion of a “due regard” duty in Section 6 of the Agreement¹⁴ was linked to a consultation at the time on the UK Government’s White Paper entitled “*Partnership for Equality*”. That consultation document set out a range of provisions to extend and strengthen the anti-discrimination legislation, and also

¹¹ Northern Ireland Act 1998, [Schedule 9](#), paragraph 4(1).

¹² The Commission has a number of responsibilities set out in Schedule 9 of the Northern Ireland Act 1998, many of which relate to Equality Schemes. The Commission’s *Section 75 – A Guide for Public Authorities*, 2010 contains its Guidelines on form and content of an Equality Scheme, as required by Schedule 9, paragraph 4. (3) (a) and approved by the Secretary of State.

¹³ [A Guide for Public Authorities](#) (ECNI, 2010), page 10.

¹⁴ [The Belfast/Good Friday Agreement](#), 1998, Section 6, paragraphs 3 and paragraph 4 in the Economic, Social and Cultural Rights subsection.

linked to recommendations arising from the earlier guidelines for “*Policy Appraisal and Fair Treatment*”¹⁵ (PAFT) and work undertaken by, and associated with, the Standing Advisory Committee on Human Rights (SACHR).

- 2.10. A further contribution to the inclusion of statutory equality duties on public authorities in the Agreement was through a discussion paper “*Mainstreaming Fairness*” that was commissioned by Unison¹⁶ and a consultative process on it facilitated by the Committee on the Administration of Justice in 2006-7¹⁷.
- 2.11. This report has been prepared 20 years on from those detailed debates and consideration. It is important to remember that the duties were seen as providing the means to change the public policy landscape and its development at the time. There was interest in the details, including proposed wording for arrangements and methodologies. This interest came from politicians, those with a direct interest in human rights and equality matters, whether as public servants, members of advocacy groups or NGOs and other interested individuals¹⁸.
- 2.12. There was particular focus and debate on the underlying processes that are contained in Schedule 9. The consultation on “*Partnership for Equality*” contributed to the proposed framework; as did the work arising from the PAFT guidelines, and experiences of mainstreaming particular issues to contribute to public policy formulation and development¹⁹. The debates from Parliament at the time illustrate this, and the Commission has continued to reflect this in its guidance²⁰ on the statutory equality and good relations duties.

Contributors

- 2.13. When Section 75 was established, it was set out in terms of three contributors. First, there are the public authorities themselves on whom the duties lie. Second, there are those who have a contribution, and role in contributing to, the decision-making processes as members of the equality groups and/or representative groups, as well as holding public authorities to account in their fulfilment of the duties. Third is the Equality Commission, with its powers and duties as set out in Schedule 9.
- 2.14. While this report mainly presents evidence of practices by public authorities in implementing their Equality Schemes, it also reflects the role, contribution and issues currently presented by equality groups and groups representing particular interests. Practices have been shaped in conjunction with, and in response to, work and engagement by members of equality groups,

¹⁵ [A Guide for Public Authorities](#) (ECNI, 2010), page 7.

¹⁶ McCrudden, C., [Mainstreaming Fairness? A discussion paper on “Policy Appraisal and Fair Treatment”](#) (Committee on the Administration of Justice, 1996).

¹⁷ [Mainstreaming Fairness “Policy Appraisal and Fair Treatment” A summary of a consultation process around “Policy Appraisal and Fair Treatment”](#) (CAJ, 1997).

¹⁸ The debates in Parliament during the passage of the Northern Ireland Bill in 1998 are illustrative of this, see in particular the [Hansard record of 27 July 1998](#).

¹⁹ Conley, H., [A review of available information on the use of impact assessment in public policy formulation and in contributing to the fulfilment of statutory duties](#) (ECNI, 2016), page 1.

²⁰ [A Guide for Public Authorities](#) (ECNI, 2010), page 9.

representative groups and individuals who have maintained their interest in not only ensuring public authorities are fulfilling their statutory equality and good relations duties, but also that public services reflect their needs and interests in equality terms.

Keeping the effectiveness of the duties under review

2.15. After a number of years of the duties being in operation, the Commission undertook a strategic review of the effectiveness of the Section 75 duties, which culminated in the Commission's report published in 2008²¹.

2.16. There were a number of overarching findings at that time, as well as detailed consideration of a range of issues that lead to recommendations that were intended to improve practices and methods for Equality Schemes. In general:

*"... the Commission found overwhelming support for the principles of Section 75. Expectations of the achievements of Section 75 remain high. However, contributors to the review called for a debate on what Section 75 is actually meant to achieve, so that the intended impact of Section 75 does not become so broad as to be meaningless ..."*²²

2.17. The vision provided from the 2008 review was of an active, anticipatory duty; an innovative approach to mainstreaming; actions on the duties which would have an impact on inequalities – considering the potential consequences of public policy decision making on the lives of people²³.

2.18. The Commission at the time set out not only the opportunities but also the challenges that were identified going forward:

*"And here, also, is both opportunity and challenge for the Commission. Opportunity to show the way towards realising what the Statute intended, demonstrating that Section 75 is a mechanism with enormous potential, not a threat; challenge to ensure that its own processes and approaches adapt to the needs of the time and that the public know what the Section offers them."*²⁴

2.19. The Commission also concluded at that time that, while Section 75 had been effective in a number of key areas, *"a shift in gear was needed to take place within public authorities; away from concentrating primarily on the process of implementing Section 75, towards achieving outcomes"*²⁵.

2.20. The Commission's focus following the publication of its review report in 2008 was to update its guidance. This guidance provides advice on Equality Schemes²⁶. The purpose of these schemes is to enable public authorities to

²¹ [Section 75: Keeping it Effective](#) (ECNI, 2008).

²² [Section 75: Keeping it Effective](#) (ECNI, 2008), page 19.

²³ [Section 75: Keeping it Effective](#) (ECNI, 2008), chapter 1.

²⁴ [Section 75: Keeping it Effective](#) (ECNI, 2008), page 3.

²⁵ [Section 75: Keeping it Effective](#) (ECNI, 2008), page 4.

²⁶ The Commission provides guidance on the "form or content" of equality schemes as a public authority must draft an equality scheme to conform with any such Guidelines issued by the Commission, as set out in: Northern Ireland Act 1998, [Schedule 9](#), paragraph 4(1).

fulfil their Section 75 duties by paying the appropriate amount of regard in any given circumstances²⁷. The Commission updated its advice and recommendations on the particular methodologies recommended to public authorities for their Equality Scheme arrangements. These methods were familiar to public authority practitioners and other stakeholders at the time and therefore retained and updated. Following the publication of its revised Guide²⁸, the Commission implemented a strategy requesting revised Equality Schemes from public authorities.

2.21. It should be noted that the requirements in Schedule 9 for what is included in an Equality Scheme apply to any public authority designated and required to produce a scheme. The Schedule makes no provision for different types of public authority, whether by size or sector. The Commission's guidance has similarly not differentiated between different types of public authority and has recommended common arrangements for all public authorities with Equality Schemes.

2.22. The Commission also reflected the principles of proportionality and relevance in the Guide²⁹. The subject of relevance in particular is considered in greater detail below, as there are issues identified on this. The principles are important for the public authority, as they provide the basis for ensuring that it can give the appropriate consideration to the statutory goals in particular circumstances³⁰, and so fulfil the duties in set out in Section 75.

Current environment and context for public service delivery

2.23. Through recent advice work and in the collection of the evidence for this report, a number of issues in the current economic environment for public service delivery have been identified. These have been reported as having a direct effect on public authorities and their actions to fulfil their statutory equality and good relations duties:

- The progressive reductions in the budgets available to public authorities have affected the resources dedicated to, and available for, equality matters. This has been apparent in the loss of both institutional memory and knowledge of the equality matters for organisations where there have been reductions in staff.
- In many of the designated public authorities with an approved equality scheme, the resource restrictions have resulted in reorganisation of functions. The equality responsibilities have in places been merged with other responsibilities, and also taken on by those who have not had previous experience in these matters. This has been particularly apparent in either smaller public authorities or those authorities where the functions considered relevant to the duties are fewer.

²⁷ Northern Ireland Act 1998, [Schedule 9](#), paragraph 4(1).

²⁸ [A Guide for Public Authorities](#) (ECNI, 2010).

²⁹ [A Guide for Public Authorities](#) (ECNI, 2010), pages 26-27.

³⁰ i.e. the "need to promote equality of opportunity" and "desirability of promoting good relations"

- The evidence collected from public authority practices also suggests that the statutory equality and good relations duties are not a particular priority in many public authorities³¹.

2.24. There have been a range of reviews of organisational practices in Northern Ireland³². There appears to be some coherence in the issues identified here, of transparency and accountability in fulfilling the Section 75 duties, with wider observations of public sector practices in areas of involvement, governance and accountability.

Summary points from this chapter

2.25. Support for statutory equality and good relations duties and their establishment was a significant part of the political discourse and processes around the Agreement twenty years ago. They remain not only statutory requirements but also continue to be important.

2.26. Over time, the focus of attention has been on the requirements for an Equality Scheme, given what is set out in Schedule 9 for the Commission and that the Equality Scheme is the framework through which the public authority is expected to fulfil its duties.

2.27. In recent times, the Commission has noted a number of trends in public authorities where either institutional expertise on equality matters has been reduced, or the equality function has been combined with other responsibilities for particular officers, and evidence that the duties in organisations as a whole might not have the focus they once did.

³¹ For a summary of the findings on good relations see, for example: Policy Arc Ltd and Kremer Consultancy Services Ltd, [Section 75 - Screening and Equality Impact Assessment: A Review of Recent Practice](#) (ECNI, 2016), page 27.

³² See, for example, [Northern Ireland \(United Kingdom\): Implementing joined up governance for a common purpose](#) (OECD, 2016) – recommendations are made for the establishment of a framework in Northern Ireland which would address early intervention/prevention: “as a building block for new social policies and programmes, and strengthening data driven analysis for improving service design and delivery”. The Review summary also identifies: “to enhance public trust in the government’s ability to pursue better outcomes for people the Review recommends that Northern Ireland improve dialogue with key stakeholders...” (p16).

3. Fulfilling the statutory equality and good relations duties in Section 75

3.1. This section sets out what is required in practice to fulfil the Section 75 duties and some issues arising from that. It describes what is required to pay “due regard” as established in caselaw. It also sets out a number of specific areas where the Commission has provided advice and guidance, in order to assist public authorities to fulfil their statutory equality and good relations duties through the application of the requirements in Schedule 9.

Context

3.2. When the Northern Ireland Act was passed in 1998 and relevant parts commenced in 1999, the duties conferred in Section 75 were not unique in the United Kingdom as “due regard” duties; they are long established in legislation for a range of statutory goals reflecting political and policy priorities³³.

3.3. However, the approach to their enforcement was unique at the time; this is what is set out in Schedule 9 and has not changed since the Act commenced. Also, the scope of the Section 75 duties was much wider in its application than preceding legislation, as they cover nine equality categories.

3.4. Section 75 (3) of the Act sets out how bodies come within scope of the duties. The authorities are wide ranging, from small public authorities with functions in Northern Ireland, to government departments and District Councils.

3.5. The Commission implemented a strategy to request revised Equality Schemes from public authorities, following the publication of its revised Guide in 2010. This strategy concluded in the 2013-14 business year, with over 150 revised Equality Schemes approved³⁴ by the Commission for public authorities. The Commission expects public authorities to implement their schemes, using the methods they have committed to, so they can to fulfil their statutory equality and good relations duties.

3.6. The Commission has prioritised advice and guidance on Equality Schemes given its statutory role and the requirements on the Commission: to provide guidance on Equality Schemes; to provide advice to public authorities and others; and to approve equality schemes³⁵. It has more recently developed a

³³ “Due regard” duties have not been limited to anti-discrimination or equality legislation, but an example was contained in Section 71 of the [Race Relations Act 1976](#) (repealed): “Without prejudice to their obligation to comply with any other provision of this Act, it shall be the duty of every local authority to make appropriate arrangements with a view to securing that their various functions are carried out with **due regard** to the need—

(a) to eliminate unlawful racial discrimination; and

(b) to promote equality of opportunity, and good relations, between persons of different racial groups”

³⁴ The number of public authorities subject to the requirement that they prepare and submit an equality scheme varies. The Commission maintains a list of current public authorities with schemes approved [here](#).

³⁵ Northern Ireland Act 1998, [Schedule 9](#), paragraphs 1-3 and 6.

number of short advice notes, which address particular themes such as the principles established for paying the required “regard”³⁶.

- 3.7. Schedule 9 sets out the circumstances which trigger the preparation of an equality scheme, whether on establishment of the authority or in response to a Commission request. A high level of compliance has been maintained with the requirement on authorities to prepare and submit equality schemes. The Commission has focused on this during the preceding Corporate Plan period, given the Strategy referred to above. It should also be noted that the Commission has to date approved the schemes submitted; there have been no referrals to the Secretary of State, nor circumstances where the Commission has not approved a submitted scheme.
- 3.8. The development of the Commission’s revised Guide for public authorities in 2010 focused on revising the Commission’s approach in the central processes of assessments. Part of this was in order to facilitate the “*shift in gear*” that was identified as needed: “*away from concentrating primarily on the process of implementing Section 75, towards achieving outcomes*”³⁷.
- 3.9. However, through the development of the revised Guide, the Commission also considered how the recommended processes, such as screening and Equality Impact Assessment (EQIA), could be improved. The results of the work to amend the methodology of “screening” were contained in its Guide in 2010. The Commission also incorporated an emphasis on “proportionality” and “relevance” into its advice to public authorities.

What is required to have (due) regard

- 3.10. There has been considerable legal interpretation of what is required by a public authority to pay the **regard** that is due or appropriate in the particular circumstances, and this is determined on a case by case basis.
- 3.11. The Commission’s advice has been revised to take account of the appropriate interpretations of the statutory requirements. Specifically, there has been a considerable amount of judicial interpretation of the statutory equality and good relations duties, much of this in England, and the now well-established principles for what is required for a public authority to have “due regard” are relevant for Northern Ireland. The Commission’s advice reflects this.
- 3.12. Case law has determined some principles, commonly known as the Brown principles, from a case of that name in Great Britain. These are principles that the courts in Great Britain take account of when assessing compliance with the public sector duties. The Commission advises public authorities that, in planning for compliance with their duties, they may find these helpful:

³⁶ For example: [Budgets and Section 75: a short guide](#) (ECNI, 2015).

³⁷ [Section 75: Keeping it Effective](#) (ECNI, 2008), page 4.

- a decision-maker must be aware that he/she is obliged to comply with the public sector duties;
- the duties must be fulfilled before and at the time that a particular decision is being considered, and not afterwards;
- the duties must be exercised in substance, with rigour and an open mind; and not as a “tick boxing” exercise;
- the duties are non-delegable; meaning that it is the actual decision-maker who must comply with the duties, and not some other person;
- the duties are continuing ones;
- it is good practice to keep adequate records that will show that the statutory goals have actually been considered and pondered and to promote transparency and discipline in the decision-making process.³⁸

3.13. In terms of “due regard”, it is established that the consideration must be given in advance of a final decision being made, not afterwards, and it must be done with an open-mind to achieve the goals set out in statute. Hence, due regard and regard are not determinants of final policy outcomes, but are the processes of providing the appropriate levels of consideration.

In practice

3.14. The duties apply across the range of a public authority’s functions; it is for the public authority to determine when the duties are relevant. The way public authorities are expected to fulfil the duties is through the use of the processes and methods that they commit to in their Equality Scheme. For example, the Commission’s advice is that the “arrangements” a public authority is required to have in their Equality Scheme for “assessing and consulting on the likely impact of policies...”³⁹ should enable an authority to determine whether, and to what extent, the duties are relevant to the function in question and the related policy and decision making processes.

3.15. The processes in Equality Schemes should also ensure transparency and accountability. Anyone who has an interest in the public authority’s business should be able to find out if a particular function is considered relevant, as well as how that function has been being developed and delivered, giving the appropriate consideration to the need to promote equality of opportunity and the desirability of promoting good relations. Public authorities must have arrangements in their Equality Schemes to publish information, such as the results of their assessments of the likely impact of policies on the promotion of equality of opportunity.

³⁸ [Section 75, Northern Ireland Act 1998 and Section 49A, Disability Discrimination Act 1995](#) (ECNI, 2015).

³⁹ Northern Ireland Act 1998, [Schedule 9](#), paragraph 2(b).

3.16. The Equality Scheme arrangements that the Commission recommends – screening and Equality Impact Assessment, or equivalent methods – are central to providing a public authority with an assessment of the likely impacts of a function or policy on the need to promote equality of opportunity⁴⁰.

3.17. Public authorities may develop alternative approaches to the Commission’s recommendations for arrangements in Schemes. This is best described through the guiding principles for the Equality Scheme approval process:

*“The Commission’s guide to the statutory duty provides the parameters of the approval process. Recommendations in the guide are, in the main, related to secure the effective implementation of the statutory requirements. The Commission’s test will be that, where a recommendation is not followed, approval will be granted if the public authority can demonstrate that its alternative approach is adequate to secure the statutory requirements.”*⁴¹

Relevance

3.18. Section 75 applies to a public authority in carrying out its functions. As it is required to have “(due) regard”, this has been considered in caselaw in terms of “relevance”. Also, the Equality Scheme arrangements are in relation to those functions of a public authority which are “relevant”⁴².

3.19. Commission guidance notes that:

*“...certain functions may be more relevant than others to the Section 75 statutory duties. Case law has also determined that a duty to give “due regard” to certain statutory goals means giving appropriate consideration to them i.e. the degree of consideration that is appropriate in the specific circumstances of the decision or policy being made. What is appropriate is likely to vary from case-to-case, and from one public authority to another. As a general rule-of-thumb, where the level of relevancy is high, then a proportionately high level of consideration is required; and vice versa.”*⁴³

3.20. The process of “screening”, which is part of the methodology recommended by the Commission to public authorities for their Equality Scheme arrangements, **should be** central to enabling public authorities to address relevance.

3.21. In its initial guidance, the Commission developed a two stage process and revised this in the course of revising its Guide in 2010, in conjunction with public authorities and other stakeholders. The process includes a number of questions for public authorities about the purpose and potential effect of the

⁴⁰ The Commission also recommends that this methodology can also be used by public authorities to inform its decisions so that it can have the appropriate “regard to the desirability of promoting good relations”.

⁴¹ *Section 75 Equality Scheme Approvals Committee – Terms of Reference*, (ECNI, 2011)

⁴² Northern Ireland Act 1998, [Schedule 9](#), paragraph 4(1).

⁴³ [Section 75, Northern Ireland Act 1998 and Section 49A, Disability Discrimination Act 1995](#) (ECNI, 2015) and [A Guide for Public Authorities](#) (ECNI, 2010), chapter 5.

policy or matter being considered, reviewed or developed. These screening questions should aid the public authority's consideration of relevance. However, the focus of the revisions for the 2010 Guide were the result of a number of aims set out in the Effectiveness Review and screening was revised also to help "*streamline the policy making process*"⁴⁴.

Summary points from this chapter

- 3.22. The focus of legal interpretation has been on what is required by a public authority to pay the **regard** that is due or required in particular circumstances, and this is determined on a case by case basis.
- 3.23. The public authority's Equality Scheme is the framework through which the public authority is expected to fulfil its statutory equality and good relations duties in Section 75.
- 3.24. Relevance and proportionality are core concepts for public authorities in ensuring they fulfil their duties, and the assessment methods recommended should assist in this.

⁴⁴ [Section 75: Keeping it Effective](#) (ECNI, 2008), page 39.

4. Evidence of public authority practices

4.1. This chapter sets out evidence that the Commission has gathered from practices by public authorities and patterns identified. It considers how the central methods in Equality Schemes, those of screening and Equality Impact Assessment, are being used by public authorities. It also considers other processes that are set out in Equality Scheme arrangements and current practices.

Context

4.2. The Commission provides advice to public authorities in relation to their duties. The Commission's advice has focused on the requirements in Schedule 9, particularly that a public authority shall prepare and submit an Equality Scheme to the Commission.

4.3. Schedule 9 is clear about the purpose of the Equality Scheme – as it must set out the arrangements through which the public authority proposes to fulfil its statutory equality and good relations duties - and is prescriptive in what an Equality Scheme shall include⁴⁵.

4.4. The Commission's guidance throughout the time of public authorities having Equality Schemes has been in providing support and advice on what the requirements set out in Schedule 9 should be in practice. The Commission developed detailed advice at the outset in 1999 and has progressively considered its advice contained therein, developing and adapting the recommended methods accordingly.

4.5. The Commission's approach to advice and the recommendations it makes for Equality Scheme arrangements was looked at for the project on public authority practices in Screening and EQIA in 2016⁴⁶. The report notes: "*the review has highlighted a number of occasions where public authorities have succeeded in mainstreaming s75 activity despite both difficult economic circumstances and a degree of frustration with some existing procedures and arrangements*".

4.6. The Commission recognises this point. It provides common advice and guidance on the requirements set out in Schedule 9. That Schedule 9 applies to any public authority, regardless of its size or nature of its functions has been identified as an issue. The requirement is that a public authority has a framework for arrangements which it applies for relevant functions. This is a long standing issue, particularly for small public authorities and/or those with limited functions when they have been preparing or revising their Equality Schemes.

⁴⁵ Northern Ireland Act 1998, [Schedule 9](#), paragraph 4.

⁴⁶ Policy Arc Ltd and Kremer Consultancy Services Ltd, [Section 75 - Screening and Equality Impact Assessment: A Review of Recent Practice](#) (ECNI, 2016), page 21.

Assessment and consultation on the likely impact of policies

- 4.7. The processes contained within an equality scheme, which provide the cornerstone for enabling a public authority to have the required regard, are their arrangements for “*assessing and consulting on the likely impact of policies...*”⁴⁷. Other scheme arrangements provide for creating the circumstances within a public authorities for it to be able to fulfil its duties with respect to all relevant functions.
- 4.8. The Commission commissioned a review of practices in relation to screening and EQIA by public authorities⁴⁸. The report reflects both quantitative and qualitative analyses from a wide range of public authority practices and experiences. Its findings also reflect the Commission’s experience from the advice given to public authorities on screening and EQIA.
- 4.9. In the quantitative assessment of “screening”, the report shows that in the time period covered, information analysed for all 163 public authorities showed 73 authorities reported in their Annual Progress Report that they had carried out screening exercises, where 31 public authorities reported that they did not⁴⁹.
- 4.10. The finding that a number of public authorities reported no screening activity is a concern. The Section 75 duties are continuing duties and apply to relevant functions of a public authority; screening, as part of an assessment, should be central for a public authority to ensure it can fulfil its duties and provide evidence of this.
- 4.11. But this finding needs to be set into the context of the wider findings in the report, particularly:
- “Probably above all else the review has thrown into stark relief dramatic differences in the level of engagement with s75 across the Northern Ireland public sector, and in turn disparate interpretations of what s75 means for the day-to-day business of each organisation.”*⁵⁰
- 4.12. The report does, however, find there to be close adherence by public authorities to the Commission’s guidance on EQIAs, when they occur, and data being used in a meaningful way to inform decision making. EQIAs tend to be the preserve of larger organisations, but are spread across all sectors. They

⁴⁷ See: Conley, H., [A review of available information on the use of impact assessment in public policy formulation and in contributing to the fulfilment of statutory duties](#) (ECNI, 2016) – for a detailed consideration of the continuing use of equality impact assessment in the different devolved regions of Britain and its continuing role as evidence of giving the required regard when a public authority has been subject to judicial review.

⁴⁸ Policy Arc Ltd and Kremer Consultancy Services Ltd, [Section 75 - Screening and Equality Impact Assessment: A Review of Recent Practice](#) (ECNI, 2016).

⁴⁹ Policy Arc Ltd and Kremer Consultancy Services Ltd, [Section 75 - Screening and Equality Impact Assessment: A Review of Recent Practice](#) (ECNI, 2016), chapter 3.

⁵⁰ Policy Arc Ltd and Kremer Consultancy Services Ltd, [Section 75 - Screening and Equality Impact Assessment: A Review of Recent Practice](#) (ECNI, 2016), page 19.

are noted as being used when the matter under consideration is contentious and/or politically sensitive⁵¹. The report notes:

*“More generally, few EQIAs were of a minimalist type and many revealed considerable effort had been exerted to ensure a thorough assessment.”*⁵²

- 4.13. The report also illustrates the difficulties of presenting good practice examples where both the statutory requirements are determined by the particular circumstances in the public authority, and the practices in implementing common methods vary so widely:

“On the one hand, undoubtedly there is considerable evidence of good practice, underpinned by mechanisms and support systems which ensure that s75 considerations permeate policy development from an early stage of formulation through to implementation, monitoring and review. In these examples, screening and EQIAs are used routinely and systematically to ensure that fairness is afforded due regard as an integral part of policy development and implementation.

*On the other hand, there would appear to be examples of organisations that have singularly failed to buy-in to both the principles and the practice of s75, either applying screening in a perfunctory manner in the latter stages of policy development or choosing not to engage with s75 processes routinely.”*⁵³

- 4.14. The report continues with the identification of a number of examples of good practice, noting that they have been identified throughout the sample of public authorities contributing to the project. They have been brought together as themes and presented with a caveat; there are few public authorities exhibiting all the factors identified⁵⁴.

Issues identified in the timing of assessments and whether the Equality Scheme processes are considered needed at all.

- 4.15. The recent review of public authority practices⁵⁵, looked at how public authorities applied the templates developed by the Commission for the screening part of assessments. There is a particular issue about how public authorities view the template and their use of it, which has also been identified as an issue.

- 4.16. The findings of the recent review of public authority practices also identified circumstances where public authorities were reporting that action had been taken at initial stages in the development of the policy, such as at the stage of

⁵¹ Policy Arc Ltd and Kremer Consultancy Services Ltd, [Section 75 - Screening and Equality Impact Assessment: A Review of Recent Practice](#) (ECNI, 2016), pages 19-20.

⁵² Policy Arc Ltd and Kremer Consultancy Services Ltd, [Section 75 - Screening and Equality Impact Assessment: A Review of Recent Practice](#) (ECNI, 2016), page 12.

⁵³ Policy Arc Ltd and Kremer Consultancy Services Ltd, [Section 75 - Screening and Equality Impact Assessment: A Review of Recent Practice](#) (ECNI, 2016), pages 19-20.

⁵⁴ Policy Arc Ltd and Kremer Consultancy Services Ltd, [Section 75 - Screening and Equality Impact Assessment: A Review of Recent Practice](#) (ECNI, 2016), chapter 6.

⁵⁵ Policy Arc Ltd and Kremer Consultancy Services Ltd, [Section 75 - Screening and Equality Impact Assessment: A Review of Recent Practice](#) (ECNI, 2016), page 23.

setting objectives, to mitigate already known equality issues⁵⁶. This did not necessarily involve the use of the arrangements in their Equality Schemes.

4.17. The report also reflects a concern as to whether the policy, when the screening process had been used, or the template applied, “*had been genuinely scrutinised against the four screening questions*”⁵⁷.

4.18. The Commission has also noted practices where the public authority may have taken the view that it already has all the information required to fulfil the duties⁵⁸. This has been explained as circumstances:

- where public authorities consider that they have available to them within their authority the information on equality required for particular assessments; or
- their early engagement in the development of a policy or the policy options has enabled them to take the equality matters into consideration in the formulation of the proposals; or
- undertaking a consultation exercise does not provide any further information to aid their equality assessment of the policy under consideration.

4.19. A further practice has been noted of public authorities considering that an assessment is required **only** when a potential adverse impact has been identified, which is not consistent with the Commission’s advice. The review of public authority practices on screening and EQIA identified this point⁵⁹. This appears to suggest that public authorities are not applying their Equality Scheme arrangements in order to fulfil requirements to have “(due) regard”; the overarching duties are a positive consideration of the need to promote equality of opportunity and/or the desirability of promoting good relations.

4.20. The Commission has also noted a practice, evidenced from screening forms, that the policy under consideration is said to be relevant to the duties, but the policy purpose/goal will result in better outcomes for all, or the criteria being applied in the policy apply to all⁶⁰. This does not appear to conform with the

⁵⁶ Policy Arc Ltd and Kremer Consultancy Services Ltd, [Section 75 - Screening and Equality Impact Assessment: A Review of Recent Practice](#) (ECNI, 2016), page 27.

⁵⁷ Policy Arc Ltd and Kremer Consultancy Services Ltd, [Section 75 - Screening and Equality Impact Assessment: A Review of Recent Practice](#) (ECNI, 2016), page 23.

⁵⁸ This evidence is drawn from a number of sources, both in the evidence provided by Policy Arc Ltd and Kremer Consultancy Services Ltd, and/or from events the Commission has held with public authority Equality Officers.

⁵⁹ Policy Arc Ltd and Kremer Consultancy Services Ltd, [Section 75 - Screening and Equality Impact Assessment: A Review of Recent Practice](#) (ECNI, 2016), page 9.

⁶⁰ For examples of this approach taken, see: Dugdale, P. and Pidgeon, C., [In year monitoring of public expenditure: an analysis of departmental bid documentation](#) (Northern Ireland Assembly, 2014), in particular sections 1.3.3 and 2.23.

principles, in that an adequate inquiry of the equality matters is needed in order to fulfil the duties to pay the required regard⁶¹.

- 4.21. Further, a number of public authorities have conducted policy consultation exercises where the policy proposals are set out, but only the “screening” questions are presented within the document. These consultations provide no analysis, nor the authority’s equality assessment of the policy in question.
- 4.22. There are risks for public authorities in these practices, in particular that those in the authority will not be able to give the appropriate consideration to “the need to promote equality of opportunity” and/or “desirability of promoting good relations” when it comes to take decisions on the policy in question. Public authorities also risk not being able to evidence their assessment of the potential impacts of that policy.

Availability of relevant data and the use of data

- 4.23. Data and evidence of how policies operate should be central to an assessment of potential impacts. Public authorities are required to have certain monitoring arrangements in their Equality Schemes.
- 4.24. The Commission provides advice and guidance for public authorities on the monitoring and data collection elements of Equality Scheme requirements. Again, this advice covers not only what Schedule 9 sets out for public authorities, but also practical guidance that is designed to encourage and assist a public authority to use data collection and monitoring to inform its policies, practices and procedures.
- 4.25. The use of data for equality assessments has varied, and this has been identified as an issue of concern. The particular issues noted have been in relation to screening, as this forms the main activity on assessments⁶². The pattern in the presentation of general demographic data in screening templates has been noted from the Commission’s advice, which is not consistent with our guidance, which says that the data should be linked to the purpose of the policy or matter under consideration⁶³. The recent review provides evidence to support this observation, noting that public authorities identified a number of contributory factors which inhibit data development, such as the resources required for data collection in an environment where resources have been significantly reduced⁶⁴.
- 4.26. This issue was also raised when the Commission considered its advice on Equality Scheme consultation arrangements. Stakeholders also raised other

⁶¹ For a detailed discussion and examples of a public authority’s understanding of the relevance of equality in the context of fulfilling a duty to have “due regard”, see: Hooper, J., [The role of Impact Assessment in effective decision making: Learning from recent Judicial Reviews](#) (Devon County Council, 2013), in particular pages 13 and 14.

⁶² Policy Arc Ltd and Kremer Consultancy Services Ltd, [Section 75 - Screening and Equality Impact Assessment: A Review of Recent Practice](#) (ECNI, 2016), chapter 3.

⁶³ [A Guide for Public Authorities](#) (ECNI, 2010).

⁶⁴ Policy Arc Ltd and Kremer Consultancy Services Ltd, [Section 75 - Screening and Equality Impact Assessment: A Review of Recent Practice](#) (ECNI, 2016), section 6.4.

matters that were considered neglected in the implementation of Equality Scheme arrangements. One specific area was that of data development to enable understanding of how policies operated and raising concerns that public authorities were not, over the course of the duties having effect, routinely collecting and using that data for further policy development work⁶⁵.

Arrangements for consultation

- 4.27. Schedule 9 sets out very specifically that a public authority will include arrangements for consultation in its Equality Scheme, and a number of circumstances where consultation shall happen. For example, a public authority must consult on its Equality Scheme before submitting it to the Commission. Schedule 9 also stipulates that the equality scheme shall state the authority's arrangements "... *for consulting on matters to which a duty under that section is likely to be relevant...*"⁶⁶; and "*for assessing and consulting on the likely impact of policies...*"⁶⁷. However, it should be noted that all the arrangements in an Equality Scheme, including any consultation, are for the purposes of enabling a public authorities to fulfil its statutory equality and good relations duties.
- 4.28. The Schedule further sets out that there will be a consultation list contained within the Equality Scheme⁶⁸.
- 4.29. These arrangements have been a matter of significant interest over the years. For example, following the *Keeping it Effective* Report in 2008, the Commission sought to reconcile the Schedule 9 requirement that an Equality Scheme must contain details of persons to be consulted, with the practical implications of maintaining such a list, when it was developing the revised Guide⁶⁹.
- 4.30. The Commission's guidance on the consultation arrangements for an Equality Scheme takes into account wider consultation practices and public policy requirements for consultation. There have been a number of changes to this wider context, in particular a Supreme Court ruling on consultation requirements generally and the changes to public policy consultation practices in Northern Ireland following the Stormont House Agreement⁷⁰. Given these, and that the Commission's Guide includes principles which were drawn from Cabinet Office guidance on consultation which has now been superceded, the Commission gave specific consideration to its advice on consultation

⁶⁵ [Proposals to amend the Commission's advice to public authorities on: Timescales for consulting on matters relevant to the statutory equality and good relations duties – Consultation Report](#) (ECNI, 2016).

⁶⁶ Northern Ireland Act 1998, [Schedule 9](#), paragraph 4(2)(a).

⁶⁷ Northern Ireland Act 1998, [Schedule 9](#), paragraph 4(2)(b).

⁶⁸ Northern Ireland Act 1998, [Schedule 9](#), paragraph 4(2)(a).

⁶⁹ [Section 75: Keeping it Effective](#) (ECNI, 2008), pages 40-44.

⁷⁰ [Proposals to amend the Commission's advice to public authorities on: Timescales for consulting on matters relevant to the statutory equality and good relations duties – Consultation Report](#) (ECNI, 2016), Section 3.

arrangements in Equality Schemes in 2016. The Commission concluded the consultation by not changing its advice, as an interim measure⁷¹.

4.31. However, through the consultation exercise, it was clear that the Equality Scheme consultation arrangements are seen to confer a wider duty to consult than for the purposes of fulfilling a public authority's statutory equality and good relations duties⁷².

4.32. In the context of the evidence of public authority practices, this raises an issue about the understanding of what the duties require, and also what the Equality Schemes provide for.

Evidence of Equality Scheme practices for fulfilling the duty to have regard to the desirability of promoting good relations (Section 75 (2))

4.33. The Section 75 statutory duties require that a public authority must have due regard to the need to promote equality of opportunity, while it must also have regard to the desirability of promoting good relations.

4.34. The term due regard was intended to be, and is, stronger than regard, but in either case an authority is required by the statute to take the specified matters into account and give them the required weight when carrying out its functions relating to Northern Ireland⁷³.

4.35. There is a difference in the way Schedule 9 sets out how the public authority will set out in its Equality Scheme how it will fulfil the separate and distinct duties in Sections 75 (1) and (2). The key arrangements required for assessing and consulting on the likely impact of policies is directed, in the Schedule, to the "need to promote equality of opportunity" alone.

4.36. The Commission conducted events with public authorities specifically and found little appetite for further guidance on Section 75 (2); "good relations" was seen to be of relevance only when particular issues arose and a framework for action on an issue needed⁷⁴. The understanding of "good relations", and therefore its definition, varied widely too.

4.37. The implementation of Equality Schemes for the purposes of fulfilling the duty under Section 75 (2) was considered further in the recent review of public authority practices in screening and EQIA. This found a low level of activity

⁷¹ [Proposals to amend the Commission's advice to public authorities on: Timescales for consulting on matters relevant to the statutory equality and good relations duties – Consultation Report](#) (ECNI, 2016).

⁷² [Proposals to amend the Commission's advice to public authorities on: Timescales for consulting on matters relevant to the statutory equality and good relations duties – Consultation Report](#) (ECNI, 2016).

⁷³ [A Guide for Public Authorities](#) (ECNI, 2010).

⁷⁴ The Commission's business plan in 2014-15 included actions to consider a number of good relations matters in the expectation of an enhanced Equality and Good Relations Commission as set out in the Executive's Together: Building a United Community Strategy

generally on good relations and sets out similar issues for public authorities to those identified by the Commission⁷⁵.

- 4.38. In the period since the publication of the Commission's Guide in 2010, some concerns have been raised about the Commission's approach to advising public authorities on their duties for Section 75 (2) specifically⁷⁶; albeit the Commission disagreed with the conclusions reached⁷⁷.
- 4.39. More recently, those raising concerns about how public authorities should fulfil their duty in Section 75 (2) have focused on the Commission's advice to public authorities on the Equality Scheme arrangements for this⁷⁸, as well as engaging with public authorities directly on those arrangements when the Equality Scheme is being drafted.
- 4.40. The evidence points to low levels of activity relating to the good relations duty for public authorities generally and that, in many instances, it is not seen as relevant.
- 4.41. This section does however, link to the wider issue of whether the Equality Scheme arrangements are seen as, and used for, helping the public authority to ensure it gives the appropriate regard to those statutory goals set out in Section 75, and the regard that is appropriate in the circumstances.

⁷⁵ Policy Arc Ltd and Kremer Consultancy Services Ltd, [Section 75 - Screening and Equality Impact Assessment: A Review of Recent Practice](#) (ECNI, 2016), section 6.6.

⁷⁶ [Unequal Relations](#) (Committee on the Administration of Justice, 2013).

⁷⁷ [Speech to CAJ Conference on 11 June 2013](#).

⁷⁸ [CAJ's submission to the 11 new District Councils in relation to draft Equality Schemes](#) (Committee on the Administration of Justice, 2014).

Summary points drawn from this chapter

- 4.42. The Equality Scheme does not appear to be seen as the vehicle for enabling the authority to pay the appropriate “regard” as a continuing statutory requirement. This is suggested in the evidence of public authority practices in screening and EQIA particularly.
- 4.43. Through the detailed consideration of the evidence of public authority practices, it is clear that, while there are some frustrations expressed about the Commission’s advice, there appear to be a number of other factors that are also of concern. The practices are varied, with areas where there are clear gaps in assessment processes for some public authorities, there are real risks identified that public authorities may not be implementing their Equality Schemes in a way that enables them to demonstrate and be accountable in fulfilling their statutory equality and good relations duties.
- 4.44. The monitoring requirements set out in Schedule 9, and data collection to inform equality assessments, have not driven a data development agenda for public authorities in recent times. There are a number of reasons found for this, not least that this appears not to be seen as a high priority in an environment of reducing resources.

5. Mainstreaming and action measures

5.1. This chapter looks at a number of ways that the implementation of the statutory equality and good relations duties can be described, and how they should link more widely to the effective development and delivery of public services. It is set in the context where outcomes are now being considered throughout the public sector. It also considers progress on the Commission's recommendation in its revised Guide⁷⁹ that public authorities develop action plans/action measures.

Context

5.2. The Commission concluded in 2008 that public authorities' focus, in relation to the implementation of the Section 75 duties, should shift from the processes contained within an Equality Scheme towards impacts and better outcomes⁸⁰.

5.3. The Commission's Effectiveness Review in 2008 addressed mainstreaming specifically⁸¹ as "*Section 75 makes equality of opportunity central to public policy decision making. It must be an essential consideration in policy development, implementation, monitoring and review. ... Section 75 has transformed the policy making process, making it more inclusive, more evidence-based and as a result, more informed*".⁸²

5.4. The Commission gave effect to this through its advice in its revised Guide in 2010; re-confirming the importance of mainstreaming as the approach that embeds equality and good relations centrally in the whole range of public policy decision-making⁸³, with the tools of screening and Equality Impact Assessment.

5.5. The Commission also recommended that public authorities commit to developing action plans or action measures as part of their Equality Scheme arrangements⁸⁴. These plans run alongside Equality Schemes – they are not specific requirements for a scheme.

5.6. During the development of successive Programmes for Government, there has been an increasing focus on outcomes. This culminated in the adoption by the Executive of the Outcomes Based Accountability/Results Based Accountability⁸⁵ methodology for the draft Programme for Government in 2016.

⁷⁹ [A Guide for Public Authorities](#) (ECNI, 2010).

⁸⁰ [A Guide for Public Authorities](#) (ECNI, 2010), page 5. See also the recommendations from [Section 75: Keeping it Effective](#) (ECNI, 2008).

⁸¹ [Section 75: Keeping it Effective](#) (ECNI, 2008), chapter 4.

⁸² [Section 75: Keeping it Effective](#) (ECNI, 2008), page 36.

⁸³ [A Guide for Public Authorities](#) (ECNI, 2010), page 8.

⁸⁴ [A Guide for Public Authorities](#) (ECNI, 2010), page 36.

⁸⁵ Friedman, M, *Trying Hard is Not Good Enough* (PARSE Publishing, 2015).

5.7. Given the adoption and development of similar outcomes approaches in other jurisdictions, particularly in Scotland where there are also the equivalent statutory equality and good relations duties on public authorities, the Commission commissioned a discussion paper that looks at key factors that contribute to better equality outcomes⁸⁶.

Commission recommendation that public authorities develop action plans/action measures

5.8. The Commission's Guide⁸⁷ recommends that public authorities have arrangements, in relation to assessing their own compliance with the duties, to develop action plans/action measures. The plans/measures themselves do not form part of the approved Equality Scheme.

5.9. The revised Equality Schemes, submitted by public authorities and approved by the Commission in the period of its recent strategy⁸⁸ to request these, included these arrangements. The Equality Schemes submitted at that time and since have included either: the commitment that the public authority would develop an action plan; or contained a plan in an appendix or as a separate document.

5.10. There was a high level of acceptance of this recommendation; all public authorities made this commitment.

5.11. The Commission recommended that public authorities report progress towards the outcomes identified in their plans in their annual reporting on progress with the Section 75 duties. These reports are generally published by public authorities, as well as being submitted to the Equality Commission.

5.12. In a recent review of action plans, the high level of initial activity in developing the action plans was noted, but the evidence shows a lower level of activity in their maintenance and renewal. Of the 86 public authorities sampled, only 28% had action plans covering 2017 and beyond⁸⁹.

5.13. While the report findings show a wide variation in the practices of public authorities in relation to their action plans, it concludes that the framework continues to provide "*the best example of reflexive and responsive legislation and of statutory equality mainstreaming.*"⁹⁰

5.14. The researchers who undertook the review recognised the work of equality officers but also acknowledged the role of both political and organisational

⁸⁶ MacMillan, K., [Discussion Paper: Key factors that contribute to better equality outcomes](#) (ECNI, 2017).

⁸⁷ MacMillan, K., [Discussion Paper: Key factors that contribute to better equality outcomes](#) (ECNI, 2017), page 40.

⁸⁸ During the period 2011-2013.

⁸⁹ Conley, H. and Warren, S., [A Review of Action Plans developed by public authorities in relation to their statutory equality and good relations duties](#) (ECNI, 2017), page 14.

⁹⁰ Conley, H. and Warren, S., [A Review of Action Plans developed by public authorities in relation to their statutory equality and good relations duties](#) (ECNI, 2017), page 30.

leadership in ensuring success. They identified a number of factors contributing to current practices, not least the level of priority currently being given to equality in some organisations, as well as the continuing restrictions in resources. The report concludes:

“... s.75 remains influential on public authorities but the difficult political and economic context has discouraged critical self-reflection in public authorities that is key to the success of the legislation.”⁹¹

5.15. The report’s recommendations reflects that many of the actions contained within the action plans were process, rather than outcome, orientated:

*“**Extending process based action measures:** Public authorities tend to develop process based action measures that are designed to initiate new or enhance existing internal systems (e.g. monitoring data, collecting data, reviewing policy, setting up working parties).”⁹²*

5.16. The findings in this report suggest that the action plans/action measures are being treated as processes, and that the recommendations by the Commission have not driven a focus on outcomes in the action measures developed by public authorities as intended.

Mainstreaming and evidence of other public authority practices

5.17. Some public authorities have suggested that if mainstreaming is successful, the subject of that mainstreaming should no longer be visible. However, the Commission’s Guide notes that questions of equality and good relations may easily become sidelined in organisations⁹³. Also, what is required from a public authority, to have the required regard to the statutory goals set out in Section 75, ensures transparency and accountability⁹⁴.

5.18. Experience to date of public authority practices in mainstreaming suggest that these practices span a broad spectrum. As is noted by the Policy Arc/Kremer report, *“there is clearly a continuing motivation among many representatives [amongst the public authority equality officers] to work with s75 processes in order to improve policies and to mainstream equality of opportunity and good relations and this commitment provides a sound foundation for the future”⁹⁵*. But there are also clear differences in interpretation of the requirements and implementation of practices.

⁹¹ Conley, H. and Warren, S., [A Review of Action Plans developed by public authorities in relation to their statutory equality and good relations duties](#) (ECNI, 2017), page 5.

⁹² Conley, H. and Warren, S., [A Review of Action Plans developed by public authorities in relation to their statutory equality and good relations duties](#) (ECNI, 2017), page 31.

⁹³ [A Guide for Public Authorities](#) (ECNI, 2010), page 8.

⁹⁴ See paragraph 3.12 above (the Brown principles).

⁹⁵ Policy Arc Ltd and Kremer Consultancy Services Ltd, [Section 75 - Screening and Equality Impact Assessment: A Review of Recent Practice](#) (ECNI, 2016), page v.

Evidence from public authority annual progress reports

5.19. Public authorities report their own progress with the duties and equality schemes, which is the implementation of their arrangements for assessing their compliance.

5.20. The Equality Commission provides public authorities with a template they can use for their progress.

5.21. For the 2014-15 business year, the following information was recorded from these reports⁹⁶. This illustrates that half of public authorities are of the view that, due to their equality and good relations considerations, changes have occurred:

“Section 1: Equality and good relations outcomes, impacts and good practice

Question: Has the application of the equality scheme commitments resulted in any changes to policy, practice, procedures and/or service delivery areas?

*50% (N=61) of public authorities reported that the application of equality scheme commitments had resulted in **changes** to policy, practice, procedures and/or service delivery areas;*

45% (N=54) reported that it had led to no changes; and

5% (N=6) reported that the question was not applicable.

Question: if yes to question above, what aspect of the equality scheme prompted or led to the change(s)?

*36% (N=22 of 61) reported that the aspect of the equality scheme leading to change was a result of **changes to access to information and services**;*

*34% (N=21 of 61) reported that it was as a result of the organisation’s **screening of a policy**;*

*26% (N=16 of 61) reported that it was as a result of analysis from **monitoring impact**;*

*37% (N=23 of 61) cited **‘other’ reasons**; and*

*25% (N=15 of 61) reported that it was as a result of what was identified through the **EQIA and consultation exercise**.”*

⁹⁶ *Public Authority Section 75 Equality Duties Summary of Annual Progress Reports 2014-15*, ECNI, 2016. This is the first year when the template provided to public authorities, to facilitate their commitments to report on their progress annually, used this format.

Summary points drawn from this chapter

- 5.22. This chapter looked at action plans/measures specifically and found there are wide variations in practices⁹⁷ and, while there are some places where the development of action plans has provided a focus on the outcomes, they have been found more often to focus on processes.
- 5.23. The evidence also identifies a range of factors contributing to public authority practices. In the wider context, where there is a current focus in public policy development to be outcomes focused, there is an opportunity to ensure that these outcomes, where relevant, take into account the need to promote equality of opportunity and desirability of promoting good relations.

⁹⁷ Conley, H. and Warren, S., [*A Review of Action Plans developed by public authorities in relation to their statutory equality and good relations duties*](#) (ECNI, 2017), page 14.

6. Public sector equality duties in Britain and the Republic of Ireland

6.1. This chapter briefly sets out how equivalent statutory duties in other jurisdictions have developed. It identifies common duties where a public authority must have “(due) regard”, and specific duties on a subset of public authorities. It also considers what is required of other Commissions, where there are statutory equality and good relations duties on public authorities, and makes links to Northern Ireland where appropriate.

Context

6.2. Where Northern Ireland established the duties and associated enforcement mechanisms in 1998, similar duties in the Race Relations Act 1976 in Britain were expanded and enhanced with enforcement powers in 2000⁹⁸.

6.3. It is equally important to reflect the evidence that suggests such statutory “**due regard**” duties and equivalents continue to be used to achieve particular public policy goals. They are used in legislation for equality goals in public services and the delivery of public functions, as evidenced in a recent report that assessed such duties from sixteen jurisdictions, published by Equinet - the European Network of Equality Bodies⁹⁹.

6.4. In Scotland, in addition to the Public Sector Equality Duties (PSEDs) on public authorities¹⁰⁰, the Scottish Government recently legislated for a statutory equality duty in education, which requires specific organisations to have “**due regard** to the need to exercise the powers ...in a way designed to reduce inequalities of outcome...” for the pupils experiencing inequalities of outcome¹⁰¹.

6.5. The Republic of Ireland established similar duties to those in Section 75 on public bodies in 2014. A public body must, “in the performance of its functions, **have regard to** the need to... eliminate discrimination, promote equality of opportunity and treatment of its staff and the persons to whom it provides services”, as well as protect human rights¹⁰².

⁹⁸ [The Race Relations \(Amendment\) Act 2000](#)

⁹⁹ Crowley, N., [Making Europe more Equal: A Legal Duty?](#) (Equinet, 2016), see in particular the assessment of Mainstreaming Duties in Section 3.3, page 29.

¹⁰⁰ There are broadly equivalent duties to those in Section 75 on public authorities in England, Wales and Scotland which are set out in Section 149 of the [Equality Act 2010](#).

¹⁰¹ [Education \(Scotland\) Act 2016, Part 1, Section 1](#).

¹⁰² [Irish Human Rights and Equality Commission Act 2014](#), Section 42.

Requirements on public authorities in other jurisdictions

- 6.6. The statutory equality and good relations duties in Britain were extended in 2010 to other grounds covered in the anti-discrimination legislation, when the Equality Act 2010 came into effect. The current duties on public authorities in Britain are set out in Section 149 (see Appendix 1).
- 6.7. Section 42 of the Irish Human Rights and Equality Commission Act 2014 establishes a statutory equality duty for public bodies in the Republic of Ireland which is similar in formulation to those in the UK (see Appendix 1).
- 6.8. The approach for equivalent duties, whether in Britain or the Republic of Ireland, differs both in the public authorities they apply to and how they apply. In Britain, there is a common set of duties - to have due regard - for a list of public authorities which is set out in Section 149 of the Equality Act 2010. There are then “specific duties” (set out in subordinate legislation) applying to a much more limited number of, and generally larger, public authorities.
- 6.9. The requirement set out in specific duties in Britain vary according to the devolved region in which the public authority operates. For example, in Wales there is still a requirement on public authorities to produce an equality scheme¹⁰³. In Scotland there are very specific requirements on not only the public authorities but also Scottish Ministers to address outcomes¹⁰⁴.
- 6.10. Recently the UK Government’s commitments on gender pay gap reporting were given effect for public bodies through amendments to the specific duty regulations under Section 149 of the Equality Act 2010¹⁰⁵.
- 6.11. There are no reviews currently available from Britain to provide evidence of the effect of these changes or their impact on public authority practices in fulfilling their duties.
- 6.12. However, the principles established from caselaw continue to apply in Britain, and public authorities can be subject to challenge in relation to their fulfilling of their statutory equality and good relations duties¹⁰⁶. While the specific duties to produce a scheme or undertake the particular process of impact assessment have been removed in England, the practice of impact assessment remains a

¹⁰³ See: Conley, H., [A review of available information on the use of impact assessment in public policy formulation and in contributing to the fulfilment of statutory duties](#) (ECNI, 2016) – for a list of the different sources of the specific duties.

¹⁰⁴ MacMillan, K., [Discussion Paper: Key factors that contribute to better equality outcomes](#) (ECNI, 2017).

¹⁰⁵ [The Equality Act 2010 \(Specific Duties and Public Authorities\) Regulations 2017](#), SI 353

¹⁰⁶ Conley, H., [A review of available information on the use of impact assessment in public policy formulation and in contributing to the fulfilment of statutory duties](#) (ECNI, 2016).

key process for a public authority to evidence how it has paid the required “regard”¹⁰⁷

6.13. There are examples of good practice that have arisen from this: one County Council developed extensive guidance following its experience of judicial review challenges on several occasions¹⁰⁸.

Enforcement of equivalent Public Sector Equality Duties

6.14. The Commission looked at what is provided for in law for the equivalent equality bodies in relation to enforcement of the public sector equality duties in Britain and the Republic of Ireland.

The Equality and Human Rights Commission

6.15. The Equality and Human Rights Commission (EHRC) in Britain has enforcement powers set out in the Equality Act 2006, and amended by the Equality Act 2010, which provide the Commission with a power to assess the extent of compliance by a public authority with the general duty. The Commission also has a wide ranging power of inquiry, and can conduct inquiries into a number of areas under the section entitled equality and diversity, as well as investigation powers (see Appendix one).

6.16. The EHRC can issue a compliance notice where it thinks that an authority has failed to comply with a duty under section 149¹⁰⁹.

6.17. It should be noted that these statutory powers enable the EHRC to assess compliance by a public authority with its duty to have “due regard”; their powers are not set with reference to the “specific duties”.

Enforcement powers in relation to the Public Sector Duties for the Irish Human Rights and Equality Commission

6.18. There are powers and duties set out for the Irish Human Rights and Equality Commission¹¹⁰ which provide scope for a review if there is evidence of a failure by a public body to comply with the overall duties to pay regard (see Appendix one).

¹⁰⁷ Conley, H., [A review of available information on the use of impact assessment in public policy formulation and in contributing to the fulfilment of statutory duties](#) (ECNI, 2016).

¹⁰⁸ For a detailed discussion and examples of a public authority’s understanding of the relevance of equality in the context of fulfilling a duty to have “due regard”, see: Hooper, J., [The role of Impact Assessment in effective decision making: Learning from recent Judicial Reviews](#) (Devon County Council, 2013) – in particular pages 13 and 14.

¹⁰⁹ [Equality Act 2006](#), Section 32.

¹¹⁰ [Irish Human Rights and Equality Commission Act 2014](#), Section 42(5).

Summary points drawn from this chapter

- 6.19. Equivalent duties for public authorities to pay (due) regard to statutory equality goals continue to be legal requirements in Britain and have recently been established for the Republic of Ireland.
- 6.20. The specific requirements on a number of public authorities (specific duties) vary between the devolved regions in Britain and these requirements have changed and developed over time. They are set through secondary legislation; they are not set out in the primary legislation of the Equality Act 2010.
- 6.21. The enforcement of the duties in other jurisdictions is also different from Northern Ireland, particularly in the statutory role for the respective Commissions.
- 6.22. The statutory equality and good relations duties operating in the UK are subject to administrative law standards in the respective jurisdictions.

7. The Commission's role to consider complaints and investigate

7.1. This chapter covers the Commission's specific powers and duties in Schedule 9 on complaints and investigations. It sets out a number of issues that have been identified through the Commission's use of these powers. It also identifies differences in legislative powers available to the different Commissions in the UK and Republic of Ireland for their respective duties.

Context

7.2. Schedule 9 of the Northern Ireland Act 1998 as a whole is entitled enforcement. The Schedule sets out duties for the Commission and what is required of public authorities. It also sets out accountability processes through complaints (Paragraph 10) and investigations (Paragraph 11).

7.3. Individual complaints can be made to the public authority about a failure to comply with its approved Equality Scheme. These complaints can subsequently be brought to the Commission, which must investigate or give reasons for not investigating. The Commission can also undertake an investigation where it believes that a public authority has failed to comply with its approved Equality Scheme. The Commission has procedures that govern the operation of these functions¹¹¹.

7.4. As a result of an investigation:

- the Commission can make recommendations to the public authority, in the context of how it should comply with its approved Equality Scheme;
- copies of the investigation report are issued to specific bodies/people, such as the Secretary of State and the Assembly, as well as the relevant parties to the complaint/investigation; and
- there could be a referral to the Secretary of State if action is not taken on the recommendations made to the public authority within a reasonable time.

7.5. There has been an increasing interest in the use of complaints and investigations from advocacy groups and non-governmental organisations¹¹². The Commission receives correspondence from a range of sources, and on a number of issues, in any year containing requests for an investigation of the concerns raised.

¹¹¹ [Investigation procedure under paragraphs 10 and 11 of Schedule 9 of the Northern Ireland Act 1998](#) (ECNI, 2014).

¹¹² See, for example: http://www.equalitycoalition.net/?page_id=28 (accessed: 02/08/17)

- 7.6. The Commission dealt with 25 enquiries by providing advice on the complaints process available under Paragraph 10 in the 2015-16 business year. Four written complaints were received in that year.
- 7.7. The Commission had undertaken 27 investigations since 2004 at the time it considered this evidence; 18 of them arose from written complaints from individuals (Paragraph 10), nine were investigations arising from the Commission's belief of non-compliance. At the time of the evidence being gathered, there were three investigations underway, all of which were from complaints made.
- 7.8. It has been of note that where a complaint has been received under Paragraph 10, the issue of concern to the complainant has tended to relate to a policy or practice in the public authority. The complaints and investigations mechanisms as set out in Schedules 9 relate to where there is a belief that a public authority has failed to comply with its approved equality scheme, which is largely about process.

Public authorities' reported activity on complaints

- 7.9. Public authorities are prompted, in the template, to report on the numbers of complaints they receive in any year when they report their progress on implementing their Equality Schemes annually. Progress reporting is self-reporting by the public authority.
- 7.10. The number of complaints reported on an annual basis has been routinely low. To illustrate this, the number recorded across all public authorities who submitted a progress report to the Commission for the business year 2014-15 was 21 complaints. The details provided also illustrate that the issues raised and considered in the context of the Equality Scheme complaints mechanism are wide. In some cases it is not clear how the issues raised directly relate to how the Equality Scheme and its arrangements have been implemented. For example:
- one authority reported a case of potential harassment as a complaint it received on its Equality Scheme;
 - two reported complaints related to the use of accessible parking bays by non-disabled people in one authority's car parks;
 - one public authority recorded one complaint which was then described as 300 "template" complaints about one issue; they were considered resolved through the organisation's internal complaints mechanism;
 - one public authority reported a case relating to an Equality Commission complainant under the anti-discrimination legislation;

- two reported complaints related to matters which were subsequently brought to the Commission by individuals under Paragraph 10 of Schedule 9.

The different enforcement frameworks for Commissions in the UK and Republic of Ireland

- 7.11. The comparable duties through the three jurisdictions are similarly framed: the statutory duties are on the public authorities, these are mainstreaming duties to ensure equality and related matters are considered throughout an organisation's functions.
- 7.12. In all cases, the legislation sets out a framework for enforcement, but does not prescribe how respective Commissions should interpret and implement its powers and duties, nor how they should be most effectively deployed.
- 7.13. Neither the Irish Human Rights and Equality Commission (IHREC) nor the Equality and Human Rights Commission (EHRC) in Britain have specific functions set out in the legislation in relation to individual complainants, in the same way as Paragraph 10 of Schedule 9.
- 7.14. The Commission's powers to investigate are in circumstances where it can form a belief that a public authority has not complied with its approved Equality Scheme¹¹³. In practice, this has resulted in an investigation of a very particular issue of concern, the specific circumstances of that issue, and the specific circumstances of one public authority.
- 7.15. As a result, while the findings and recommendations from an investigation will provide some learning for public authority practices, the ripple effect can be limited beyond the public authority that has been subject to the investigation.
- 7.16. All three Commissions (the Equality Commission, IHREC and EHRC) have investigation/inquiry or review powers. Neither the IHREC nor the EHRC appears to have to identify where it "believes that a public authority may have failed to comply with a scheme" in order to intervene using its enforcement powers; albeit this option is not expressly precluded.

¹¹³ Northern Ireland Act 1998, [Schedule 9](#), paragraph 11.

Summary points from this chapter

- 7.17. The provision of powers and duties for the Equality Commission in relation to complaints and investigations are set out in Schedule 9. There have been relatively few complaints made to both public authorities and the Commission where there may be a failure by a public authority to comply with its Equality Scheme.
- 7.18. The matters raised in complaints on which the Commission advises, the evidence of the complaints reported by public authorities, and those matters the Commission considers for further investigation are generally a concern about a public authority's policies or practices. There is not necessarily a clear link to particular commitment in an equality scheme.
- 7.19. There is experience within all the Commissions identified of a range of powers and duties for enforcement, such as investigation and or inquiry. The provisions of Schedule 9 for the Equality Commission have resulted in a range of investigations, and they have been on specific issues with one public authority at any one time.

8. Issues and opportunities identified

8.1. This chapter sets out a number of issues identified from our review of the evidence and patterns of practices by public authorities. It sets them out as the fundamental issues that the Commission has agreed need to be addressed by public authorities as a matter of priority. Through the course of gathering and examining the evidence, the Commission has also identified a number of opportunities going forward, which have contributed to the identification of the agreed issues.

Context

8.2. The preceding chapters set out the evidence that the Commission has considered during the course of the 2016-17 business year. The evidence has presented a picture of how the duties are being implemented.

8.3. This picture has been drawn from detailed consideration of the evidence gathered; the Commission's understanding, from experience in advising public authorities and others; the Commission's understanding of the wider political and economic context for public services in Northern Ireland; and other sources such as from the use of our investigation powers. A number of reviews commissioned during the period; analysis of other research and relevant sources that are referenced in this report, as well as stakeholder engagement, have also contributed.

8.4. As a result of examining public authority practices, the Commission is concerned about the effective implementation of the Section 75 duties by public authorities.

8.5. The Commission has identified a number of issues from this, which it believes are fundamental to the effective implementation of the duties by public authorities.

8.6. The Commission also considers that there are clear opportunities to further support, enable and advise public authorities in their fulfilment of their statutory equality and good relations duties.

Issues identified in public authorities' implementation of the Section 75 duties

8.7. **Leadership.** While recognising the circumstances of reduced resources, leadership continues to be imperative within public authorities to ensure the maintained focus on equality matters, as well as ensuring good governance and the mainstreaming of equality considerations throughout the business of the authority.

- 8.8. This has been evidenced through the Commission’s advisory work and the reviews of practices set out in this report. The Commission’s public policy positions recognise leadership as a key success factor in securing greater equality of opportunity¹¹⁴, as well as good relations.
- 8.9. In Scotland, there has been a coherence in political leadership and sustained commitments to address equality matters centrally in the National Outcomes Framework, in successive Programmes for Government, the legislative programme, and within assessment and reporting frameworks¹¹⁵, including high level programmes such as the budget¹¹⁶.
- 8.10. **Ownership.** The evidence, and our experience in advice, suggests that public authorities do not, in all instances, see the purpose of having an Equality Scheme as assisting in fulfilling their statutory equality and good relations duties.
- 8.11. This issue has been drawn from evidence particularly in the implementation of the main processes in Equality Schemes, as set out in Chapter 4, as well as the Commission’s advice in confirming what is required to fulfil a “due regard” duty.
- 8.12. **Understanding and/or misinterpreting the purpose and scope of the duties.** The evidence clearly suggests that Equality Schemes continue to be seen by public authorities as processes in themselves; they are not seen as contributing equality of opportunity and good relations considerations to decision making.
- 8.13. The evidence also suggests there are different understandings of, or expectations of, what is required in fulfilling the duties (i.e. to have “due regard/ regard to...”) amongst different stakeholders.
- 8.14. **Definitions of key terms and expectations.** It remains the case, reflected in the evidence of practice, that there is an issue in the continuing differences among stakeholders in what is understood by the terms “equality of opportunity” and “good relations”.
- 8.15. Within the wider context, particularly in the current political environment, the understanding and use of the terms “equality” and “good relations” differ. There is particular evidence presented of practices relating to good relations and how this is being shaped by understandings and expectations of good relations.
- 8.16. But the wider understanding of what the Section 75 duties provide for also remains an issue, as evidenced in the understanding of how consultation

¹¹⁴ See, for example, the [Commission’s submissions](#) to consultation exercises in order to secure the equality principle in the Code of Conduct for District Councillors.

¹¹⁵ MacMillan, K., [Discussion Paper: Key factors that contribute to better equality outcomes](#) (ECNI, 2017).

¹¹⁶ [Equality Statement: Scottish Draft Budget 2017-18](#) (Scottish Government, 2016).

arrangements in the Equality Schemes apply (see Chapter 4), given what is clearly established for what is required to pay “due regard” (see Chapter 3).

- 8.17. **Transparency and accountability.** The requirements of Schedule 9 provide for a model for the duties described as “responsive” (in the context of legislation and regulation that can be reflexive and/or responsive)¹¹⁷. The evidence also suggests that some public authority practices have moved away from the responsive approach¹¹⁸, with limited opportunities for stakeholder involvement in decision making through use of the Equality Scheme processes, and limited information presented in assessments when public authorities present equality assessments as screening templates.
- 8.18. Chapter 4 considers evidence from public authorities where Equality Officers have reported on the perception that there are limited contributions to policy development from applying the Equality Scheme processes, but also that the knowledge and experience of equality matters continues to be held, for a range of reasons, by those Equality Officers.
- 8.19. **Data development.** Equality Scheme commitments have not driven a data development agenda in the public sector, despite the requirements in Schedule 9 for particular monitoring arrangements and the Commission’s longstanding advice (see Chapter 4).
- 8.20. Evidence-based policy making is not a recent development; nor is advice on how to collect information to inform service development and the benefits of this.
- 8.21. **Accountability and risk.** Evidence suggests that the perceived risks of not fulfilling the statutory equality and good relations duties, and/or non-compliance, are probably small.
- 8.22. In public authorities where the duties are of higher relevance to the functions, it is likely that the risks of non-compliance are considered relatively low; it is likely to be quantified in relation to the risk of a Commission investigation. It has been less likely to be considered a risk in public law, although a number of cases have been heard recently in Judicial Review where the public authority’s fulfilment of its Section 75 duties has been considered.
- 8.23. In the annual progress reports, there is a small number of complaints reported by public authorities.

¹¹⁷ Conley, H., [A review of available information on the use of impact assessment in public policy formulation and in contributing to the fulfilment of statutory duties](#) (ECNI, 2016).

¹¹⁸ Identified through a number of events that have been held for those with lead responsibility for equality matters within public authorities.

Issues identified in the Commission's powers and duties in Schedule 9

8.24. **Complaints.** There are specific requirements on the Commission in relation to complaints. The range and nature of complaints to the Commission has consistently reflected particular issues on policies and practices that are of concern to the complainant, which are not always clearly associated with what Equality Scheme arrangements provide for.

8.25. **Investigations** are adversarial, given the statutory requirement that they are considered in relation to a belief of non-compliance with an Equality Scheme. They have mostly been driven by particular circumstances. They have provided some learning for public authority practices, but can be limited in the ripple effect of the findings, particularly when arising from a paragraph 10 complaint.

Opportunities

8.26. There is ongoing, and it is likely there will be further, interest in the circumstances and context in Northern Ireland as the 20th anniversary of the signing of the Good Friday/Belfast Agreement approaches in April 2018.

8.27. The Commission will continue to provide advice and information on the statutory equality and good relations duties, and fulfil its functions as set out in Schedule 9. It will focus on addressing the issues identified.

9. Conclusions, recommendations and proposed actions

- 9.1. The Commission has a considerable body of evidence available on the operation of the Schedule 9 requirements of the Northern Ireland Act 1998. The Schedule 9 requirements are there to enable public authorities to fulfil their statutory equality and good relations duties set out in Section 75, and to enable enforcement of those duties.
- 9.2. The Commission has a duty in Schedule 9 of the Act to “to keep under review the effectiveness of the duties imposed by Section 75”¹¹⁹. The Commission does this in a number of ways, through its continuing work to provide advice and guidance, as well as through specific review activities, such as the strategic review of the effectiveness of the Section 75 duties it undertook in 2006-8¹²⁰.
- 9.3. The work to examine evidence of public authority practices arose from the Commission’s advisory role. This report has brought together evidence of public authorities’ practices on their statutory equality and good relations duties, and wider evidence such as the issues and evidence from complaints. It has also enabled some examination of the wider circumstances and from other relevant jurisdictions, particularly Britain and the Republic of Ireland.
- 9.4. The Commission agreed that the collection and consideration of evidence, the issues identified, and the opportunities currently available, allow for this report to “*provide strategic direction for the Commission’s future focus on the statutory equality and good relations duties on public authorities in Section 75 of the Northern Ireland Act 1998*”¹²¹.
- 9.5. The Commission agreed to consolidate the evidence base available in a report, reflecting the issues identified and to be addressed in order to encourage public authorities to sustain and improve implementation of their statutory equality and good relations duties¹²².
- 9.6. Appropriate actions were incorporated into the Commission’s business plan for 2017-18. In practice, the first action has been to compile this report. This report is now presented for wider consideration, action and engagement on the proposals it makes.

¹¹⁹ Northern Ireland Act 1998, [Schedule 9](#), paragraph 1(a).

¹²⁰ [Section 75: Keeping it Effective](#) (ECNI, 2008).

¹²¹ Agreed at the Commission Meeting held in [March 2017](#).

¹²² Agreed at the Commission Meeting held in [March 2017](#).

Recommendations

9.7. The Commission recommends to public authorities that:

- senior leaders and decision-makers in organisations routinely seek assurance within their organisations that they are fulfilling the duties to have due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations;
- those responsible for providing information for decision-making on a function or policy should ensure they provide sufficient information, from their equality assessments, for the appropriate consideration (i.e. due regard to the need to promote equality of opportunity, and regard to the desirability of promoting good relations) to be given in particular decisions;
- the importance of the statutory equality and good relations duties are restated, given the wider political and economic context, as well as reconfirming the necessity of fulfilling the duties within the organisation – they continue to be a statutory requirement;
- the shift of focus from process to outcomes should continue. Equality Schemes are to enable public authorities to fulfil the Section 75 duties – to give the appropriate consideration to the need to promote equality of opportunity and desirability of promoting good relations - when they deliver their functions. Through giving the appropriate consideration, a public authority will ensure that the decisions they take will be mindful of “the consequences on the lives of people”¹²³; and
- they ensure their consideration of the need to promote equality of opportunity, and desirability of promoting good relations, is evidence based and the data is available to support the consideration. There is a clear link between the consideration needed to meet the Section 75 duties and the data development agenda that is required for the Outcomes Based Accountability approach to the draft Programme for Government. This should drive the collection and use of equality data.

¹²³ [A Guide for Public Authorities](#) (ECNI, 2010), page 10.

Proposed actions

1.8 The Commission has identified a number of actions that it proposes in support of these recommendations:

- To set the agenda and debate in highlighting the importance of the duties and their continuing relevance to, and assistance in, the development of public policy and service delivery in Northern Ireland.
- To engage specifically with politicians, senior leaders in public authorities and decision makers to re-confirm their roles and responsibilities.
- To convey and communicate one of the most important issues and success factors – leadership. While recognising the circumstances of reduced resources, leadership continues to be imperative within public authorities to ensure the maintained focus on equality matters, as well as the mainstreaming of equality considerations throughout the business of the authority.
- To prioritise its advisory activities on public authority practices in screening and Equality Impact Assessment, to ensure that these central methodologies are used to greatest effect by public authorities in consistently providing meaningful equality assessments of the policy objectives and policy goals under consideration at any given time.
- To use the issues identified in this report and review its approach to investigations generally in the forthcoming period.

1.9 The Commission will continue to engage with all stakeholders with roles to play with respect to ensuring that public authorities are fulfilling their statutory equality and good relations duties in Section 75.

APPENDIX 1

Northern Ireland Act 1998, Section 75

Statutory duty on public authorities

75. (1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity -
- (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
 - (b) between men and women generally;
 - (c) between persons with a disability and persons without; and
 - (d) between persons with dependants and persons without.
- (2) Without prejudice to its obligations under subsection (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.
- (3) In this section “public authority” means -
- (a) any department, corporation or body listed in Schedule 2 to the Parliamentary Commissioner Act 1967 (departments, corporations and bodies subject to investigation) and designated for the purposes of this section by order made by the Secretary of State;
 - (b) any body (other than the Equality Commission) listed in Schedule 2 to the Commissioner for Complaints (Northern Ireland) Order 1996 (bodies subject to investigation);
 - (c) any department or other authority listed in Schedule 2 to the Ombudsman (Northern Ireland) Order 1996 (departments and other authorities subject to investigation);
 - (d) any other person designated for the purposes of this section by order made by the Secretary of State;
- (4) Schedule 9 (which makes provision for the enforcement of the duties under this section) shall have effect.
- (5) In this section -
- “disability” has the same meaning as in the Disability Discrimination Act 1995; and
- “racial group” has the same meaning as in the Race Relations (Northern Ireland) Order 1997.

Equality Act 2010 – public sector equality duty on public authorities

149 Public sector equality duty

- (1) *A public authority must, in the exercise of its functions, have due regard to the need to—*
- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.*

Equality Act 2006 – EHRC powers and duties for enforcement of the Public Sector Equality Duties

Section 31: Public sector duties: assessment

- (1) *The Commission may assess the extent to which or the manner in which a person has complied with a duty under or by virtue of section 149 ... of the Equality Act 2010 (public sector equality duty).*

Section 16: Inquiries

- (1) *The Commission may conduct an inquiry into a matter relating to any of the Commission's duties under **sections 8¹²⁴ [F1 and 9]**.*
- (2) *If in the course of an inquiry the Commission begins to suspect that a person may have committed an unlawful act—*
- (a) in continuing the inquiry the Commission shall, so far as possible, avoid further consideration of whether or not the person has committed an unlawful act*

¹²⁴ Emphasis added

Section 8: Equality and diversity

(1) The Commission shall, by exercising the powers conferred by this Part—

- (a) promote understanding of the importance of equality and diversity,*
- (b) encourage good practice in relation to equality and diversity,*
- (c) promote equality of opportunity,*
- (d) promote awareness and understanding of rights under the [F1Equality Act 2010],*
- (e) enforce [F2that Act],*
- (f) work towards the elimination of unlawful discrimination, and*
- (g) work towards the elimination of unlawful harassment.*

(2) In subsection (1)—

- “diversity” means the fact that individuals are different,*
- “equality” means equality between individuals, and*
- “unlawful” is to be construed in accordance with section 34.*

(3) In promoting equality of opportunity between disabled persons and others, the Commission may, in particular, promote the favourable treatment of disabled persons.

Irish Human Rights and Equality Commission Act 2014, Section 42

42. (1) A public body shall, in the performance of its functions, have regard to the need to—
- (a) eliminate discrimination,
 - (b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and
 - (c) protect the human rights of its members, staff and the persons to whom it provides services.
- (2) For the purposes of giving effect to *subsection (1)*, a public body shall, having regard to the functions and purpose of the body and to its size and the resources available to it—
- (a) set out in a manner that is accessible to the public in its strategic plan (howsoever described) an assessment of the human rights and equality issues it believes to be relevant to the functions and purpose of the body and the policies, plans and actions in place or proposed to be put in place to address those issues, and
 - (b) report in a manner that is accessible to the public on developments and achievements in that regard in its annual report (howsoever described).
- (3) In assisting public bodies to perform their functions in a manner consistent with subsection (1), the Commission may give guidance to and encourage public bodies in developing policies of, and exercising, good practice and operational standards in relation to, human rights and equality.
- (4) Without prejudice to the generality of subsection (3), the Commission may—
- (a) issue guidelines, or
 - (b) prepare codes of practice in accordance with [section 31](#), in respect of the development by public bodies of performance measures, operational standards and written preventative strategies for the purpose of reducing discrimination and promoting human rights and equality in the public sector workplace and in the provision of services to the public.
- (5) Where the Commission considers that there is evidence of a failure by a public body to perform its functions in a manner consistent with subsection (1) and that it is appropriate in all the circumstances to do so, the Commission may invite the public body to—
- (a) carry out a review in relation to the performance by that body of its functions having regard to *subsection (1)*, or
 - (b) prepare and implement an action plan in relation to the performance by that body of its functions having regard to *subsection (1)*, or both.
- (6) A review or an action plan under *subsection (5)* may relate to—
- (a) equality of opportunity or human rights generally, or

- (b) a particular aspect of human rights or discrimination, in the public body concerned.
- (7) The Commission may, and, if requested by the Minister, shall, review the operation of *subsection (1)*.
- (8) For the purposes of assisting it in carrying out a review under *subsection (7)*, the Commission shall consult such persons or bodies as it considers appropriate.
- (9) Where the Commission carries out a review under *subsection (7)* it—
- (a) may, or
- (b) where the Minister has requested the review, shall, make a report of the review to the Minister and any such report shall include such recommendations as the Commission thinks appropriate.
- (10) The Commission shall cause a copy of the report to be laid before each House of the Oireachtas.
- (11) Nothing in this section shall of itself operate to confer a cause of action on any person against a public body in respect of the performance by it of its functions under *subsection (1)*.

Equality Commission

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