

Association for Criminal Justice Research and Development

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***The Potential of the Public Sector Equality and Human Rights Duty - Chief  
Commissioner, Sinead Gibney, Irish Human Rights and Equality Commission  
(IHREC)***

Good morning everyone,

And thank you, Maura, for your kind introduction and thank you to the conference organisers for inviting me to speak here today.

I'm going to talk about the transformative potential of the Public Sector Equality and Human Rights Duty for how public services are delivered.

I hope to share some of our experiences, as the Irish Human Rights and Equality Commission, in working with public sector bodies in the implementation of the Public Sector Equality and Human Rights Duty.

And I'm going to talk a bit about the practical challenges for implementation which we've seen over what is now almost a decade since the statutory obligation was first introduced in our own IHREC Act 2014.

What I'd really like to achieve in my talk is to leave you, as practitioners, as public servants, and as people who work with and support service users, feeling empowered to use the Duty to progressively improve how public services, and services in the criminal justice sector in particular, are conceived, delivered, and experienced by people living in Ireland.

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So firstly, what is the Public Sector Equality and Human Rights Duty?

The Duty is, at its core, a positive obligation on public bodies to do their business in a way that eliminates discrimination, promotes equality of treatment and opportunity, and protects human rights. This obligation extends to both the staff of an organisation, and those who use its services.

To be specific, the legislation requires a public body to have regard to these duties in the execution of its functions. And I'll come back to that wording a little later.

The Duty was and is an innovation in equality law. A positive obligation to actively take measures to promote equal treatment and protect human rights, as opposed to a simple prohibition of discrimination.

Consequently, it's not singularly focused on resolving legal disputes in individual cases after they arise, or in dealing with discrimination and violations of human rights after the fact, when the harm has already been caused.

Rather, it is intended to prevent such problems from arising in the first place and to resolve them before they escalate.

Another key feature is that the Duty places the burden of proving compliance with equality and human rights standards squarely with the public body, as opposed to the individual who is seeking to vindicate their rights, for example through litigation.

Of course, a critical difference between the Public Sector Duty and other equality legislation is that an individual cannot sue a public body for failing to comply with it. But, the Duty may be invoked by a Court in considering a related matter. And, while it has not yet been tested, a public body's obligations in respect of the Duty may be considered as part of a judicial review.

Section 42 of the IHREC Act, which sets out the overarching equality and human rights Duty on public bodies, is also explicit about how public bodies can demonstrate that they are, in fact, having regard to this duty in the execution of their functions.

The Act requires public bodies to take a systemic approach to their own assessment of the equality and human rights engaged in the course of their work, summarised by the actions *assess, address and report*.

...So looking at the first of these; *Assess*.

This requires a public body to identify any equality and human rights issues that are relevant to its purpose and functions, through consultation and evidence gathering.

The results of this assessment must then be set out in its strategic or corporate plan in a way that is accessible to the public.

Second, it must *Address* those issues raised at the *Assess* stage.

To fulfil this, the public body should analyse and prioritise the issues raised by the equality and human rights assessment and set out the plans, policies and actions it's going to take to tackle these issues in the context of its strategic or corporate plan.

And finally, a public body is required to *Report* annually on its progress, developments and achievements relating to the *Assess* and *Address* phases.

It's through this mechanism that the *Duty* fosters a systemic whole of organisation approach, and one that is subject to constant review.

It encourages Public Sector Bodies to take a critical look at their functions through a human rights and equality lens in order to assess whether or not they have taken adequate steps to address identified issues, not just in their daily work, but also when developing future policies, plans and services.

Ireland is changing, becoming more diverse. People who work with the users of public services experience this a lot quicker than the law acts to catch up with it. By implementing the *Duty* in this systemic way, public bodies can meet the needs of – and indeed reflect in its own staff body – a pluralist society.

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Let me give you an example from our own organisation of how the Duty can influence how a public body does its business. I'll say from the outset that we are also feeling our way as an organisation through some of the practicalities of how we implement the Duty. I don't set us up as any kind of paragon.

Because even a body whose core business is human rights and equality has its blind spots. That's why the assessment stage is really important. For us, surveying our staff was hugely beneficial, because they're the ones dealing directly with people accessing our services. They were therefore well able to point out who is not accessing our services, but should be. This has provided much needed insight into critical issues that we need to tackle in our own service delivery.

So a number of the actions arising from our assessment focus on how we communicate information about rights to certain groups who are harder to reach, either by virtue of the ableist world that we all live in, or because they're living very much on the margins of our society.

I'm going to tell you about another example of how a public service changed their practice because of the Duty. This was a project undertaken by the organisation Community Action Network, or CAN, supported by IHREC, relating to users of methadone clinics. The practice in these clinics had been to require users to provide a urine sample under direct supervision of a health professional. This did not respect the users' right to privacy or dignity.

CAN, and the services users themselves, worked with the HSE to change that policy, because the objective of providing clear and untampered urine samples could be achieved without breaching those fundamental rights.

You, as practitioners, are already doing much of the work of the Duty. I know there are great examples of really progressive work across every arm of the criminal justice sector which consider the particular needs of women, of minority groups, of Travellers, of people with disabilities. Tailoring services for particular groups is an example of the Duty in action.

The communications campaign carried out by the Department of Justice aimed at women experiencing domestic violence, and the outreach services provided by members of An Garda Síochána to older persons in our community during the Covid lockdown period are also good examples of how employing a targeted approach to human rights issues affecting specific groups can lead to the development of inclusive policies and practices. The learnings from these examples have the potential to be mainstreamed across the public service.

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IHREC also has a statutory duty to provide guidance and support to public bodies to improve implementation of the Duty. And I'm going to talk through now the work we've done with a number of bodies in the criminal justice sector, the Probation Service, the Irish Prison Service, and An Garda Síochána.

Our work included piloting the 'assess' phase of the Duty with public bodies, including the Prison and Probation Services. And I'd like to again express my gratitude to those organisations for being partners in that work.

The pilot projects in particular gave us the opportunity to see first-hand the issues that frequently arise when implementing the Duty.

These are experiences and learnings which we then fed into the development of our guidance tools, which have now been completed and are available resources for Public Bodies to use as tools for implementing the Duty.

As part of our promotion of the duty, we also developed an eLearning course so that public service employees across the country could engage with our message online, while learning more about equality and human rights and their place in the delivering the Duty.

To date, An Garda Síochána have the largest uptake of that eLearning module of any public body, with a large number of members having completed the training. We're currently in the process of assisting An Garda Síochána in hosting thee-learning on their own intranet system, which highlights their ongoing commitment to training members in the Duty.

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I'd like to highlight the potential of the Duty to move good practice in discrete areas out to the mainstream. The UK, which has had a public sector equality duty since 2010, is making some progress in this way.

The UK's duty was legislated for by the Equality Act of 2010, which places legal obligations on authorities there to promote equality, eliminate discrimination and foster good relations between different groups.

And it has made an impact within the justice system and courts system, including in driving diversity in recruitment of police officers and in addressing bias in stop and search protocols.

It has also led public authorities in the UK to implement improved data monitoring and analysis systems to identify disparities and inequalities in the treatment of different groups who are exposed in one way or another to the Criminal Justice system.

A good example of the public sector duty at work in the UK is the statutory requirement in Scotland to publish Mainstreaming Equality Reports.

This obliges Scottish public bodies to report, no more than every two years, on the progress they have made in making equality integral to the exercise of their function. The reporting provide an overview of what has moved forward, challenges they have faced and details of future plans in relation to mainstreaming equality within a specified timeframe.

For instance, a recent Report published in April 2023 by the Scottish Tribunals and Courts Service details progress on their three equality outcomes 2019 to 23, while setting 3 new equality outcomes for 23 to 27.

It contains items on Leadership, diversity in recruitment and Board Membership, accessibility, Equality Impact Assessments and on an Equality Audit, as well as detailing their partnerships with groups promoting equality for service users including those with autism, British Sign Language Users, children, women and girls and ethnic minorities.

Such reporting is carried out across all public sector bodies in Scotland including those in the criminal justice system such as the Scottish Prison Service, Police Scotland and the Crown Office and Procurator Fiscal Service.

In the UK more broadly, the Ministry of Justice offers training in areas such as equality and diversity but also in understanding and delivering the Public Sector Equality Duty. Public Sector Equality Duty considerations and checks are included in the Courts and Tribunals Service Change Standard Operating Controls and reasonable adjustments for disabled service users are recorded on a national HMCTS database.

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The transformative potential of the Public Sector Duty cannot be over-stated.

If fully implemented and its requirement to integrate the Duty into the strategic planning and annual reports cycle carefully adhered to, a given public body would undergo a significant advancement towards meeting its obligations to eliminate discrimination, promote equality and protect human rights.

Its approach of ongoing review is designed to encourage public bodies to continue to dynamically address human rights and equality issues, to keep it in line with a changing society, and ultimately fulfil its ability to carry out its function in an equal, inclusive and efficient manner.

As the Duty applies across all functions of an organisation, the nature of the cyclical review is key to ensuring that there is adequate oversight and a whole of organisation approach, positively contributing to a sustainable and embedded cultural change within the organisation.

That said, coming up on nine years since its enactment, we in IHREC recognise that implementation of the Duty is limited and fragmented.

It's clear that providing information and guidance on the Duty alone will not in itself deliver meaningful compliance by public bodies.

As acknowledged in our most recent Strategy Statement, there's a need for us as a Commission to both promote positive actions to fulfil responsibilities within the public service, and to respond to non-compliance.

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Systemic issues exist which serve to hold back the implementation of the duty and there are three of them in particular that I'd like to focus on now, namely leadership, capacity building and data collection.

And so on the first of these, leadership.

The success of the implementation of the duty in any organisation is dependent on its people, and most notably its key decision makers.

To succeed, the Duty must be promoted within the organisation to engage the minds, priorities and ambitions of those who will ultimately oversee its implementation.

This ownership and leadership from senior management of public bodies including within the criminal justice sector greatly facilitates the Duty's implementation by establishing the Duty as a key priority, and is crucial in supporting the commitment to promoting equality, diversity and inclusion.

Second, building capacity is central for embedding of the Duty in a public sector body, in terms of skills and resources.

Training and capacity building for all Criminal Justice Sector staff on equality, human rights and the Duty should be made easily available and accessible. We understood from our own extensive engagement with public bodies that even where the will was strong to positively engage with human rights and equality issues, there was a lack of understanding about what these issues are, and are not.

To this end, and I mentioned this earlier, we invested in an e-Learning tool on human rights, equality and the Duty, which has seen very encouraging take up levels across the public service.

So far, 183 Public Bodies have engaged with the tool, which is available to all – including people working outside the civil and public service.

The third systemic barrier is equality data collection. Collection and analysis of internal and external sources of information and data is really important to build a working analysis of the issues relating to the Duty and in ensuring effective monitoring and reporting on equality and human rights. Public bodies should be proactive about collecting equality data that is for the purpose of identifying and preventing discrimination. We will be doing more work on guidance for public bodies on equality data collection over the course of this strategic cycle. But I would like to say clearly to you today that: you can and should be doing it now.

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Finally, a word on how compliance is monitored – a question which comes up a lot. As I said at the outset, this is a self-assessed Duty. But it is still a statutory obligation.

At IHREC, we're currently developing a cloud-based system to monitor public bodies' compliance with the Duty. This is to better inform our own monitoring of implementation, but also with a view to publishing information on implementation from next year.

We're also currently conducting a consultation process to inform the drafting of a Code of Practice on the Duty.

This will set out recommendations to provide assistance to public bodies in developing, amongst other things, operational standards. And in doing so, it will provide sample wording which public bodies could include in their Statement of Strategies.

We hope that this will be of assistance to both people working in public bodies, and staff and service users looking to understand an organisation's legal obligations.

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To conclude, the Public Sector Duty has the potential to transform our Public Services and assist them in meeting their obligations to eliminate discrimination, promote equality and protect human rights.

But real fundamental change in these matters does not come from a lack of ambition, tokenism or short-sightedness, but through a sustained, systemic and targeted approach.

It comes with real leadership to drive institutional change

Through committing to change by building up organisational capacity through training and resource allocation

And through collecting the necessary data to ensure that outcomes are well informed and on-point.

Under-pinning all of this, it requires a process that puts in place an ongoing review mechanism of assess, address and review so that that organisation is ready to meet not just its equality and human rights obligations of today but also its challenges in the future.

It is the view of our Commission that compliance with the Public Sector Equality and Human Rights Duty is that pathway, in delivering a public service that we can all be proud of.

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