



# The Equal Rights Review

*Promoting equality as a fundamental human right  
and a basic principle of social justice*

## In this issue:

- Special: Equality in the area of education
- The education of Gypsies, Roma and Travellers in the UK
- Understanding gender inequalities in education
- Reforms in the equality protection systems in Australia and the Netherlands
- Testimony from female journalists in Sudan





# Contents

5 *Editorial* Equality in Education

## Articles

11 *Anna Brown* Searching for the Aussie “Fair Go”: A Survey of the Legal Landscape and Road to Reform of Australian Anti-Discrimination Law

32 *Jenny Goldschmidt* Protecting Equality as a Human Right in the Netherlands

50 *Joshua Hepple* Will Sexual Minorities Ever Be Equal? The Repercussions of British Colonial “Sodomy” Laws

## Special

67 *Elaine Unterhalter* Mutable Meanings: Gender Equality in Education and International Rights Frameworks

85 *Brian Foster and Peter Norton* Educational Equality for Gypsy, Roma and Traveller Children and Young People in the UK

113 *Brenda Parkes* Exclusion of Pupils from School in the UK

## Testimony

131 Breaking through the Silence - Women and the Media in Sudan: Testimony of Four Female Journalists

## Interview

139 Equality in Higher Education: Experts’ Perspectives  
ERT talks with David Ruebain and Marcelo Paixão

## Activities

161 The Equal Rights Trust Advocacy

171 Update on Current ERT Projects

195 ERT Work Itinerary: July – December 2011

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# Equality in Education

Around the world, enrolment, attendance and completion rates in education vary substantially according to membership in disadvantaged groups, including groups of lower socio-economic status. A recent country report published by The Equal Rights Trust identified numerous patterns of inequality and discrimination in the area of education in Kenya, based on ethno-regional difference, gender, sexual orientation, disability, albinism, HIV status and other characteristics defining disadvantage in the Kenyan context.<sup>1</sup> Ethno-regional differences in education mirror stark differences in economic development: for example, educational participation and outcomes in North Eastern Province and the arid districts of Rift Valley and Eastern Provinces are substantially below the national average.

Stigma and prejudice against sexual minorities result in exclusion from school and other educational inequalities. In Nairobi, ERT was told: “For lesbian women, one of the worst sources of discrimination is the family: parents do not understand sexual orientation, and often withdraw support for education of their daughters once they find out that they are lesbians.”<sup>2</sup> A significant number of persons with disabilities interviewed by ERT stated that familial prejudice about disability led their parents to prevent them from attending school. A man with a physical disability in Kisumu said he was the only one of his six siblings

who did not go to school. The ERT report also identifies serious problems in access to education for children with albinism as a result of schools’ failure to take steps to accommodate their visual impairments; the categorisation of these children as blind has the effect not only of condemning them to poor school performance, but also of denying them access to appropriate healthcare addressing their particular problems.

Education is an area very sensitive to all types of socially and politically constructed disadvantage – an area in which such disadvantage is reflected and amplified. Therefore, the area of education should be covered comprehensively in every country’s national equality legislation, and equality considerations should underlie every piece of education law. However, most national legal systems to date fall short. States have a long way to go to comply with the relevant international and regional human rights norms: equality provisions throughout international and regional instruments, read in conjunction with articles related to the right to education. The 1961 UNESCO Convention against Discrimination in Education contains useful principles to guide law-makers, and a wealth of good (and bad) practice can be gleaned by policy makers from the work of the UN Committee on the Rights of the Child, other treaty bodies as well as the remarkable work of Gay McDougall, the former UN Independent Expert on Minority Issues, whose

mandate contributed greatly to highlighting equality in education as a right of children belonging to minorities.

This issue of *The Equal Rights Review* contains materials which look at just a few out of the dozens of complex issues around educational equality. After decades of attention to – and action on – gender inequalities in education, it continues to be a massive problem in most countries, ubiquitous though frequently coming in more subtle and paradoxical manifestations. Unterhalter’s study takes a deep plunge into these challenging waters. The worst gender inequalities, of course, are those of pure denial of access to education, which is highly co-related with poverty. The Kenyan government described a reality not at all specific to Kenya alone, when it acknowledged, in a report to a UN treaty body:

“Poverty hinders many parents from educating their daughter beyond primary school. In some cases, where resources are scarce, parents still prefer boys’ education over girls’ meaning that fewer women would qualify for meaningful wage employment.”<sup>3</sup>

An article by Foster and Norton relates the British experience on Roma education – a very important and timely contribution, as Europe currently seems to be unknowingly imitating the British journey, sliding downhill from ethnically-defined positive action to ethnically-blind policy. As shown in the article, in Britain under the present coalition government, the recent closing of programmes explicitly targeting the Gypsy, Roma and Travellers and merging those under broad childhood or regional schemes is leading to deterioration in educational achievement. In the European Union, the national strategies for Roma integration submitted so far by EU member states to the European Commission spell out a backwards trend with regard to

policies to achieve educational equality for Roma. One of the basic policy principles adopted earlier on which there seemed to be a degree of consensus and which is backed by the European Commission defined the need for “explicit but not exclusive” targeting of Roma in policy-making and the allocation of resources<sup>4</sup>. However, in a characteristic example of an emerging trend, the Dutch, German and a number of other national strategies express a principled opposition to ethnic explicitness. Among education policy people, I am hearing a resurgence of statements of the type: “If we can properly address socio-economically disadvantaged groups, this will cover also the eligible Roma, because most are poor anyway.”

We have come a full circle. This thinking reminds me of the responses of the Bulgarian, Romanian and other Eastern European governments back in the early 1990s when confronted with the charges that, when it comes to Roma, they were having a racial discrimination problem at home to deal with. Back then, the post-communist governments argued that there was no such a thing in their societies as racial or ethnic discrimination; and that all allegedly ethnic disadvantage was in fact of a socio-economic nature (and as such, best addressed by themselves as, on account of having lived in a Communist society, they knew everything about how to remove socio-economic disadvantage). Twenty years later, and more than a decade after the historic Race Equality Directive was adopted by the European Council<sup>5</sup>, this form of denial of racism is back. Probably due to a fatigue with identity politics that may have gone too far in the past decade, the emerging fashion as demonstrated in many of the national strategies for Roma inclusion is a new denial of ethnic identity as a determinant of equality policy. This is a leap not just in the opposite direction but also backwards.

Where racism is at play, ethnic identity can't be ignored as a determining, if not exclusive, factor of eligibility for targeted educational policies. If – as the EU institutions and the individual EU governments have long been acknowledging in dozens of documents – it is the Roma ethnic identity that is one of the grounds of discrimination and inequality suffered by the Roma, then it has to be one of the grounds on which the beneficiary group of positive action is defined.

But it is exactly the approach to positive action that is the problem here. A missing angle in the large Roma education discourse at present is that of modern equality law. The lack of a clear equality perspective is particularly damaging in respect to forming a vision on how positive action benefitting Roma equality in education should look like. This is too bad, because positive action is the key to educational equality for disadvantaged groups in general and Roma in particular.

The Declaration of Principles on Equality, expressing a moral and professional consensus among experts and advocates, stated at Principle 3:

“To be effective, the right to equality requires positive action. Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality.”

The Declaration defines positive action as a necessary element of the right to equality that should be present at the policy level from the start, not as an afterthought of good will towards a vulnerable group, undertaken once formal equal treatment is achieved. The “particular groups” must

therefore be defined in equality-relevant ways: in order for equal rights in the area of education to be realised, positive action is mandatory where there is inequality linked to a particular protected characteristic and it is proportionate to take a particular measure. This understanding is one of the most important achievements of the developing frameworks and concepts of equality law in Europe and elsewhere. It can also be described as a departure from the notion of formal universal equality and a movement toward what the EC has termed “substantive equality in practice”. Many of the national strategies for Roma integration, however, mark a return to the formal equality approach, even though it is most of the time masked in confusing rhetoric.

The third article in this volume's Special is about school exclusions in the UK. ERT invited Brenda Parkes to write about this issue in the aftermath of the riots that shook London and other English cities in August 2011. As a foreigner living in Britain, I have been puzzled for years by the weird phenomenon of exclusions which my British colleagues seemed to accept as a matter of course. Both the high numbers and the apparent ease with which young children can be thrown out of schools in Britain seemed to me eccentric. Then last summer we saw the riots, defined not by any political agenda but by young people breaking shop windows in order to obtain running shoes. I supposed that school exclusions were one of the mechanisms that had been manufacturing the rioters. But as I was wondering if exclusions were indeed a key factor for “the ruin of many a poor boy”, Prime Minister David Cameron came on TV saying angrily that more discipline was needed in schools, and expressed regret that school exclusion decisions had been frequently overturned by Tribunals. Parkes' article in

this issue describes the recent trend in the spirit of Cameron's concerns, with exclusions being made even easier than before.

Finally, this issue contains a double interview on equality in higher education, in which David Ruebain and Marcelo Paixão touch upon some of the more controversial issues of higher education equality. The sphere of higher education remains one in which efforts to achieve equality in access, results,

onward opportunities, research parameters and staff promotions have lagged behind similar efforts in the spheres of primary and secondary education. But the role which higher education plays, both in the lives of individual students and in society as a whole, means that the impact of any inequalities within this sector can be wide-reaching. The interview illustrates approaches to realising equality in higher education in two leading countries in this area, Brazil and the UK.

Dimitrina Petrova

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1 The Equal Rights Trust, *In the Spirit of Harabmee: Addressing Inequalities and Discrimination in Kenya*, February 2012.

2 *Ibid.*, p. 122.

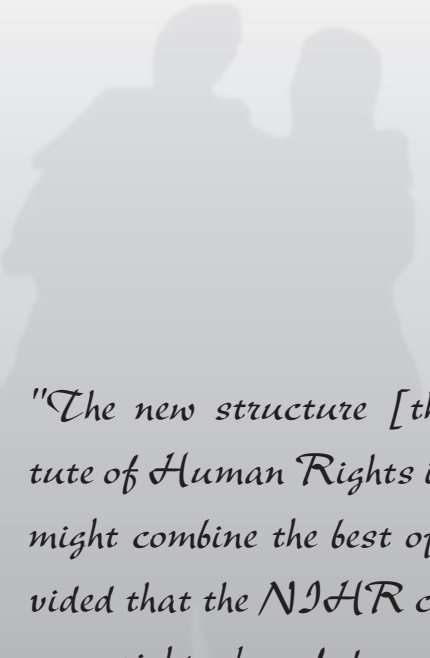
3 Committee on the Elimination of Discrimination against Women, *Seventh Periodic Report of State Parties: Kenya*, UN Doc. CEDAW/C/KEN/7, 2010, Para 167.

4 *Vademecum: The Ten Common Basic Principles of Roma Inclusion*, European Commission, undated, available at: [http://www.coe.int/t/dg4/youth/Source/Resources/Documents/2011\\_10\\_Common\\_Basic\\_Principles\\_Roma\\_Inclusion.pdf](http://www.coe.int/t/dg4/youth/Source/Resources/Documents/2011_10_Common_Basic_Principles_Roma_Inclusion.pdf).

5 Council Directive EC/2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 29 June 2000, OJ L180/22.



# ARTICLES



*"The new structure [the National Institute of Human Rights in the Netherlands] might combine the best of two worlds. Provided that the NIHR combines general human rights knowledge and experience with more specific expertise in the complex field of equality and non-discrimination, the institutional combination of the continued specialised division dealing with opinions and investigation related to individual cases and the NIHR with a broad mandate in the field of human rights may be well-equipped to tackle complex human rights issues whilst incorporating equality as an independent and accessory right."*

*Jenny Goldschmidt*



# Searching for the Aussie “Fair Go”: A Survey of the Legal Landscape and Road to Reform of Australian Anti-Discrimination Law

Anna Brown<sup>1</sup>

Australia’s anti-discrimination laws are a patchwork of overlapping and inconsistent protections which are based on an outdated, reactive, complaint-based legal model which fails to address systemic discrimination or promote substantive equality. This article traces briefly the development of anti-discrimination law in Australia and identifies the limitations of current federal laws and priorities for the reform of federal anti-discrimination laws that is currently underway. The so-called “Consolidation Project” has been pitched to the Australian community as an exercise in addressing inconsistencies and reducing regulation. However, the reform process also provides an opportunity to rethink the framework of Australia’s equality laws and strengthen and modernise them in line with best practice examples from overseas.

## 1. The Current State of the Law

Surprisingly, despite boasting the 13<sup>th</sup> largest economy in the world, the world’s fifth-highest *per capita* income, robust democratic institutions and a highly regarded independent judiciary, Australia is the only liberal democracy without institutional protection of human rights. There is no overarching and comprehensive protection of human rights in Australian national law, such as a bill of rights enshrined in the Australian Constitu-

tion or by legislation. The right to non-discrimination is one of the few human rights with a degree of legislative protection in Australia, however this right is not enshrined in the Australian Constitution and, as a result, anti-discrimination laws may be overridden by subsequent legislation. Moreover, as identified by Belinda Smith and Dominique Allen, Australia’s anti-discrimination laws “have not developed significantly since their inception, leaving Australia lagging behind international consensus on human rights and equality”.<sup>2</sup>

Some of the most pressing human rights issues facing Australia are both causes and consequences of inequality. While the overall level of wellbeing of the Australian population is high when compared to the populations of many other countries, beneath these overall statistics hide substantial differences in the health and wellbeing of specific groups within Australia’s population. Although this is most evident for Aboriginal and Torres Strait Islander peoples,<sup>3</sup> there are also many other communities that experience discrimination and disadvantage in Australia. Women still fair worse than men on key indices such as pay equity, representation at decision-making levels, retirement income and superannuation levels.<sup>4</sup> Members of culturally and linguistically diverse (CALD) communities and Aboriginal and Torres Strait

Islander people experience systemic barriers to full participation in Australian life and suffer the adverse effects of persistent racism and discrimination.<sup>5</sup> For example, it has been found that Australian employers are still more likely to grant interviews to candidates with Anglo-Celtic names, on otherwise identical job applications in a supposedly open field.<sup>6</sup> Identity-motivated crime and harassment against Muslim Australians<sup>7</sup> and international students, particularly Indian nationals,<sup>8</sup> has been recognised as a more recent and growing problem. Recent legislative reforms have reduced inequality before the law for same sex couples,<sup>9</sup> with marriage equality remaining the final sticking point, but nevertheless members of Australia's LG-BTIQ communities continue to experience high levels of prejudice, stigma, exclusion, discrimination, abuse and hate-motivated assault.<sup>10</sup> Ageism acts as a significant barrier to workplace participation for older people and is prevalent in a wide range of policy areas, for example, operating to deny access to health services and accommodation.<sup>11</sup> Despite representing 20% of Australia's population, people with disabilities experience significant disadvantage and exclusion from full and equal participation in the life of the Australian community. Other groups, such as persons experiencing homelessness, refugees and newly arrived migrants, also experience systemic discrimination and significant disadvantage.

Australia is a federal parliamentary democracy and the legal regulation of discrimination is an area of concurrent legislative power for the Commonwealth and the States. The existence of multiple regulatory jurisdictions and the inconsistencies between State and federal legislation create constitutional and practical problems, which are exacerbated by the uneven and *ad hoc* development of various anti-discrimination laws across the

jurisdictions over the past decades. This has led to increasing calls for and, more recently, concerted efforts to bring about the harmonisation and consolidation of existing laws.<sup>12</sup>

Currently, Commonwealth anti-discrimination law is found across four separate pieces of legislation, each dealing with a different ground of discrimination. The Racial Discrimination Act 1975 (Cth) (RDA) was the first federal anti-discrimination law, enacted less than a decade after the Constitution was amended to remove provisions which discriminated against Indigenous Australians and the infamous "White Australia" immigration policy came to an end. As was the case with later generations of discrimination law in Australia, the RDA was influenced by the global political movements of the time, primarily the civil rights movement in the United States. Ground-breaking in its time, the RDA implemented Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>13</sup> and was substantially based on its text. Subsequent federal laws also followed the enactment of international treaties, as well as the spread of feminism and the politicisation of minority groups. The Sex Discrimination Act 1984 (Cth) (SDA) followed the ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>14</sup> The Disability Discrimination Act 1992 (Cth) (DDA) was taken as a step in fulfilling Australia's obligations under international human rights instruments,<sup>15</sup> and ratification of the 2007 Convention on the Rights of Persons with Disabilities (CRPD)<sup>16</sup> followed some years later, in 2008.

The most recent of the federal statutes, the Age Discrimination Act 2004 (Cth) (ADA), provides the weakest protections of all the four Acts. The economic imperative of max-

imising workforce participation and utilising the skills and experience of all members of society featured heavily in the rationale behind the introduction of the ADA.<sup>17</sup> Disappointingly, the ADA replicates many of the limitations of the previous laws without adopting any of the potential lessons.

In addition, the Australian Human Rights Commission Act 1986 (Cth) establishes the Australian Human Rights Commission, regulates the processes for making and resolving complaints under the other four statutes and establishes a more limited mechanism in relation to certain attributes protected under the International Labour Organisation Convention No. 111. There are also provisions relating to discrimination in employment in the Fair Work Act 2009 (Cth). Finally, a “light touch” regulator was established by the Equal Opportunity for Women in the Workplace Act 1999 (Cth), to be replaced by the Workplace Gender Equality Act 2011 (Cth), which promotes gender equal opportunity in the workplace through requiring employers to report annually.

The development of these four federal anti-discrimination laws over nearly 40 years is marked by significant differences in drafting and coverage. The differences range from the particular innovations of the DDA, for example, which provides for the development of industry standards and action plans; to inconsistencies in definitions and differences in scope of coverage. Two of the more significant differences of this kind are, respectively, (i) the definitions of indirect discrimination, and (ii) the exclusion of the States and Territories from the operation of the SDA as compared to the other statutes. Another example is that the RDA prohibits offensive behaviour based on race but the other statutes do not deal specifically with vilification or hate speech. The RDA is also unique in enshrining

a general right to equality before the law and applies to all areas of public life without restriction – in contrast with the more limited scope of the other three federal statutes which restrict their coverage to a defined list of spheres of life. At the other end of the scale, the effectiveness of the ADA is hampered by permanent exceptions to a greater degree when compared to the other statutes.

In each case, the drafting of the statutes reflects the impact of political compromise as compared to the international instruments from which they draw their inspiration. For example, much criticism has been directed towards the highly equivocal terms of the “objects” clause of the SDA which states that it will give effect only to “certain provisions” of CEDAW and repeatedly uses the qualification “so far as possible”,<sup>18</sup> reflecting the divisiveness of the public battle around the introduction of the SDA.<sup>19</sup>

In contrast to the more limited coverage at a federal level, the parliaments of every State and Territory have enacted general anti-discrimination statutes which prohibit discrimination on many grounds in addition to those covered by the four federal Acts.<sup>20</sup> As stated above, inconsistency between those laws has been, and remains, a significant constitutional and practical problem.<sup>21</sup> As Simon Rice argued, the “unprincipled diversity” of the various State, Territory and federal laws creates significant legal complexity, confusion and added costs for duty-holders and complainants alike.<sup>22</sup> Due to the number of jurisdictions involved, the diversity of laws and often deeply entrenched ideological positions held by major political parties on the issues involved in this area of law, it is not surprising that commentators have described the task of harmonising all anti-discrimination laws nationally as a “herculean task”,<sup>23</sup> and that a national committee of Attorneys-General

have failed to report any material progress on a project to harmonise State, Territory and federal anti-discrimination laws that was commenced a number of years ago.

Australia's industrial relations laws also include anti-discrimination provisions, adding to the complexity for users of the legal system as well as those tasked with reforming the law. The Fair Work Act 2009 (Cth) "general protection" provisions create a parallel avenue for pursuing discrimination complaints in an employment setting but provide more limited redress to complainants.<sup>24</sup> A detailed analysis of Australia's labour laws is outside the scope of this article. It should, however, be noted that they have acted as the site of many significant test cases on equality issues, such as a recent historic decision on equal pay for women in the community sector and significant decisions on maternity and parental leave and accommodation of family responsibilities.<sup>25</sup> In contrast, Sara Charlesworth has highlighted the significant failure of anti-discrimination law to protect women in casualised part-time employment in her recent discussion of the case of *New South Wales v Amery*.<sup>26</sup> Any attempt to modernise Australia's anti-discrimination laws would ideally confront the problems associated with the separation of labour law from anti-discrimination laws of general application and improve the intersections between these two frameworks.

## 2. Problems with Federal Laws

Australia's current anti-discrimination laws have made an important contribution to addressing discrimination in Australian society. However, no matter how ground-breaking (or otherwise) they may have been in their time, the laws are outdated and limited in their effectiveness. While Australia's anti-discrimination laws were generally based

on the so called "fault-based" model of anti-discrimination law established in the UK in the 1970s, they have failed to keep pace with reform in the UK and other jurisdictions.<sup>27</sup> Australia's legal framework has been summarised as representing the "fault-based" model by Belinda Smith and Dominique Allen in these terms:

"Australia's laws prohibit discrimination on specific grounds in particular fields. The law characterises discrimination perpetrated by individuals as a wrong and provides victims with a tort like right of complaint. Orders can be made compelling the employer or service provider to compensate a victim but only after the harm has been done and the victim has proven that the employer or service provider caused the harm. The law imposes a negative duty on employers and service providers *not* to discriminate but no other obligations. Duty-holders are not required to do anything unless a finding of fault is made."<sup>28</sup>

This "fault-based" model is generally said to fall within the so called "third generation" of anti-discrimination legislation, modelled on negative duties and an individualistic, adversarial style approach rather than "fourth generation" positive duties and affirmative action.<sup>29</sup> This model is reactive and complaints-based, effectively placing the burden of enforcement against wrongdoers on individuals suffering from discrimination. A number of factors mean that the burden of proving a discrimination case in Australia is simply too heavy for many, already vulnerable, individuals. These factors include, for example, the complexity of the law, particularly the difficulty of applying the tests for discrimination. Smith and Allen use the example of a woman demoted as a result of having taken maternity leave. To claim discrimination, she will be required to identify whether

the detriment (loss of pay or seniority) was a result of different treatment of pregnant workers (direct discrimination) or the different impact of an apparently neutral rule about taking leave (indirect discrimination). The two alternatives would require different kinds of evidence in order to prove them and there remain different defences available to respondents. As Smith and Allen highlight, the scope of protection from direct discrimination has been severely limited, so as to apply only to consistency of treatment without any obligation to accommodate difference; and the ability to seek recourse for indirect discrimination has been stymied due to its interpretation and extraordinary difficulties relating to proof.<sup>30</sup>

After overcoming the definitional complexity, complainants must also meet the heavy burden of proof and the costs of pursuing a matter through the courts, including potential liability for legal costs.<sup>31</sup> Access to free or low cost legal services for complainants is limited, hampered by inadequate funding of legal services and advocacy organisations. Significantly, awards of compensatory damages in discrimination cases are traditionally very low and the potential costs liability for an unsuccessful complainant may represent up to three or four times the potential compensation available for a successful case.<sup>32</sup>

In addition, as Beth Gaze and Simon Rice have observed, the Australian courts have demonstrated a disappointing tendency to give literal, narrow and overly technical readings of the law which are out of touch with the aims and intent of the legislation,<sup>33</sup> although Belinda Smith suggests that a beneficial interpretation may be more likely with a redrafted set of laws.<sup>34</sup> This approach compares unfavourably with more flexible and progressive judicial interpretation in foreign jurisdictions, such as the Court of Justice of

the European Union jurisprudence on sex and pregnancy discrimination. As the Hon Michael Kirby AC CMG has observed:

“[T]he field of anti-discrimination law is littered with the wounded who appear to present the problem of discrimination which the law was designed to prevent and redress but who, following closer judicial analysis of the legislation, fail to hold on to the relief ordinarily granted to them.”<sup>35</sup>

Under this system, there is little pressure on duty-holders to address discrimination proactively, which highlights the second limitation of the Australian model. Federal anti-discrimination law in Australia, with one or two minor exceptions, fails actively to promote equality or address systemic discrimination.<sup>36</sup> Australia’s fault-based approach merely deals with the “symptoms” of systemic problems rather than attempting to create an operating environment in which discrimination is less likely to occur and attempts are made to overcome structural barriers that entrench inequality. Regulation could and should, for example, (i) equip regulators with powers to tackle proactively instances of systemic discrimination and deal with the policies, procedures and practices which cause or perpetuate discrimination (rather than merely resolving single complaints); and (ii) introduce positive duties to promote equality and provide for other positive actions such as special measures and action plans to incentivise and guide duty-holders to eliminate discrimination and promote equality.

A third key failing is the lack of comprehensiveness of federal anti-discrimination law. Currently, federal anti-discrimination law only addresses a small number of grounds of discrimination and does not adequately account for multiple, particularly intersectional, discrimination.<sup>37</sup> Finally, the effective-

ness of federal anti-discrimination laws is compromised by the number and scope of permanent exceptions available to certain entities and individuals in relation to a number of areas of public life and/or activities or conduct.<sup>38</sup> The broad permanent exceptions for religious organisations in the SDA and ADA, ostensibly designed to protect religious freedom, are examples of exceptions which are out of step with international human rights law standards as well as the views of the broader Australian community.<sup>39</sup>

### 3. Recent State-Based Developments

The general equal opportunity legislation found in the States and Territories covers a greater number of protected attributes when compared to the four federal statutes. For example, most States and Territories prohibit discrimination on the grounds of sexual orientation, gender identity, political belief, religious belief and industrial activity.<sup>40</sup> Some more unusual examples are the inclusion of physical features as a protected attribute in Victoria and explicit protection against vilification on the grounds of HIV/AIDS infection in New South Wales.<sup>41</sup>

Nonetheless, these statutes were influenced by federal laws and share many of the flaws described above. However, recent developments in Victoria, Australia's second most populous State and second largest economy after New South Wales, signal the beginnings of a more integrated and comprehensive human rights-based approach to the protection and promotion of equality in Australia. Notably, Victoria is one of two jurisdictions within Australia which boasts some form of statutory human rights protection which includes guarantees of the right to equality before the law and the right to effective protection from discrimination.<sup>42</sup>

The recent Equal Opportunity Act 2010 (Vic) (the 2010 Act) followed a year-long process of independent review and public consultation and was aimed at tackling systemic discrimination and promoting proactive compliance with less reliance on individual complaints.<sup>43</sup> While the 2010 Act falls short of international best practice in many respects, for example, by failing to provide for a shifting onus of proof and retaining broad exceptions for religious organisations,<sup>44</sup> its new features create a framework directed at proactive compliance and positive action. For example, the 2010 Act equipped the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) with a suite of compliance and enforcement powers, including the power to investigate instances of discrimination without the need for an individual complaint, the power to issue compliance notices and the power to enter into enforceable undertakings.<sup>45</sup> The 2010 Act also takes the step of introducing a positive duty on both public and private bodies. The content of the duty is to "eliminate discrimination as far as possible", which is somewhat unusual, however, when compared to the positive duties in other jurisdictions such as the United Kingdom, which apply only to public bodies but require the advancement of equality of opportunity as well as the elimination of discrimination.<sup>46</sup> The "objects" clause of the 2010 Act refers to the promotion of the human right to equality and explicitly acknowledges the link between discrimination and disadvantage.<sup>47</sup> The 2010 Act also explicitly provides for the implementation of special measures where the purpose is to promote or realise substantive equality, reflecting the intention that special measures should be viewed as a means of progressively realising substantive equality.<sup>48</sup> The 2010 Act also introduces a new duty to make reasonable adjustments, but this duty applies only in re-



lation to people with a disability, rather than all protected attributes, and its operation is limited to employment, education and goods and services.<sup>49</sup> It should be noted, however, that a requirement for employers not to refuse unreasonably to accommodate employees' parental or carer responsibilities in relation to their work arrangements was introduced in 2008 and remains in the 2010 Act. The 2010 Act maintains an exhaustive list of protected attributes<sup>50</sup> and the scope of application remains limited to certain spheres of activity.<sup>51</sup> A number of permanent exceptions in the previous legislation were narrowed in, or removed altogether from the 2010 Act. A significant number of permanent exceptions do, however, remain including a potentially broad exception for "things done with statutory authority".<sup>52</sup>

In 2011, a newly elected conservative Victorian Government passed amending legislation which weakened many of the new proposed powers of the VEOHRC and reinstated broad permanent exceptions for religious organisations and schools.<sup>53</sup> Despite this disappointing development, many positive features of the new legislation remain, representing the "high watermark" in Australian anti-discrimination law.<sup>54</sup>

## 4. The Road to Reform

### 4.1 Inquiries into the Reform of Federal Anti-Discrimination Law

#### *Australian Law Reform Commission Inquiry*

A number of inquiries have been undertaken in recent years which have considered aspects of federal anti-discrimination law and options for future reform. In 1993, the Australian Law Reform Commission (ALRC) was tasked with investigating steps that should

be taken "so as to remove any discriminatory effects of laws on or of their application to women with a view to ensuring their full equality before the law".<sup>55</sup> The reference was limited to equality before the law and focused on the SDA. The ALRC identified a number of limitations of the SDA:

- It addresses only individual acts of discrimination within specified fields of activity for which a person may make a complaint;
- It has a limited understanding of equality and it does not take account of the historical and contextual framework of disadvantage;
- It is unable to address the issue of violence against women as discrimination other than within the framework of sexual harassment;
- It is unable to challenge directly gender bias or systemic discrimination in the content of the law;
- It concentrates on the treatment of individuals rather than the effects of laws;
- It cannot strike down rules or laws;
- It exempts areas from its operation; and
- Its protection is activated only by making a complaint.<sup>56</sup>

To respond to these shortcomings, the ALRC recommended the introduction of a legislative guarantee to "equality in law", which would extend to (i) equality before the law, (ii) equality under the law, (iii) equal protection of the law, (iv) equal benefit of the law and (v) the full and equal enjoyment of human rights and fundamental freedoms.<sup>57</sup> Largely modelled on Canada, this guarantee would apply to acts of government and the performance of public functions, powers and duties. It would also override inconsistent laws and enable challenges to be made, in a similar way to the operation of European Union law in relation to the United Kingdom.<sup>58</sup> However, given that the ALRC model otherwise remained premised on individual

complaints as the means of identifying and remedying offending conduct, the “combined Equality Act” ultimately proposed by the ALRC would have only been “more of the same approach”.<sup>59</sup>

Amendments to the SDA introduced in 1995 addressed, to some extent, concerns raised earlier by the ALRC. The amendments included new preambular recognition of equality before the law and the rights to equal protection and equal benefit of the law.<sup>60</sup> The grounds of prohibited discrimination were also expanded to incorporate “potential pregnancy”.<sup>61</sup> The 1995 amendments also sought to clarify the tests for indirect discrimination and special measures.<sup>62</sup>

#### *Senate Inquiry into the Sex Discrimination Act*

In 2008, a parliamentary committee was charged with reviewing the effectiveness of the SDA in eliminating discrimination and promoting gender equality (the 2008 SDA Review). The Senate Standing Committee on Legal and Constitutional Affairs (SSCLCA) further developed the findings of the ALRC review and, in its report (the 2008 SDA Report) made a number of recommendations to improve the effectiveness of the SDA, for example:

- Extending its application to all areas of public life and including a general “equality before the law” clause;
- Removing the qualifying words “as far as possible” from the “objects” clause;
- Extending coverage to men as well as women and expanding the definition of marital status to include same sex couples;
- Reforming the tests for direct and indirect discrimination, including removing the need for a comparator;
- The inclusion of the additional protected attribute of “breastfeeding status” and the

extension of coverage in the area of family responsibilities to include a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements in order to accommodate family or carer responsibilities;

- A number of changes to the complaints and dispute resolution procedures;
- Expanding the litigation intervention, educative and other functions of the federal anti-discrimination regulator; and
- Suggesting amendments to some exceptions and exemptions to the SDA.<sup>63</sup>

In the course of the review, the SSCLCA heard extensive evidence on the deficiencies of the current legal framework from equal opportunity regulators, academics, discrimination lawyers, NGO experts, trade unions and other interest groups. A number of submissions recommended the consolidation and harmonisation of existing laws by developing one consolidated act to deal with all the protected attributes in a single instrument.

The SDA was recently amended in response to some of the recommendations made by the SSCLCA in the SDA 2008 Report. The amendments included the introduction of an express prohibition against direct discrimination (but not indirect) on the basis of family responsibilities in the area of work.<sup>64</sup> Breastfeeding was also established as a separate ground of discrimination.<sup>65</sup> Protections against sexual harassment were also moderately strengthened, for example, by clarifying that sexual harassment via technologies, like mobile telephones and social networking sites, and in schools is unlawful. The federal government, however, deferred most of the SSCLCA’s recommendations to be considered in the context of developing Australia’s Human Rights Framework and consolidating federal anti-discrimination laws.<sup>66</sup>

### *National Human Rights Consultation*

In 2008, the Australian Government commissioned a panel of experts to conduct the most extensive community consultation on human rights ever conducted in Australia. In its 2009 report, the National Human Rights Consultation Committee (NHRC Committee) found that federal anti-discrimination laws go only “part of the way” towards fulfilling Australia’s obligation under international human rights law to prohibit discrimination. The NHRC Committee also noted that a large number of submissions, as well as participants at community roundtables, expressed concern about the inadequacies of the federal anti-discrimination laws.<sup>67</sup> These concerns prompted the NHRC Committee to recommend an audit of all federal legislation, policies and practices to determine compliance with Australia’s international human rights obligations, with priority given to the issue of discrimination.<sup>68</sup> This was one of a series of recommendations designed to strengthen the promotion and protection of human rights in Australia, including the establishment of a national human rights instrument that would provide legally enforceable protection for, among other rights, the right to equality and freedom from discrimination.

### **5. United Nations Commentary**

Australia’s anti-discrimination laws have been widely criticised as falling short of obligations under the international human rights system in a number of areas. For example, in 2009, the United Nations Human Rights Committee, the treaty body responsible for monitoring state parties’ compliance with the International Covenant on Civil and Political Rights, noted that “the rights to equality and non-discrimination are not comprehensively protected in Australia in Federal law”.<sup>69</sup>

The Human Rights Committee recommended that Australia should “adopt Federal legislation, covering all grounds and areas of discrimination to provide comprehensive protection for the right to equality and non-discrimination”.<sup>70</sup> Similarly, the UN Committee on Economic, Social and Cultural Rights has recommended that Australia “enact Federal legislation to comprehensively protect the rights to equality and non-discrimination on all the prohibited grounds”.<sup>71</sup> This Committee has also commented that “the State party’s anti-discrimination legislation does not provide comprehensive protection against all forms of discrimination in all areas related to the Covenant rights”.<sup>72</sup> More recently, throughout its Universal Periodic Review before the Human Rights Council, Australia received a number of recommendations regarding the adequacy of its anti-discrimination laws.<sup>73</sup>

Such commentary through United Nations mechanisms serves to underline the importance of enacting laws that effectively address discrimination and promote equality in order to fulfil Australia’s international human rights obligations. These scrutiny mechanisms are particularly important for a country such as Australia which is not engaged in the European or any other regional system.

### **6. The Consolidation Project**

In response to the National Human Rights Consultation, the Australian Government announced a Human Rights Framework in April 2010 (the Framework).<sup>74</sup> Described by one commentator as “icing without the cake”, the Framework failed to deliver a comprehensive human rights act for Australians. It delivered instead a number of measures, such as scrutiny of legislation and investment in human rights education, designed to enhance the protection of human rights

in Australia. Among these was a commitment to consolidate the four federal anti-discrimination laws into a single act (the Consolidated Act). This so-called “Consolidation Project” was also intended to be a vehicle for responding to the remaining recommendations of the 2008 SDA Report and to deliver on an election commitment to introduce new prohibitions on discrimination on the basis of sexual orientation and gender identity.<sup>75</sup>

Despite its grounding in a human rights agenda, the Consolidation Project has been promoted by Australia’s Attorney-General and Minister for Finance as a “better regulation partnership”, designed to reduce regulatory burden for business through simplified and consistent lawmaking.<sup>76</sup> The stated purpose of the project is not to enhance or strengthen protections, or to promote substantive equality, but to “reduce the regulatory burden and drive greater efficiencies and improved productivity outcomes by reducing compliance costs for individuals and businesses, particularly small business”.<sup>77</sup> Both the tenor of the initial announcement and the absence of any kind of public consultation process attracted criticism and concern among civil society.<sup>78</sup> The announcement foreshadowed the release of draft legislation without any opportunity for prior public discussion or debate, in contrast with, for example, the 14-year long process of consultation and expert consideration that took place in the United Kingdom. As Simon Rice notes, concern that the approach will “result in different provisions being resolved at the level of the lowest common denominator is heightened by the ominous ‘deregulatory’ rationale for the exercise”.<sup>79</sup> This concern has been alleviated to an extent by an undertaking by the government that the changes would not result in any diminution of existing protections.<sup>80</sup> However, such limited parameters fall disappointingly short

for many that have long campaigned for reform to Australia’s anti-discrimination laws. In the months following the announcement, a number of NGOs authored a joint letter to the responsible minister calling for the terms of the Consolidation Project to be broadened to encompass modernising and strengthening Australia’s anti-discrimination laws and promoting equality rather than pursuing the more limited exercise of consolidating existing laws in the name of deregulation.<sup>81</sup>

More recent developments, both in regard to language and process, have given civil society cause for greater optimism. Public statements have been made by the Australian government in international forums endorsing the object of promoting substantive equality.<sup>82</sup> Most significantly, a discussion paper was released by the Attorney-General’s Department in September 2011 (the Government Discussion Paper) which represented the long awaited commencement of a formal consultation process.<sup>83</sup> The language of the Government Discussion Paper improves upon the more limited wording in previous public statements, stating that the reform process “provides an opportunity to (...) explore opportunities to improve the effectiveness of the legislation to address discrimination and provide equality of opportunity to participate and contribute to the social, economic and cultural life of our community”.<sup>84</sup> The paper offers a welcome discussion of many of the limitations of the current system and options for reform, drawing on international examples and posing a number of questions to guide public comment.

## **7. Priorities for Reform**

This section identifies a number of key priorities relevant to the current consolidation of anti-discrimination laws but does not represent a comprehensive or in-depth analysis

of all the issues and options for reform. For such an analysis, readers are directed to submissions made in relation to the Government Discussion Paper.<sup>85</sup>

## 7.1 Changes to Better Address Individual Instances of Discrimination

### *Definitions*

The definitions of discrimination currently used in federal anti-discrimination laws have been criticised extensively as inconsistent, complex and uncertain.<sup>86</sup> The statutes currently define both “direct” and “indirect” discrimination. As noted in a submission made by a group of Australian discrimination experts, this has “made analysis of complaints cumbersome and distorted as the definition of direct discrimination, and considering the impact of indirect discrimination has always been complex”.<sup>87</sup> The interpretation of the comparator test by the courts in cases of direct discrimination has raised the bar, some would say insurmountably, for complainants, and has led to unpredictable and, at times, absurd and unjust results.<sup>88</sup>

While there are some variations between the definitions of indirect discrimination across the four federal statutes, they generally require an unreasonable condition, requirement or practice which disadvantages members of a group with a protected attribute. Somewhat unusually, compared to other jurisdictions, the DDA and RDA also require an additional element of the complainant not being able to comply with the condition, requirement or practice. Due to the barriers to proving an indirect discrimination claim in practice, protection against indirect discrimination has not actually operated to promote substantive equality. For example, the 2008 SDA Report found that complainants face difficulties in identifying a condition, require-

ment or practice and also in relation to the reasonableness test.<sup>89</sup>

There has been some consideration given to the adoption of a unified definition of discrimination on the basis that the two categories of direct and indirect discrimination are artificial and unnecessarily complicated.<sup>90</sup> However, such a step would be unprecedented among Australian jurisdictions. Currently, the test favoured by discrimination experts is a simplified test which has been drafted to incorporate the concepts of both direct and indirect discrimination. It utilises some wording from existing legislation, but also expressly states that the two forms of discrimination are not mutually exclusive and provides for the general defence of justification to apply to both.<sup>91</sup> The group of discrimination experts referred to above noted in a joint report that whilst direct discrimination was not previously subject to a general exception, and therefore this change could be considered a diminution in protection on its face, in practice the defence of justification should be narrowly construed such that the exceptions from discrimination are no wider than the current enumerated exceptions that it will replace.<sup>92</sup> The drafters will also need to be mindful of the conservatism demonstrated by the Australian courts in past anti-discrimination decisions when considering the likelihood that the defence will be construed more broadly. Perhaps clear explanatory material to future legislation is one way in which the Attorney-General’s Department could seek to mitigate risk. Whatever definition of discrimination is adopted in the Consolidated Act, it is hoped that it will strike the delicate balance of improving on the burdensome complexity of the current models without diminishing the strength of existing protections.

### *Burden of Proof*

Changes to the burden of proof are also a priority for reform and a necessary corollary to changes which simplify the tests for discrimination. Under the tests for direct discrimination contained in all Australian anti-discrimination laws, the burden of proving that the respondent treated the complainant less favourably because of their protected attribute falls entirely on the complainant.<sup>93</sup> This leads to the well-documented difficulty of requiring a complainant to prove the reason for the respondent's conduct where the knowledge is in the hands of the other side and all the evidence is likewise in their possession.<sup>94</sup> A much fairer model would be to shift the burden of proof to the respondent once the complainant has established a *prima facie* case, in line with practice in many other jurisdictions.<sup>95</sup> This would have the added advantage of enabling the law better to deal with discrimination on the ground of multiple attributes. Whilst such reform will remedy a significant deficiency in the current laws, it will be politically challenging to achieve, given the project's focus on reducing regulation and the likelihood for strong resistance by duty-holder lobby groups. The potential for consistency with the shifting burden contained in the discrimination provisions of Australia's industrial laws, however, provides a strong argument in favour of more progressive reform.<sup>96</sup> Such a reform would also align Australian law more closely with the approach taken in the United Kingdom.

### *Intersectional Discrimination*

Whilst there is some capacity under existing laws to deal with claims of discrimination on the ground of multiple attributes, there is a need better to address multiple discrimina-

tion, particularly intersectional discrimination, in the new Consolidated Act. While it may be possible to discuss cases involving intersectional discrimination informally at the initial conciliation stage of a discrimination dispute, complainants experiencing intersectional discrimination face extreme challenges when it comes to particularising and proving the discrimination before a court. Complainants may be deterred from initiating and pursuing their claims at the outset because their experiences of discrimination do not fall neatly within the established categories.<sup>97</sup> For these reasons, discrimination experts and NGOs representing affected communities are advocating for explicit coverage of intersectional discrimination in the Consolidated Act.

### *Broadening the Coverage of Anti-Discrimination Law*

Presently, federal anti-discrimination laws prohibit discrimination on the basis of race, sex (including pregnancy, marital status and family responsibilities), disability and age.<sup>98</sup> State and Territory laws provide for coverage of a greater number of protected attributes, albeit not yet compliant with international human rights law.<sup>99</sup> The Australian Government has committed to extending protections to the grounds of sexual orientation and gender identity, but the reform process also presents the opportunity to broaden coverage to a greater number of attributes. In its submission to the Government Discussion Paper, the Human Rights Law Centre (HRLC) recommended a non-exhaustive list of attributes including specific protection for certain attributes afforded protection under international law, such as holding a criminal record, social status, status as a victim of family violence, religious activity or belief, political activity or belief, trade union membership or industrial activity and other

status.<sup>100</sup> Advocates representing intersex individuals are also concerned to ensure that intersex status is afforded protection under the new Consolidated Act and not merely inappropriately subsumed under the category of gender identity.

### *Litigation Costs*

The federal laws currently provide no special protection from the risk of adverse costs orders in discrimination matters, beyond the general discretion of judges with regards to costs. This presents a significant barrier to access to justice, especially for victims of discrimination who, due to their vulnerability and financial situation, tend to be risk-adverse.<sup>101</sup> When faced with the risk of an adverse costs order, many complainants shy away from litigation and choose, instead, to settle their complaints at the conciliation stage. Settlements reached at conciliation often fail to reflect the seriousness of the discriminatory conduct in dispute.

In a 2004 report on the efficacy of the DDA, Australia's Productivity Commission recommended that parties should be required to bear their own costs, subject to discretion to award costs in accordance with statutory guidelines that had been developed for the family law jurisdiction.<sup>102</sup> A number of NGOs representing affected communities have renewed these calls for a no-costs federal jurisdiction for discrimination complaints during this consultation phase of the Consolidation Project. However, a no-costs jurisdiction does not remove the difficulties faced by complainants unable to fund litigation in the face of the prospect of a very low award of damages which is likely to be significantly less than their legal fees. A more generous scheme providing for (i) higher and more appropriate awards of compensatory damages, (ii) reforms to the rules around protective costs orders, and (iii) increased funding for

legal services for discrimination complainants needs to accompany any reform to the rules around costs in the federal anti-discrimination jurisdiction.

## **7.2 Tackling Systemic Discrimination and Promoting Equality**

### *Positive Duty*

As discussed above, Australia's federal anti-discrimination laws are currently reactive and complaint-based. Enforcement relies on individual victims bringing their discrimination complaints before the Australian Human Rights Commission (AHRC) and the courts. Hence, the laws act as a deterrent to discriminatory conduct, rather than actively promoting equality.

Bringing Australia into line with "fourth generation" equality laws requires the imposition of a positive duty to tackle discrimination and promote equality, consistent with South Africa, United Kingdom, Canada and the United States,<sup>103</sup> although Australia should aspire to learn from the limitations of these reforms rather than simply emulate foreign jurisdictions.<sup>104</sup> The attraction of a positive duty is that it is proactive rather than reactive. It shifts some of the burden from complainants to duty-holders, who must take positive steps to ensure that their conduct and practices contribute to equality and inclusiveness.

While the imposition of a positive duty on the public sector is currently under consideration as part of the Consolidation Project, there appears to be a reluctance to impose positive duties on the private sector. NGOs, and civil society more broadly, are likely to continue to argue for a broad positive duty applicable to both private and public bodies, particularly as the positive duty to eliminate

discrimination as far as possible contained in the 2010 Act in Victoria<sup>105</sup> has come into effect without any evidence of adverse effects or unintended consequences to date. It remains to be seen whether there will be political appetite for such a step in light of the concern expressed by business groups.<sup>106</sup>

### *Special Measures*

Special measures are “positive measures intended to enhance opportunities for historically and systematically disadvantaged groups, with a view to bringing group members into the mainstream of political, economic, social, cultural and civil life.”<sup>107</sup>

At present, federal anti-discrimination laws suffer from a number of deficiencies with respect to special measures. First, they adopt inconsistent approaches to the nomenclature and scope of permissible special measures. Further, aside from the SDA, each of the federal anti-discrimination acts currently treats a special measure as a special kind of “exception” to unlawful discrimination, rather than conceiving of special measures as positive measures for the promotion of equality. The laws also fail to take account of the international legal requirement to engage in consultation and obtain the consent of the affected group.<sup>108</sup> Reform is needed to simplify and harmonise the different approaches to special measures and to ensure consistency with the international legal principles.

### *Powers of the Commission*

At present the AHRC has limited functions and powers to effect compliance and enforcement of federal anti-discrimination law. The AHRC’s current inquiry functions are limited to government activities, but should be expanded so that it may investi-

gate human rights concerns across all States and Territories, including in the private sector. The AHRC should be able to initiate and pursue such investigations on its own motion, rather than merely on the basis of a particular complaint. This would enable the AHRC to address more effectively systemic discrimination and relieve the burden that is currently placed on individual complainants. To ensure that such investigations lead to a real change, investigative powers would need to be accompanied by additional enforcement options, such as the options contained in the 2010 Act introduced in Victoria discussed above. The current reform process should consider the range of options available, drawing on best practice and experience in other jurisdictions, to ensure that the AHRC is equipped with a suite of compliance and enforcement powers that enable it to undertake activities which effectively tackle systemic discrimination. Any concerns regarding conflicts or perceptions of conflict – as between the roles of the AHRC as conciliator and/or mediator and its enforcement role – could be adequately addressed through confidentiality protocols.

### *Representative Proceedings*

Broadening the scope for parties to bring representative complaints is another proposal that would help to alleviate the burden currently placed on individual complainants. Although the Australian Human Rights Commission Act 1986 (Cth) permits representative complaints, a representative will not have standing before a federal court unless it is independently “aggrieved” by the alleged discriminatory conduct – the precondition necessary in order to meet the relevant definition of an “affected person”.<sup>109</sup> The situation is further complicated by legislation governing the Federal Court of Australia,<sup>110</sup> which provides that only a person



who has a “sufficient interest” to commence a proceeding against the respondent on his or her own behalf has standing to bring a representative proceeding.

Reform is therefore needed in order to enable public interest organisations to commence and pursue discrimination proceedings on behalf of aggrieved persons, particularly where the claim involves a systemic problem and the organisation has a demonstrated legitimate interest in the subject matter of the complaint.

## **8. The Importance of Process**

As discussed above, the absence of a formal process for nearly 18 months following the announcement of the Consolidation Project was a source of concern for many within civil society. HRLC convened a number of roundtables in partnership with the Australian Human Rights Commission which took place in 2010. A gender specific roundtable was also held by the Equality Rights Alliance, an organisation that had been active in co-ordinating NGO engagement in relation to the 2008 SDA Review. These events enabled NGOs to develop their thinking and positions on specific issues and to co-ordinate lobbying and campaigning activities in the absence of a formal process.

A dedicated website, established by HRLC in May 2011, has also facilitated NGO engagement, discussion and debate around the reforms taking place in Australia<sup>111</sup>. The “online hub” provides a repository of resources and background information for NGOs, as well as a means of disseminating submissions and news about developments in the reform process, hopefully raising the profile of the reforms and levels of public scrutiny regarding their development. The website also features “guest blogs” from discrimi-

nation experts, advocates and users of the anti-discrimination law system to encourage debate and discussion on specific issues raised by the reforms. An email distribution list, twitter feed and discussion board provide interactive elements to further facilitate information-sharing between NGO’s.

HRLC convened a significant agenda-setting national conference in July 2011 to discuss the reform of Australia’s equality laws and best practice models and frameworks for promoting equality.<sup>112</sup> The conference attracted 100 advocates, lawyers, academics, community leaders and policy-makers, including the government officers responsible for developing the new Consolidated Act. Speakers included international expert Dr Dimitrina Petrova of The Equal Rights Trust, leading UK experts Kate Pickett and Richard Wilkinson, as well as domestic legal and other experts, a Government Minister, tribunal members, leaders and advocates from affected communities and representatives from equal opportunity regulators. Importantly, representatives from leading corporations were able to pitch the “business case” for equality and speak of the value of diversity to their workforce and business practices. The conference was useful in building (i) support for more ambitious reforms to enhance, rather than merely consolidate, existing laws, and (ii) consensus around some of the key issues. NGO meetings were held around the time of the conference to provide opportunities for more detailed discussion among civil society and attendees were able to draw on the expertise of international guest Dimitrina Petrova to enable NGO input on domestic equality law reform to be informed by comparative experience, evidence and best practice.

Following the release of the Government Discussion Paper in September 2011, the

Attorney-General's Department also held a number of multi-stakeholder forums and NGO meetings to consult with interested parties and receive feedback on the Government Discussion Paper. The meetings provided a useful opportunity to speak directly to government representatives regarding concerns or queries raised by the Government Discussion Paper and express views on the questions posed within.

## 9. Where To From Here?

At the time of writing, submissions were due on the Government Discussion Paper in a matter of weeks. Exposure legislation is expected to be released in early 2012 and introduced into Parliament in the second

half of the year. The new bill may face an uncertain political environment due to the Labour Government's status as a minority government. This means the passage of the bill will be dependent on the support of a small number of independent and minority party representatives. Given the growing consensus on both the social and economic benefits of equality and the need to tackle systemic discrimination, however, it can only be hoped that principled leadership on this issue will prevail and that the Australian government can achieve a well-resourced, comprehensive system of prevention, regulation, enforcement and monitoring of discrimination and equality – just as they have achieved in many other areas of public policy.

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2 Smith, B. and Allen, D., "Whose Fault Is It? Asking the Right Question When Trying To Address Discrimination", *Alternative Law Journal*, Vol. 37(1), 2012, pp. 30-34.

3 By all social indicators, Aboriginal and Torres Strait Islander peoples rate as among the most disadvantaged peoples in Australia, rating far worse than any others in education, employment, health, standard of living and incidence of family violence. They are also grossly over-represented in the child protection and criminal justice systems. The disparity in life expectancy is very significant: Aboriginal and Torres Strait Islander peoples' life expectancy is 12 years less for males and 10 years less for females than that of their non-Aboriginal and Torres Strait Islander counterparts.

4 For a more detailed analysis of key gender issues in Australia, see Australian Human Rights Commission, *2010 Gender Equality Blueprint*, June 2010, available at: [http://www.hreoc.gov.au/sex\\_discrimination/publication/blueprint/Gender\\_Equality\\_Blueprint.pdf](http://www.hreoc.gov.au/sex_discrimination/publication/blueprint/Gender_Equality_Blueprint.pdf).

5 The negative health and social consequences of race discrimination have been documented by social research conducted in the Australian State of Victoria. See, for example, VicHealth et al, *Building on our strengths: A framework to reduce race based discrimination and support diversity in Victoria: Addressing the social and economic determinants of mental health and well-being*, November 2009, available at: <http://www.vichealth.vic.gov.au/Publications/Freedom-from-discrimination/Building-on-our-strengths.aspx>.

6 Leigh, A. and Booth, A., *Does Racial and Ethnic Discrimination Vary Across Minority Groups? Evidence from Three Experiments*, Australian National University, 2010, available at: <http://andrewleigh.org/pdf/AuditGender.pdf>.

7 See, for example, Poynting, S., *Living with Racism: The Experience and Reporting by Arab and Muslim Australians of Discrimination, Abuse and Violence Since 11 September 2011: Report to the Human Rights and Equal Opportunity Commission*, 2004, available at: [http://www.hreoc.gov.au/racial\\_discrimination/isma/research/UWSReport.pdf](http://www.hreoc.gov.au/racial_discrimination/isma/research/UWSReport.pdf); and Islamic Women's Welfare Council of Victoria Inc, *Race, Faith and Gender: Converging Discriminations Against Muslim Women in Victoria: The Ongoing Impact of September 11, 2001*, 2008, available at: [http://www.islamicwomenswelfare.org.au/files/iwwcv\\_race\\_faith\\_report.pdf](http://www.islamicwomenswelfare.org.au/files/iwwcv_race_faith_report.pdf).

8 During Australia's Universal Periodic Review before the United Nations Human Rights Council, India expressed its concern over the safety and well-being of Indian students in the country, and expressed the hope that the Australian Government would ensure the safety of all in the country. Australia accepted a recommendation to implement additional measures to combat discrimination against "foreign students (essentially coming from India)". See UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, UN Doc A/HRC/17/10, 2011, Para 44 and Recommendation 65.

9 The Australian Government recently enacted reforms which amended 85 Commonwealth laws to eliminate discrimination against same-sex couples and their children in a wide range of areas, including social security, taxation, Medicare, veteran's affairs, workers' compensation, educational assistance, superannuation, family law and child support. Significant issues affecting transgender and intersex Australians remain unaddressed.

10 See, for example, Joint Working Group of the Attorney-General's and Health Minister's Advisory Committees on Gay, Lesbian, Bi-sexual, Transgender and Intersex Issues, *With Respect: A Strategy for Reducing Homophobic Harassment in Victoria*, November 2011, available at: [http://www.also.org.au/about/what\\_we\\_do\\_1/projects/wrap/with\\_respect](http://www.also.org.au/about/what_we_do_1/projects/wrap/with_respect).

11 Ryan, S. (Age Discrimination Commissioner), *Tackling Age Discrimination in the Labour Market: The Role of the Australian Human Rights Commission*, 13 December 2011, Speech presented at Older Workers and Workability Conference, available at: [http://www.hreoc.gov.au/about/media/speeches/age/2011/20111213\\_workability.html](http://www.hreoc.gov.au/about/media/speeches/age/2011/20111213_workability.html).

12 Although efforts to harmonise the multiple and varying State and Territory equal opportunity laws have been sitting with a national committee of Attorneys-General for a number of years without report of any progress.

13 International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A (XX) (1965).

14 Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180 (1979) (CEDAW).

15 These include the International Labour Organisation Convention No. 111 concerning Discrimination in Respect of Employment and Occupation; the International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI) (1966); the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) (1966); and a number of related declarations (see Second Reading Speech, Disability Discrimination Act (Cth), Commonwealth Parliament, House of Representatives, Official Hansard, 26 May 1992, delivered by the Hon Brian Howe, Minister for Health, Housing and Community Services).

16 Convention on the Rights of Persons with Disabilities, G.A. Res. A/RES/61/106 (2007).

17 Second Reading Speech, Age Discrimination Act 2004 (Cth), Commonwealth Parliament, House of Representatives, Official Hansard, 26 June 2003, 17623 (Attorney-General, the Hon Daryl Williams).

18 Sex Discrimination Act 1984, section 3.

19 See, for example, a submission which noted that the qualification is not consistent with CEDAW and the words result in a "qualified commitment to international obligations, which is inappropriate in respect to an Act of such importance": Australian Human Rights Commission, *Submission to Senate Legal and Constitutional Affairs Committee, Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act*, 2008, p. 102.

20 Anti-Discrimination Act 1977 (New South Wales); Equal Opportunity Act 1984 (South Australia); Equal Opportunity Act 1984 (Western Australia); Anti-Discrimination Act 1991 (Queensland); Discrimination Act 1991 (Australian Capital Territory); Anti-Discrimination Act 1996 (Northern Territory); Anti-Discrimination Act 1998 (Tasmania); Equal Opportunity Act 2010 (Victoria).

21 Rees, N., Lindsay, K. and Rice, S., *Australian Anti-Discrimination Law: Texts, Cases and Materials*, The Federation Press, 2008, p. 3.

22 Rice, S., "And Which 'Equality Act' Would that Be?", in Thornton, M. (ed.), *Sex Discrimination in Uncertain Times*, ANU E Press, 2010, p. 210.

23 *Ibid.*

24 Fair Work Act 2009, Part 3-1.

25 See, for example, *Australian Municipal, Administrative, Clerical and Services Union and others (C2010/3131) v Australian Business Industrial (AM2011/50)* [2012] FWA 1000.

26 [2006] HCA 14; and Charlesworth, S., "Law's Response to the Reconciliation of Work and Care: the Australian Case", in Busby, N. and Grace, J. (eds.), *Families, Care-giving and Paid Work: Challenging Labour Law in the 21<sup>st</sup> Century*, Edward Elgar Publishers, 2011, p. 94.

27 For discussion of the fault-based model, see Fredman, S., "Changing the Norm: Positive Duties in Equal Treatment Legislation", *Maastricht Journal of European and Comparative Law*, Vol. 12, 2005, pp. 369-398.

28 See above, note 2, p. 35.

29 See, for example, McLaughlin, E., "From Negative to Positive Equality Duties: The Development and Constitutionalisation of Equality Provisions in the UK", *Social Policy and Society*, Vol. 6(1), 2007, p. 112.

30 See above, note 2, p. 34.

31 See above, note 22, pp. 201-202.

32 See above, note 21, p. 8; and Schulman, J., "David and Goliath Battle over Disability Discrimination", *ABC The Drum*, 2 November 2011, available at: <http://www.abc.net.au/unleashed/3625988.html>.

33 Gaze, B., "Context and Interpretation in Anti-Discrimination Law", *Melbourne University Law Review*, Vol. 26, 2002, pp. 332-333; and see above, note 22, pp. 203-204.

34 Smith, B., "Rethinking the Sex Discrimination Act: Does Canada's Experience Suggest We Should Give Judges a Greater Role?", in Thornton, M. (ed.), above note 22, p. 214.

35 *X v Commonwealth (1999)* 200 CLR 177 at 213.

36 See, for example, Senate Legal and Constitutional Affairs Committee, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, December 2008.

37 Multiple (or compounded) discrimination occurs when a person or group is discriminated against on more than one ground; for example, where an Indigenous woman is discriminated against on the basis of her sex and her race, her experience of discrimination is different from both Indigenous men and non-Indigenous women so may not be redressed by either sex or race discrimination law.

38 For example, under the Sex Discrimination Act 1984 (Cth), any clubs without a liquor licence (by virtue of the definition of club in section 4), religious bodies (sections 23, 27 and 38) and charities (section 36) are permanently exempt from the operation of the legislation.

39 Age Discrimination Act 2004, section 35; and Sex Discrimination Act 1984, section 37. Both provisions exempt any acts or practices of a body established for religious purposes that conforms to the doctrines, tenants or beliefs of the relevant religions or are necessary to avoid injury to the religious sensitivities of adherents of that religion.

40 These attributes are drawn in differing terms in different jurisdictions. For example, some jurisdictions use terms such as "homosexuality" and "transgender" (see, for example, Anti-Discrimination Act 1977 (NSW), Part 3A and Part 4C) whereas others have adopted broader terms such as "sexual orientation" and "gender identity" (see, for example, Equal Opportunity Act 2010 (Vic), section 6).

41 See Equal Opportunity Act 2010 (Vic), section 6; and Anti-Discrimination Act 1977 (NSW), sections 49ZXB and 49ZXC.

42 See Charter of Human Rights and Responsibilities Act 2006 (Vic), section 8. The other (and first) statute was the Human Rights Act 2004 (Australian Capital Territory), enacted in a much smaller jurisdiction and not a full State.

43 According to the website of the Department of Justice, Victoria, Australia (available at: <http://www.justice.vic.gov.au/home/your+rights/equal+opportunity/justice++equal+opportunity+review++documents>), the stated aims of the Equal Opportunity Act 2010 (the 2010 Act) were as follows:

- changing the Commission from a complaints handling body to one that educates and facilitates dispute resolution, best practice and compliance;
- giving the Commission more effective options to respond to systemic discrimination;
- encouraging best practice and proactive compliance by duty holders without reliance on individual complaints;
- providing a more effective and efficient system for resolving disputes;
- removing legal and technical barriers to the elimination of discrimination; and
- clarifying, updating and amending certain exceptions to unlawful discrimination.

44 See Equal Opportunity Act 2010 (Vic), sections 82 and 83 (religious exceptions). This Act is silent on the issue of the burden of proof but the laws relating to evidence and civil procedure provide for the onus to fall on the complainant except where otherwise stated.

45 These powers were, however, altered and/or removed by later amendments discussed below.

46 Compare with Part 11, Chapter 1 (Public sector equality duty) of the British Equality Act 2010.

47 2010 Act, section 3.

48 2010 Act, section 12; see also Victorian Parliament, *Equal Opportunity Bill 2010: Explanatory Memorandum*, p. 14, available at: [http://www.austlii.edu.au/au/legis/vic/bill\\_em/eob2010260/eob2010260.html](http://www.austlii.edu.au/au/legis/vic/bill_em/eob2010260/eob2010260.html). It is worth noting that the previous legislation classified special measures as an exception to discrimination.

49 Under section 7 of the 2010 Act, discrimination means "direct or indirect discrimination on the basis of an attribute". In addition, the meaning of discrimination now includes a contravention of the duty to make reasonable adjustments for people with a disability or reasonable alterations to common property. A breach of such a duty will constitute discrimination without the additional need to prove direct or indirect discrimination under the 2010 Act.

50 2010 Act, section 6. The attributes are age, breastfeeding, disability, employment activity, gender identity, industrial activity, lawful sexual activity, marital status, parental status or status as a carer, physical features, political belief or activity, pregnancy, race, religious belief/activity, sex, sexual orientation and personal association with someone who has, or is assumed to have, any of the characteristics.

51 Compared to, for example, Principle 8 of the Declaration of Principles on Equality which provides that “[t]he right to equality applies in all areas of activity regulated by law”. (See *Declaration of Principles on Equality*, published by The Equal Rights Trust, London 2008, p. 8.) Notably, administration of justice remains a significant gap in terms of coverage and, despite recommendations to include the additional attributes of irrelevant criminal record and homelessness, the 2010 Act did not extend protections to these groups.

52 2010 Act, section 75.

53 The Equal Opportunity Amendment Act 2011 (Vic) (EOAA) reinstated broad permanent exceptions for religious bodies and schools (sections 18 and 19 of the EOAA amended section 82 of the 2010 Act), and weakened the powers of the Victorian Equal Opportunity and Human Rights Commission by, *inter alia*, removing the power to conduct public inquiries, altering its power to investigate systemic discrimination and removing the power to issue compliance notices (section 21 of EOAA replaced Part 9 of the 2010 Act).

54 For further discussion of the Victorian reforms, see Forsyth, A., “The Human Right to Equality”, *Law Institute Journal*, Vol. 85(10), 2011, p. 36.

55 Australian Law Reform Commission, *Equality before the Law: Justice for Women*, Report No. 69, 1994, Part I, p. xv, available at: [http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC69\\_Pt1.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC69_Pt1.pdf).

56 *Ibid.*, Para 4.5.

57 *Ibid.*, Para 4.20.

58 *Ibid.*, Para 4.21.

59 See above, note 22, p. 200.

60 See preamble of the Sex Discrimination Act 1984 (Cth) (reprint as at 10 April 1996) inserted by section 3 of the Sex Discrimination Amendment Act 1995 (Cth).

61 See section 7 of the Sex Discrimination Act 1984 (Cth) (reprint as at 10 April 1996) amended by section 3 of the Sex Discrimination Amendment Act 1995 (Cth).

62 See section 7B (indirect discrimination: reasonableness test) of the Sex Discrimination Act 1984 (Cth) (reprint as at 10 April 1996) amended by section 3 of the Sex Discrimination Amendment Act 1995 (Cth) and section 7D (special measures intended to achieve equality) of the Sex Discrimination Act 1984 (Cth) (reprint as at 10 April 1996) amended by section 3 of the Sex Discrimination Amendment Act 1995 (Cth).

63 For the complete set of recommendations, see: Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008 SDA Report), 2008, available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=legcon\\_ctte/sex\\_discrim/report/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/sex_discrim/report/index.htm).

64 Sex Discrimination Act 1984 (Cth), section 7A.

65 *Ibid.*, section 7AA, as inserted by Sex and Age Discrimination Legislation Amendment Act 2011 (Cth), section 17.

66 The Parliament of the Commonwealth of Australia, House of Representatives, *Sex and Age Discrimination Legislation Amendment Bill 2010: Explanatory Memorandum*, p. 1, available at: [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4459\\_ems\\_c086303d-5577-4466-8aaf-8f99dccc7685%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4459_ems_c086303d-5577-4466-8aaf-8f99dccc7685%22).

67 National Human Rights Consultation Committee, *National Human Rights Consultation Report*, September 2009, pp. 114-115, available at: [http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReportDownloads](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads).

68 *Ibid.*, Recommendation 4, p. xxx.

69 UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc. No. CCPR/C/AUS/CO/5, 2009, Para 12.

70 *Ibid.*

71 Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc. No. E/C.12/AUS/Co, 2009, Para 14.

72 *Ibid.*

73 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, UN Doc. No. A/HRC/17/10, 2010, Paras 86.23, 86.24, 86.41, 86.42, 86.44, 86.45, 86.46, 86.57, 86.59 and 86.98.

74 Commonwealth of Australia: Attorney-General's Department, *Australia's Human Rights Framework*, 2010, [http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Documents/HumanRightsFramework\[1\]PDF.pdf](http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Documents/HumanRightsFramework[1]PDF.pdf).

75 This election commitment followed a series of reforms undertaken by the Labour Federal Government in its previous electoral term which amended 85 Commonwealth laws to eliminate discrimination against same-sex couples and their children in a wide range of areas, including social security, taxation, Medicare, veteran's affairs, workers' compensation, educational assistance, superannuation, family law and child support. The election commitment was shared by the Coalition opposition.

76 McClelland, R. MP (Attorney-General) and Tanner, L. MP (Minister for Finance and De-Regulation), *Reform of Anti-Discrimination Legislation*, 21 April 2011, available at: [http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/page/MediaReleases\\_2010\\_SecondQuarter\\_21April2010-ReformofAnti-DiscriminationLegislation.html](http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/page/MediaReleases_2010_SecondQuarter_21April2010-ReformofAnti-DiscriminationLegislation.html).

77 *Ibid.*

78 See for example, Ball, R., "Addressing the Equality Deficit", *Human Rights Law Centre E-Bulletin*, 25 February 2011, available at: <http://www.hrlc.org.au/content/topics/equality/opinion-addressing-the-equality-deficit-25-feb-2011/>; see also above note 22, p. 210.

79 See above, note 22, p. 211.

80 Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, 2011, p. 9, available at: <http://www.ag.gov.au/Documents/Consolidation+of+Commonwealth+Anti-Discrimination+Laws-Discussion+Paper.pdf>.

81 Joint Letter to Attorney-General Robert McClelland, dated 5 August 2010, from Rachel Ball of HRLC and co-signed by 21 NGO representatives, available at: <http://www.equalitylaw.org.au/elrp/about/>.

82 For example, see Australia's response to Recommendation 42 made by the United Kingdom during the Universal Periodic Review in which the Government accepted a recommendation to "ensure that its efforts to harmonise and consolidate Commonwealth anti-discrimination laws address all prohibited grounds of discrimination and promote substantive equality": Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia: Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, UN Doc. No. A/HRC/17/10/Add.1, Para 4.

83 See above, note 80.

84 *Ibid.*, p. 5.

85 Copies of submissions, including the HRLC's submission, *Realising the Right to Equality: the Human Rights Law Centre's Recommendations for the Consolidation and Reform of Commonwealth Anti-Discrimination Law*, are available at: <http://www.equalitylaw.org.au/elrp/submissions/>, and the website of the Attorney-General's Department: <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Pages/ConsolidationofCommonwealthantidiscriminationlaws.aspx>.

86 See above, note 82, p. 9; see also above note 63, Para 11.12.

87 Discrimination Law Experts' Roundtable, *Report on Recommendations for a Consolidated Federal Anti-Discrimination Law in Australia*, 31 March 2011, p. 6.

88 As noted by the discrimination experts, as a result of the decision in *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62 (a court's decision on whether a comparator must have the attribute-related features of the complainant), the requirement of a comparator proves both conceptually and practically difficult, for example, in cases where there is no suitable comparator such as those concerning pregnancy, breastfeeding or disability.

89 See above, note 63, Para 3.27.

90 See above, note 80, p. 44; see also evidence given by the New South Wales Bar and Law Council of Australia, cited in the 2008 SDA Report, above note 63, Para 3.13.

91 Discrimination Law Experts' Group, *Consolidation of Commonwealth Anti-Discrimination Laws Submission*, 11 December 2011, pp. 9-10.

92 *Ibid.*, p. 10.

93 In the case of indirect discrimination, a number of laws provide for a shifting of the burden to the respondent (to prove that the condition was reasonable) once a complainant has established that a condition, requirement or practice has a discriminatory impact. Specifically, the Age Discrimination Act 2004 (Cth) and the Anti-Discrimination Act 1991 (Qld) were enacted with a requirement that the respondent bears the onus of proving reasonableness in an indirect discrimination complaint. The Sex Discrimination Act 1984 and the Disability Discrimination Act 1992 have been amended (Sex Discrimination Amendment Act 1995 (Cth), section 3; and Disability Discrimination and Other Human Rights Legislation Amendment Act 2009 (Cth), Schedule 2).

- 94 For a comprehensive analysis of the difficulties of proving discrimination complaints in Australia, please see Allen, D., "Reducing the Burden of Proving Discrimination in Australia", *Sydney Law Review*, Vol. 39, 2009, pp. 580-605.
- 95 As is the case in the United Kingdom, the European Union and Canada.
- 96 See above, note 87, p. 9. According to the Discrimination Law Experts, the shifting onus has a "long and unremarkable history in Australian industrial law and continues in ss 361 and 782 of the FWA".
- 97 See Gaze, B., *Submission to the Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality*, Undated, Submission No 50 to 2008 SDA Review, p. 2, available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=legcon\\_ctte/sex\\_discrim/submissions/sublist.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/sex_discrim/submissions/sublist.htm).
- 98 In addition, a complaints stream is provided for under the Australian Human Rights Commission Act 1986 (Cth) which is designed to give effect to Australia's obligations under the International Labour Organisation Convention No.111 in which complaints of discrimination in employment under a number of grounds are able to be conciliated by the Australian Human Rights Commission and a report made to the Attorney-General who must table a report in Parliament. However, complainants cannot access a court process to enforce their rights or access any other form of redress.
- 99 For example, neither social status nor homelessness is a protected attribute under any State or Territory anti-discrimination legislation. See Human Rights Law Centre, *Realising the Right to Equality: Submission to the Government Discussion Paper on the Consolidation of Anti-Discrimination Laws*, January 2012, available at: <http://www.equalitylaw.org.au/elrp/submissions/>.
- 100 *Ibid.*, p. 19.
- 101 Productivity Commission, *Review of the Disability Discrimination Act 1992*, 2004, p. 369.
- 102 *Ibid.*, Recommendation 13.4, p. 396.
- 103 See, for example, Equality Act 2010 (UK), Part 11, Chapter 1: Northern Ireland Act 1998 (UK), section 75 and Schedule 9; Fair Employment and Treatment (NI) Order 1998 (UK); Employment Equity Act 1998 (South Africa); Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (South Africa), section 5; Employment Equity Act 1995 (Canada); and Executive Order 11246 – Equal Employment Opportunity 1965 (USA).
- 104 For a detailed discussion of the various UK equality duties including their weaknesses and limitations, see Hepple, B., "The New Single Equality Act in Britain", *The Equal Rights Review*, Vol. 5, 2010, pp. 18-21.
- 105 2010 Act, Part 3.
- 106 For example, the Australian Chamber of Commerce and Industry expressed concern about imposing a positive duty on the private sector to eliminate discrimination and promote equality. See above, note 63, p. 120.
- 107 Cook, R., "Obligation to Adopt Temporary Special Measures under the Convention on the Elimination of all Forms of Discrimination against Women", in Boerefijn I. et al (eds.), *Temporary Special Measures: Accelerating de facto equality of women under article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women*, Transnational Publishers, 2003, p. 119.
- 108 Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination*, UN Doc. No. CERD/C/GC/32, 2009.
- 109 Australian Human Rights Commission Act 1986 (Cth), section 46PO(1).
- 110 Federal Court of Australia Act 1976 (Cth), section 33D(1).
- 111 See [www.equalitylaw.org.au](http://www.equalitylaw.org.au).
- 112 The HRLC was able to convene the conference and establish the dedicated website with financial assistance from the Attorney-General's Department.

# Protecting Equality as a Human Right in the Netherlands

## From Specialised Equality Body to Human Rights Institute

Jenny Goldschmidt<sup>1</sup>

### Introduction

This article describes the recent shifts in the structure of protection against discrimination of vulnerable groups in the Netherlands. This development in the Netherlands is not unique but resembles that which has taken place in some other countries, such as Britain, where the various equality bodies have been merged into the single Equality and Human Rights Commission.

Two approaches to the protection of equality can be seen in Europe. In some member states of the European Union (EU), specialised equality bodies exist as a result of the obligations emanating from EU equality directives.<sup>2</sup> These bodies deal only with equality and non-discrimination issues, having different mandates in various countries. In other member states, national human rights institutions (based mostly on the Paris Principles<sup>3</sup>) deal also with equality issues, but as part of a broader human rights mandate. At present, a trend is appearing whereby states merge equality bodies dealing with specific grounds of discrimination (especially gender, race and disability) into one single equality institution covering all grounds of discrimination, and also incorporate equality bodies into human rights institutions. Recently, Equinet – the European network

of equality bodies – published its perspective on the possible links between equality bodies and national human rights institutions, highlighting that “policy makers are increasingly exploring the potential overlap between human rights and equality and the links between the institutional infrastructures responsible for each area.”<sup>4</sup> Equinet explains that several forms of such linkages exist, merger being the most complex one which demands most careful attention.<sup>5</sup>

This article addresses the very recent decision to merge the Equal Treatment Commission in the Netherlands (the ETC) into a national human rights institution (the NIHR). This development has seen the abolition of the equality body which has existed for almost 40 years in several forms. After ample experience with gender equality commissions, the Netherlands was one of the first countries to establish a single equality body in 1994 which, over the course of time, established a solid reputation. At the end of 2011, a bill was adopted to establish the NIHR, within which the existing ETC will be incorporated.<sup>6</sup> A specific section within the NIHR will continue to hear and investigate individual complaints based on the national equality legislation.



This change can, on the one hand, be considered positively as a shift towards a more fundamental human rights approach to equality and discrimination, but, on the other hand, it can also give rise to concerns that the promotion of equality might get less attention. These concerns have, understandably, been heightened by the fact that the additional budget awarded to the NIHR is restricted, as was the case in Ireland where the budget of the human rights commission was recently severely cut, for example.<sup>7</sup>

This article attempts to provide a more positive view. The new situation seems to offer new opportunities for a more coherent human rights approach towards equality and non-discrimination, instead of a rather specific approach that is necessarily related to the tasks of a specialised body. It considers whether, after an initial stage, during which the concept of equality has been well-defined and applied in concrete cases, it is now the time to take a step forward.

## **1. Looking Back: A Short History of the ETC Since 1994**

### **1.1 History**

Equal treatment legislation in the Netherlands has been developed since the European Directives on equal pay for men and women (the Gender Equality Directives) came into force in the 1970s.<sup>8</sup> The implementation of the Gender Equality Directives in Dutch national legislation began in 1975, with the enactment of the Equal Pay Act and the incorporation of the right to equal pay of men and women in the Civil Code (now Article 7:646).

Since 1975, special commissions have been established to monitor the implementation of these “equality laws” and each commis-

sion had the power to deal with individual complaints. For example, in 1975, the enactment of the Equal Pay Act created the Equal Pay Commission.<sup>9</sup> In 1980, the Equal Treatment Act (on Equal Treatment of Men and Women at Work) (the Equal Treatment Act) was adopted and in the same year the specific Equal Treatment Act for the Public Service was also introduced.<sup>10</sup> The Equal Treatment Act established the new Equal Treatment Commission on Men and Women, within which the existing Equal Pay Commission was incorporated. In 1989, the equal treatment legislation was revised and consolidated into a single Equal Treatment in the Workplace Act (ETWA) including equal pay and the civil service.<sup>11</sup> This new act covered gender discrimination and discrimination based on related grounds such as marital status. In the Civil Code, the relevant provisions on equal treatment of men and women were incorporated in the articles 7:646 and 7:647. Thus, specific acts covered the public sector and at the same time similar provisions were incorporated in the civil code, to cover private contracts.

### **1.2 Merging European and Constitutional Frameworks in 1994**

A far more fundamental change took place in 1994, with the enactment of the new and expanded Equal Treatment Act (ETA), which marked an interesting coincidence of constitutional and European developments. In 1983 the new Constitution of the Netherlands (the Constitution) had come into force.<sup>12</sup> Article 1 of the Constitution contains the principle of equality and the prohibition of discrimination. In the parliamentary debates on the new Constitution, it was established that this provision has third party effect and therefore also covers acts of non-state actors.

It was decided, however, that the interpretation of the constitutional equality and non-discrimination provision could not be left entirely to the judiciary, in particular because of the need to establish a fair balance in cases of conflict between the prohibition of discrimination and other fundamental rights guaranteed in the Constitution of 1983. For example, conflicts were foreseen between the principle of equality and the freedom of education, the freedom of religion, and the right to privacy. The ETA was therefore enacted in order to regulate the content and scope of the prohibition of discrimination in the most important horizontal relationships, e.g. in the field of labour and the provision of goods and services.<sup>13</sup> Its structure followed the system adopted in the pre-existing Equal Treatment Act as revised in 1980, based on the Gender Equality Directives. In its Article 1 § 1, the ETA contained a closed and limited list of prohibited grounds of discrimination (being the eight grounds mentioned in Article 1 of the Constitution: religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status). The ETA system also included (i) a restricted scope of the prohibition of discrimination (limited to employment<sup>14</sup> and the provision of goods and services<sup>15</sup>), (ii) a system of exceptions to the principle of non-discrimination for religious institutions<sup>16</sup> and for genuine occupational qualifications,<sup>17</sup> (iii) limited possibilities for affirmative action,<sup>18</sup> (iv) the demand for an objective justification in case of indirect discrimination,<sup>19</sup> and (v) the possibility for religious institutions to make specific demands related to their convictions as long as these do not amount to discrimination on any other ground.<sup>20</sup>

The ETC was established to monitor the implementation of the ETA and other existing equality laws, thus creating a specialised equality body with powers to consider and

investigate individual complaints and to give non-binding opinions.<sup>21</sup> Article 12 of the ETA provides that individual plaintiffs, organisations, workers' councils or employers, and also judges or others dealing with dispute settlement have the power to bring a case to the ETC.

The provisions on equal treatment of men and women in the workplace in the Civil Code and the Equal Treatment Act remained in force separately, but the new ETC replaced the previous Equal Treatment Commission on Men and Women and assumed all of its powers.

Following the coming into force of the Constitution in 1984, it took a further 10 years before the ETA was enacted. Various drafts preceded the final bill. Initiatives were taken by the government (the usual initiator of legislation), members of Parliament and non-governmental organisations (NGOs) and a very intensive public debate took place. Why? The core issues under discussion were the proposed exceptions to the prohibition of discrimination in relation to the freedom of education and the freedom of religion. This debate was closely related to the pillarised structure of Dutch society where the different religious groups had rights to establish their own institutions, such as schools and hospitals, based on their specific doctrines, with public funding. Therefore, the ETA reflects a very specific national history but also embodies European influences, in particular through the adoption of the closed normative structure. The prohibited grounds of discrimination, the scope of the legislative protection and the permitted exceptions are precisely defined in the ETA itself and leave no room for interpretation.

The mandate of the ETC, established by Article 12 of the ETA, is explicitly restricted to

the interpretation of the ETA and other specific equality legislation in existence prior to the ETA's enactment, i.e. the Equal Treatment Act, the relevant provisions in the Civil Code and the ETWA dealing with gender discrimination. Following the enactment of the ETA, the EU normative framework was expanded<sup>22</sup> and new national laws were enacted on other grounds, such as disability, age, and working hours.<sup>23</sup> Competences based on these specific acts were added to the mandate of the ETC.<sup>24</sup> The new statutes essentially implemented the provisions of the new European equality directives (the Equality Directives), and the mandate of the ETC was thus extended in order to cover these additional grounds and areas in line with the legislation.

Where the Equality Directives contained different structures for the different grounds of discrimination, the specific national laws followed these specific structures and the mandate of the ETC also varied accordingly. This was particularly the case in relation to the nature of the exceptions relating to the different grounds. The ETA and the disability legislation both contained a strictly closed system for all grounds covered by their provisions, whilst the legislation on the other grounds (such as age, religion, part time work and temporary contracts) has a more open structure of exceptions and permits the use of reasonable justification in cases of both direct and indirect discrimination.

The result has been a rather complex compilation of separate equality laws, each with a different scope and a different approach to exceptions, but all having the competence of the ETC as a common aspect.<sup>25</sup> The competence of the ETC is defined in each specific law, therefore it is bound to apply different interpretative frameworks depending on the legislation it is acting under in a particular

case, and it lacks a general mandate to investigate complaints or give advice on non-discrimination and equality. Therefore, as Richard Carver has argued, "in the impeccably monist Netherlands, where international law is regarded as a superior part of national law, the mandate of the Dutch Equal Treatment Commission refers only to national law".<sup>26</sup>

Further, in terms of accessibility and transparency, the complex structure of equality laws in the Netherlands can be seen as a barrier to an effective enforcement mechanism. It is often difficult to explain to individuals or NGOs that the ETC is competent to consider a complaint of discrimination against a minority ethnic group by a housing corporation (in the context of providing goods and services) but not competent to give an opinion on the refusal to give a member of the same group a building permit by the authorities, because in the latter case there is an administrative act which is not caught by the scope of Article 7 of the ETA which covers goods and services in a more restricted sense.<sup>27</sup>

These problems have, however, been identified and action is gradually being taken. Recently, steps have been taken to integrate the various equality laws into one single Equality Act<sup>28</sup> and a bill to adapt the terminology of direct and indirect discrimination in various laws was passed by the House of Representatives and the Senate and entered into force at the end of 2011.<sup>29</sup>

## **2. Present Situation Regarding Equal Treatment Law<sup>30</sup>**

The very specific situation of the Dutch equality law, resulting from its combined European Union law and constitutional background, has been evaluated regularly. The ETA itself contains an obligation that every five years, calculated from the date on which

it entered into force, the ETC is required to draw up a report of its findings on the operation of the ETA.<sup>31</sup> The most recent report of the ETC was published in 2011 and covered the period from 2004 to 2009.<sup>32</sup> The various evaluations provided by the ETC have resulted in minor adaptations of the legislation, but only recently, in 2010, was a bill published for consultation<sup>33</sup> by the government to integrate the most important of the existing equality laws into a new single Equality Act (the Equality Bill).<sup>34</sup> The Equality bill has yet to be presented to Parliament, but this will hopefully take place in 2012. This proposal will not, as such, impact on the mandate and tasks of the ETC, but the consultation draft of the Equality Bill did suggest that the position of the ETC will be reconsidered in the light of the recent developments relating to the NIHR.

### **3. Towards a National Human Rights Institution**

#### **3.1 First steps**

The establishment of the NIHR in the Netherlands has a long history. In 1999, the Dutch section of the International Commission of Jurists<sup>35</sup> celebrated its 25<sup>th</sup> anniversary with a seminar on the question of whether the Netherlands needs a national human rights institution, and the presentations and reactions were subsequently published.<sup>36</sup> During this seminar, the history and meaning of national institutions were analysed in the light of the Paris Principles and Recommendation No. R (97) 14 of the Committee of Ministers of the Council of Europe (the CoE Recommendation), and the question was discussed as to whether the various independent institutions existing in the field of human rights in the Netherlands covered the tasks required of such national institutions. The Paris Principles were adopted by the Gen-

eral Assembly of the United Nations,<sup>37</sup> and are closely related to the 1993 World Conference in Human Rights, held in Vienna, where the important role of national institutions was reaffirmed.<sup>38</sup> The CoE Recommendation adopted a similar perspective, emphasising the role of non-judicial bodies in the protection of human rights.<sup>39</sup>

The contributions to the 1999 seminar emphasised the positive role played by various existing institutions in the Netherlands and also identified some gaps.<sup>40</sup> The contributions also showed that it is difficult to define the tasks and position of a new institution without impacting on the much appreciated work of the existing bodies, such as the National Ombudsman, the Privacy Institution (named *Registratiekamer* at that time), the ETC, the Advisory Committee for Human Rights, the National Bureau on Combating Racism and other governmental and non-governmental institutions.<sup>41</sup>

The conclusion was that gaps exist, but that more research was needed to identify exactly the most suitable mandate of a national institution. Although there was little or no open disagreement on the idea that the establishment of a national human rights institution was necessary, it was clear that different options existed varying from a “platform” of existing institutions to the establishment of an entirely new body.<sup>42</sup>

Following the seminar, concrete actions remained forthcoming.<sup>43</sup> Several parliamentary resolutions and petitions by NGOs and human rights scholars resulted in governmental promises that steps would be taken to present a proposal for a future national institution<sup>44</sup>. Subsequent NGO actions that insisted that an independent institution should be established, however, met little enthusiasm from the government.<sup>45</sup>

Disappointed by this lack of action on the part of the government, a consortium of four independent institutions in the field of human rights decided to take the lead. In 2004, the Dutch Data Protection Authority, the National Ombudsman, the ETC and the Netherlands' Institute for Human Rights at Utrecht University (probably better known under its Dutch abbreviation SIM) (the Consortium), met to discuss the establishment of a national institution. From the outset, NGOs most involved in the debate – NJCM (the Dutch section of the International Commission of Jurists) and the Netherlands' Helsinki Committee – also attended the meetings, as did a representative from the Home Office, without formal mandate.

In March 2005, a memorandum was signed by the four members of the Consortium in the presence of the Minister of Interior, in which they expressed their intention to investigate the possible options for a national human rights institution.<sup>46</sup> The results of this joint investigation were presented to the Minister of Interior in September 2005 in a report entitled *The Action to the Word*.<sup>47</sup> This report analysed the mandate and structure of the existing institutions, and presented three models to fill the gaps in the protection of human rights: (i) an informal platform; (ii) the establishment of an entirely new organisation; or (iii) the assignment of the tasks of a national institution to one of the existing organisations.<sup>48</sup> The last option was seen as the preferred option. The report emphasised the requirements laid down in the Paris Principles in relation to the mandate and independence of the future institution and the necessity of a legal foundation.<sup>49</sup> These elements needed to be fulfilled in order for the new institution to acquire the “A-status” granted by the UN to fully compliant national institutions.<sup>50</sup> Previously, the ETC had been recognised as

observer (“B-status”) in the absence of a fully competent independent body. At this stage, the Consortium expressed a preference for attribution of the tasks and powers of a national institution to SIM, the Netherlands' Institute of Human Rights at Utrecht University.<sup>51</sup> The Consortium proposed to appoint an “architect” who would further elaborate the final structure and mandate of the proposed national institution, in due consultation with all relevant stakeholders, including NGOs.<sup>52</sup>

In the same period, international developments supported the need to fill the gap in the national human rights protection system in the Netherlands. After the adoption of the Paris Principles by the UN General Assembly in 1993, and the CoE Recommendation, the European Parliament adopted in 2005 a resolution on the role of national institutions (including the Fundamental Rights Agency of the EU itself), urging the member states to establish such institutions.<sup>53</sup> Further, in 2005, the Netherlands stood for a seat in the newly established UN Human Rights Council and, in the pledge, stated that a national institution was to be established - a statement that was repeated at the candidacy in 2006.

Thus, the international action of the Dutch Foreign Office, the international pressure imposed by the EU Parliament and the UN Human Rights Council, and the initiative of the Consortium, mutually reinforced each other. The establishment of a national institution meeting the requirements to obtain the A-status at international level had become a common goal. In 2006, a resolution was accepted by the House of Representatives to summon the Dutch government to take all necessary steps to establish a national institution.

### 3.2 Towards Realisation

Despite the apparent consensus, it took more than another five years before the law to establish a national institution was adopted.<sup>54</sup> Whilst awaiting the necessary legislative developments, the Consortium decided in 2006 that it was time to establish a foundation as a pre-structure for a national institution established by law. The former National Ombudsman and member of the Council of State, M. Oosting, was appointed as the independent chair. Although the authority, expertise and commitment of M. Oosting were of great importance in this next stage of the Consortium's work, the foundation remained "in formation".

In preparation for developing the necessary legislation, the Minister of Interior financed an explorative study by two "architects", who proceeded to hold broad consultations and to produce an extensive report, which was published by the Consortium in a more concise advice paper in 2007 – *Human Rights Connect and Oblige: A National Human Rights Institution... also in the Netherlands*.<sup>55</sup> Once again the gaps in the human rights structure in the Netherlands were explained.<sup>56</sup> The report stated that the starting point was the need to establish an institution that meets the requirements of the "A-status" prescribed by the Paris Principles, including having an independent structure with a legal basis and a broad mandate including advice, monitoring of implementation, international cooperation, training and education, and research/investigation.<sup>57</sup> The report did not foresee an individual complaint mechanism, but it did envisage that individual complaints were to be referred to the competent institutions.<sup>58</sup> This is based on the assumption (which was also held in the first report of the Consortium of 2005), that the existing institutions (such as the National Ombuds-

man, the Data Protection Authority and the ETC and several more specific independent commissions) already covered a broad field in which individual complaints were possible and that there was first and foremost a need to assist people who wanted to lodge a complaint in finding their way to the most appropriate institution.

It took more than another four years before the bill establishing the *College voor de Rechten van de Mens* – the National Human Rights Institution of the Netherlands – was adopted by Parliament.<sup>59</sup> The delay was caused mainly by changes of government and an ongoing debate on (i) the preliminary conditions for the independence of the institution, including the necessary budget, and (ii) the best way to incorporate the national institution into the existing structure.

Whereas in the first report of the Consortium, SIM was mentioned as a possible home for the institution, in the course of time, other options were also considered. In 2008, the cabinet proposed a system of "twinning" or "shared services" at the office of the National Ombudsman, with a structure involving the other partners of the Consortium.<sup>60</sup> This option was criticised in the associated parliamentary debates, because it was feared that it would still entail the establishment of a new institution instead of incorporation within an existing one. The cabinet was invited to investigate other options and after another round of intensive deliberations within a steering committee, where the relevant departments and the Consortium were involved, the cabinet opted in 2009 to incorporate the national institution within the ETC.<sup>61</sup> The steering committee had proposed two options, one being the National Ombudsman hosting the national institution, the other being the integration of the national institution in the ETC. The steering commit-

tee ultimately opted for the latter of the two options, because the alternative expansion of the National Ombudsman's mandate lacked support and merging the new institution into the existing ETC satisfied the preference that no new institutions should be established.

This decision finally paved the road towards the enactment of the Act on the Establishment of the Netherlands' Institute of Human Rights (the NIHR Act).<sup>62</sup> The bill which preceded the NIHR Act (the NIHR Bill) was published on the internet for consultation at the end of 2009, and was subsequently sent to Parliament in August 2010. In November 2011, the NIHR Bill was finally accepted by the Senate and the NIHR Act was enacted in December 2011. The date when the NIHR Act enters into force has yet to be determined, but it is expected to be in mid-2012.

#### 4. Structure and Mandate of the NIHR

##### 4.1 Independence

As the acquisition of the "A-status" as a national human rights institution was the ambition of the government (with some NGOs complaining that this ambition and the related international prestige seemed more important than the protection of human rights itself<sup>63</sup>), the Minister of Justice obtained advice from the National Institutions and Regional Mechanisms Section of the Office of the High Commissioner for Human Rights in Geneva (NIRMS) to ensure that the NIHR Bill reflected the requirements of the Paris Principles and subsequent recommendations of the International Coordinating Committee (ICC) of National Human Rights Institutions' Sub Committee of Accreditation (the Sub Committee of Accreditation).<sup>64</sup>

National human rights institutions with A-status are required to participate fully in

the UN as a national institution and also in the ICC.<sup>65</sup> The Sub Committee of Accreditation has developed mechanisms to consider all institutions in order to evaluate whether they (still) meet these requirements.<sup>66</sup> More specific than the general provisions concerning equality bodies in the Directives, the requirements for national human rights institutions are elaborated in the Paris Principles, which prescribe a pluralist composition and independent membership.<sup>67</sup> In the UN *Handbook for the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, the elements of independence are identified as legal and operational autonomy, financial autonomy and independence through appointment and dismissal procedures restricting the involvement and influence of the government.<sup>68</sup>

Prior to enactment of the NIHR Act, the ETC had been granted "B-Status" because its mandate does not cover "human rights" in general but only equality. Paragraph 2 of the Paris Principles states that "[a] national institution shall be given as broad a mandate as possible". Further, the procedures of appointment of the members of the ETC may not guarantee full independence as its members are appointed by the relevant Ministers.<sup>69</sup>

In June 2010, when the decision to merge the ETC and the NIHR had already been taken, but the NIHR Bill had not yet been presented to Parliament, the ETC had obtained the confidential advice of the National Institutions and Regional Mechanisms Section (NIRMS) of the Office of the High Commissioner for Human Rights which had resulted in the provision of some recommendations, particularly in relation to the independence of the proposed NIHR. It was advised that such independence must be reflected in the activities, the composition and the exercise of the ETC's powers and functions. Concerns, based on the draft

that had been published for consultation on the internet, were raised at this stage regarding the role of the Minister of Justice in the selection of the members and staff of the ETC, given that it would ultimately be transformed into the NIHR. The selection procedure is required to be open, objective and transparent, involving broad consultations. In the Act as it was presented in August 2011, these recommendations have been implemented. Article 4 of the NIHR Act reaffirms the independent performance of the duties of the institution and provides safeguards for the independence of the members and staff. The members of the NIHR are to receive their commission from the government by Decree, and the commission is to be proposed by the Advisory Council consisting of the National Ombudsman, the President of the Data Protection Authority, the President of the Council for the Judiciary and members from civil society, thus guaranteeing their independence.<sup>70</sup> The staff is to be appointed by the NIHR itself.<sup>71</sup>

#### 4.2 Scope of Responsibility

The NIHR Act does not give an exhaustive definition of “human rights” but simply refers to the scope of responsibility of the NIHR as “human rights, including the right to equal treatment”.<sup>72</sup> Explicit reference to the principle of equal treatment is not repeated in the other provisions where human rights are mentioned, because, as the Explanatory Memorandum<sup>73</sup> states, “equal treatment as laid down in the Equal Treatment Act, is also a human right”.<sup>74</sup>

Article 3 of the NIHR Act enumerates the tasks of the Institution to be as follows:

- investigating the protection of human rights;
- reporting and making recommendations on the protection of human rights including annual reports;

- providing advice;
- providing information and coordinating and encouraging human rights education;
- encouraging research;
- encouraging national and international cooperation;
- pressing for ratification, implementation and observance of human rights treaties and other international resolutions and for withdrawal of reservations; and
- pressing for observance of European and international recommendations on human rights.

The Office of the High Commissioner’s recommendation to the Minister of Justice of 15 October 2010 that the NIHR Act should explicitly include reference to the “promotion” of human rights wherever reference in the text is made to “protection” has not been followed and there has been no further debate.

The nature of the “advisory task” of the NIHR has been further elaborated in Article 5 of the NIHR Act, which states that advice can be given either on the request of a Minister or Parliament or on the initiative of the NIHR itself on all types of laws, regulations and draft international decisions. In the parliamentary debate preceding enactment, two aspects of the “advisory task” were discussed more extensively. The first was the question of whether the power to lodge legal proceedings and/or *amicus curiae* briefs in court should not be included. The Minister did not see any added value to grant this kind of legal capacity to the NIHR as it could always be called to act as an “expert witness” in court proceedings by one of the parties to the proceedings.<sup>75</sup>

In any event, and irrespective of the decision reached in this regard prior to enactment, it can be held that the capacity to submit *amicus curiae* briefs does not need any legal ba-



sis: it is for the court in question, be it European, international or national, or any other relevant body, to choose whether to accept such third party interventions or not.<sup>76</sup>

The other subject of discussion was the power included in Article 7 of the NIHR Act which enables the NIHR to institute an on-site investigation and to gain access to all places, with or without permission (except for places designated by law as secret places). Doubts were raised as to both the necessity and the desirability of such competence being given to the NIHR. In relation to “free access”, fears were expressed that the NIHR would also be authorised to enter a church, mosque or any other religious place where services are held. The Minister of Justice affirmed in an explanatory letter that this power is necessary to enable the NIHR to meet the requirement in the Paris Principles of having access to all relevant information in order to conduct proper investigations.<sup>77</sup> In the same letter he explains that fears of violations of the constitutional freedom of religion are not justified because the General Act on the Entrance of Dwellings (*Algemene wet op het binnentreden*) contains restrictions related to places where religious services are held,<sup>78</sup> and these are applicable to the actions of the NIHR too.<sup>79</sup>

#### 4.3 Staff

The independence of members and staff of the NIHR is safeguarded by the provisions in Chapter 3 of the NIHR Act on the composition and procedure of the NIHR. The members shall be appointed by Royal Decree on the Recommendation of the Minister of Justice, with the advice of the Advisory Council.<sup>80</sup> Article 15 provides for the establishment of the Advisory Council consisting of three *ex officio* members, being the National Ombudsman, the President of the Data Protection Author-

ity and the President of the Council for the Judiciary, and a minimum of four and a maximum of eight members representing (i) civil society organisations involved with human rights protection, (ii) employers’ organisations, (iii) employees’ organisations, and (iv) academics, appointed by the Minister of Justice after he is informed of the membership of the NIHR and the three *ex officio* members. The relevant provisions that guarantee independence and protect against dismissal of the Judicial Officers (Legal Status) Act apply to the members and substitute members of the NIHR (Article 17 enumerates these provisions explicitly) who are appointed for a period of 6 years allowing re-appointment.<sup>81</sup> The staff is appointed by the NIHR itself.

#### 4.4 Budget

One of the preconditions for an effective national human rights institution is access to substantial and sufficient resources. Although both the Consortium and the “architects” had stated a necessary budget of 1.15 million Euros (in addition to the existing budget of the ETC of over 5 million Euros), due to financial constraints, the additional budget has been determined to be 600,000 Euros, giving an additional 300,000 Euros for each of the first two years to enable the NIHR to make the necessary initial investments, after which the budget will be evaluated.<sup>82</sup>

#### 4.5 The End of an Era

The establishment of the NIHR in which the ETC will be incorporated thus implies the end of the existence of a specialised equality body in the Netherlands. The choice to incorporate the ETC into the NIHR is not only justified by the reluctance to establish new institutions, but the Explanatory Memorandum also mentions the importance of the accessory character of the principle of

equality, being inextricably bound up with all other fundamental rights, as expressed in major human rights documents.<sup>83</sup> Thus, the incorporation of the institution responsible for protecting the principle of equality in the Netherlands into an institution with a broader remit may also reinforce the promotion and protection of equality and the fight against discrimination.<sup>84</sup>

Moreover, the abolition of the ETC as a specialised body does not mean that specific provisions on equal treatment entirely disappear. For example, Chapter Two of the NIHR Act contains provisions on the specific mandate to hear and investigate individual complaints in the field of equal treatment.<sup>85</sup> These provisions replace similar provisions in Chapter 2 and Article 33 of the ETA.

### **5. A Different Future: From Specialised Body to a Specialised Branch**

In the Explanatory Memorandum to the NIHR Bill, the importance and relevance of the ETC as a specialised equality body (in conformity with the obligations of the EU Directives) was re-emphasised. It explained, therefore, that the tasks thus far performed by the ETC must continue to be carried out by the new NIHR. As the advisory and investigatory powers of the ETC coincide with the duties of the NIHR, a special provision was required for the hearing of complaints regarding discrimination, and this was included as Article 3 § 1 of the NIHR Act. Chapter 2 of the NIHR Act (comprising Articles 9-13) deals with “Investigations and Findings Relating to Equal Treatment”. According to Article 9, a separate division of the NIHR is responsible for these activities. The Explanatory Memorandum holds that:

“It is up to the Institute itself to decide how the other duties should be di-

vided among the different members and among the staff of the office. This means that some members may be concerned only with hearing complaints and some only with preparing advice and reports whereas others may be involved in both sets of activities.”<sup>86</sup>

The relevant provisions of the ETA related to the complaints procedure are repeated in Articles 10-13 of the NIHR Act. The competence of the NIHR remains restricted to complaints based on the specific equality laws that invest the ETC with the power to consider complaints. That means that the NIHR has no competence to hear complaints in the field of discrimination which fall outside of the specific equality law provisions, such as a case involving discrimination against women in an Orthodox Christian party (because this is not related to work or the provision of goods and services)<sup>87</sup> or the refusal to allow disabled people to enter a restaurant (because disability discrimination thus far is only prohibited in relation to work).<sup>88</sup>

As a consequence of the new structure with a specific division for complaints and investigations on discrimination, the decree determining the procedures of the ETC<sup>89</sup> will require amendment; a draft was submitted for an internet-consultation in early 2011,<sup>90</sup> and will result in a new decree. The proposed decree does not entail fundamental changes in the existing procedure. The proposed amendments are described as a codification of the existing practice and would result in:

- more discretion for the NIHR to attach conclusions to the fact that one of the parties does not attend a hearing after being summoned;
- the amplification of the potential for complaints to be settled without hearings;

- more discretion for the NIHR to publish opinions in individual cases without mentioning the full names of the parties.

## 5. Concluding Remarks

Thus, after 18 years of successful existence, the ETC, the specialised equality body, will cease to exist in 2012. Do we have to regret this or is the incorporation in the new NIHR a step towards a broader human rights approach of the principle of equality? This approach may be broader in the sense that (i) equality issues may be considered in a context beyond that of the rather restrictive specific equality laws and the prohibition of discrimination, and (ii) the right to equality may be applied in relation to other fundamental rights.

The answer to the question of whether the replacement of the ETC by the NIHR represents a positive step or not cannot be a simple yes or no. There is always a risk, of course, when a solid structure is abolished. The ETC is an institution which has gained its reputation by developing specialised knowledge on the principle of equality, in particular because the many individual cases which it has considered reveal the specific problems in the field of investigation and interpretation of equality law and in the implementation thereof. Discrimination takes place in many forms, which are often related to patterns of dominance within society. Thus the inclusion of harassment as a form of discrimination,<sup>91</sup> the duty to provide reasonable accommodation,<sup>92</sup> the occurrence of discrimination by association<sup>93</sup> are concepts that have been developed as a result of the concentration on equality. It demands a very thorough knowledge of the manifestations of discrimination and the impact of inequality and the meaning of difference to conceptualise these aspects. Not all human rights experts are also experts

in this field, and the inclusion of the responsibilities of the ETC within the remit of the NIHR brings with it a certain risk that the specific equality expertise developed by the ETC will get less attention.<sup>94</sup>

In the first stage of its existence, the ETC focused on the development of a solid body of case law through which it clarified the complex character of equality norms. The quality of the opinions given in such cases needed to be convincing for both parties concerned and for the legal profession, but also for civil society and employers' and employees' organisations which had responsibility for implementing and adopting their content. Once this body of case law had been developed, it became possible to pay more attention to strategic issues, such as active "follow-up policies" (although these have been in place since the establishment of the ETC, albeit less openly than in the latter periods), education, independent investigations and international cooperation. Active "follow-up policies" include frequent contacts with the parties concerned after the decision, in order to explain the implications of the individual decisions and to endeavour to provide a more structural implementation to individual decisions by involving all relevant organisations in its implementation. At all stages, the ETC had to explain time and again that it was bound and limited by a restrictive legal framework, which (i) attributed to the ECT competences only in relation to the specific field of equality protection, (ii) provided a "closed system" in most specific laws, (iii) allowed no extra-legal exceptions to direct discrimination, and (iv) provided no general human rights test to be applied in cases where the principle of equality conflicted with other human rights. These restrictions did, however, allow the ETC to concentrate on the interpretation of the equality provisions and

to establish very clearly the implications and contents of the principle of non-discrimination. It was then the task of the judiciary (competent to consider the full scope of a case) or others to use this interpretation in their work. The restrictions placed on its potential impact can thus be seen as both a weakness and a strength of the ETC.

Of course there are also fears that, within the broad mandate of the NIHR, the protection of equality will be pushed aside and the protection of vulnerable groups against discrimination would be negatively impacted. Also, concerns exist that the expertise in the field of non-discrimination would fade away in the NIHR which is required to cover a much broader scope of work.

On the other hand, the opportunities offered by the NIHR for the promotion of equality and the fight against discrimination and exclusion cannot be underestimated. More and more exclusion is taking place as a result, for example, of the failure to protect the human rights of vulnerable groups, the restriction of the rights of immigrants and the reduction of facilities for disabled people in times of crisis.<sup>95</sup> These acts constitute violations of the human dignity of affected persons, who disproportionately belong to disadvantaged groups.<sup>96</sup> Such violations of dignity are closely related to the need for the protection of equality as an intrinsic part of all human rights.

The NIHR will have more effective tools at its disposal in order to deconstruct and reveal these forms of substantive inequality. Of course this demands an awareness of and expertise on the complex manifestations of exclusion and the contents and scope of international human rights obligations, with specific knowledge of those obligations which are intended to increase the protection of

vulnerable groups and minorities. Therefore it is important that the protection of equality has been mentioned explicitly in the law and that a special division of the NIHR with responsibility for investigations and findings relates to equal treatment, and that the necessary expert knowledge on equality law has been established.

In addition to equality law expertise, however, it is also necessary for general human rights expertise to be available to those within the NIHR responsible for implementing equal treatment norms. National and also European equality provisions can no longer be seen in isolation. More and more, international and regional human rights systems reinforce and influence each other. The European Union is not only bound to observe the European Charter of Fundamental Rights; it is also a party to the UN Convention on the Rights of People with Disabilities and is soon to become a party to the European Convention of Human Rights (ECHR). The provisions in the EU equality directives thus have to be applied and interpreted in conformity with these legal instruments which may demand a different interpretative framework in addition to that of the specific equality laws.<sup>97</sup>

In the field of the existing restrictions imposed by the specific equality laws, it can be maintained that these still persist in the field of individual complaints and investigations. However, the fact that these specific duties are now embedded in a broader institution will allow the NIHR to take up cases and issues that are not admissible under the strict equality laws but still pay attention to the underlying issues in their advisory and other tasks, thereby disclosing the various forms of discrimination and, where possible, proposing remedies. This may also be effective in cases where the “closed system” of Dutch equality law does not allow for a specific jus-

tification which might be prescribed by other fundamental rights. This approach may be more effective than an artificial broadening of the scope of the “closed system” embodied in the ETA. An example may clarify this. Recently, the ETC ruled that the ETA could not be applied in a case where specific reactions of a political nature were removed from an interactive internet site of a weekly because the editors held that these did not go with the image of the weekly. The editors based their defence against the complaint of discrimination on the basis of political conviction on their freedom of expression, protected by Article 10 of the ECHR. However, this was not a defence, or exception, foreseen in the ETA. As a result of the “closed system” established in the ETA, the ETC, strictly speaking, had no competence to consider this defence of the editors of the internet site in question. However, the ETC held that the ETA could not be applied if it was not in accordance with international human rights treaties. The ETC therefore accepted the extra-legal exception of the defendants.<sup>98</sup> It would not be possible here to discuss the implications and possible pitfalls of this decision, but the first commentaries have identified the obvious risks, particularly because the ETC (and the future equal treatment division of the NIHR) becomes vulnerable to the criticism that it lacks the competences to oversee the full implications of such complex case law in the broader field of human rights.<sup>99</sup> This is in particular true when it concerns a controversial issue like freedom of expression where the case law of the European Court of Human Rights is all but clear, particularly when the protection of minorities is involved; and the judgments have often been based on narrow majorities.<sup>100</sup> In the future context of the NIHR, this pitfall may be escaped by giving, on the one hand, an opinion on the implications of the strict normative framework of Dutch equality laws, and on the other hand,

advice on the compatibility of the ETA with the ECHR in a broader context, with both due expertise and authority.

Thus the new structure might combine the best of two worlds. Provided that the NIHR combines general human rights knowledge and experience with more specific expertise in the complex field of equality and non-discrimination, the institutional combination of the continued specialised division dealing with opinions and investigation related to individual cases and the NIHR with a broad mandate in the field of human rights may be well-equipped to tackle complex human rights issues whilst incorporating equality as an independent and accessory right.

Summing up these comments, the provisional conclusion is positive. The conclusion cannot be anything other than provisional, as the proof of the pudding is in the eating: the practice of both the NIHR generally, and the equality division thereof particularly, will demonstrate whether such optimism is justified or not. The Equinet publication mentioned above provides guidance on how to ensure an effective cooperation between equality bodies and national human rights institutions which deserves attention in this case. The recommendations are based on the experiences of others, and “Principles and Factors for Success” (the Principles) are defined.<sup>101</sup> These recommendations emphasise the linkage between equality and human rights, but also make clear that this linkage alone is not sufficient to ensure that a joint body is successful. The Principles emphasise that cost considerations should not be decisive, and that the balancing of resources is also important. Support and commitment of stakeholders with a remit of equality is required as much as that of human rights stakeholders, which may also demand a merge of cultures.

The existence of the new NIHR provides an opportunity for a more inclusive protection against discrimination. In order to realise fully this opportunity, it is essential that the members and staff of the NIHR have (i) profound expertise, experience and authority in the fields of both human rights and non-discrimination, (ii) a solid basis in civil society, either because they have experience in civil society organisations or because they have already established good relations with, and have a strong reputation among, such organisations, and (iii) good working relations with, in particular, human rights NGOs. Finally, the NIHR will require a budget that

enables its members and staff to perform this task. Fernhout and Wever emphasise that the NIHR must be courageous from the outset. A restricted budget cannot justify a “low profile start”. On the contrary, the NIHR must select issues and topics for its first actions that attract public attention and give it maximum visibility.<sup>102</sup>

Of course, the existing body of specific equality laws still needs due attention to integrate the complex system of separate acts and to harmonise the core concepts to bring them in accordance with the recommendations of, amongst others, the European Commission, but that is another story!

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2 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 13; and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 20.

3 UN General Assembly, *Resolution 48/134: National Institutions for the promotion and protection of human rights*, UN Doc. No. A/RES/48/134, 1993.

4 Equinet, *Equality Bodies and National Human Rights Institutions: Making the Link to Maximise Impact*, November 2011, p. 5.

5 *Ibid.*, p. 8.

6 Wet College voor de rechten van de mens (National Human Rights Institution Act) van 24 November 2011, Staatsblad 2011, 573.

7 Council of Europe Commissioner for Human Rights, *Ireland: “Budget cuts put human rights at risk”*, 15 September 2011, available at: [http://www.coe.int/t/commissioner/news/2011/110915reportireland\\_EN.asp](http://www.coe.int/t/commissioner/news/2011/110915reportireland_EN.asp).

8 Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; and Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

9 Staatsblad 1975, 129.

10 Staatsblad 1980, 384.

11 Staatsblad 1989, 168.

12 The Constitution of the Netherlands, Staatsblad 1983, 70.

13 Staatsblad 1994, 230.

14 Equal Treatment Act 1994, Articles 5 and 6.

- 15 *Ibid.*, Article 7.
- 16 *Ibid.*, Article 3.
- 17 *Ibid.*, Article 2 § 2, § 4 and § 5.
- 18 *Ibid.*, Article 2 § 3.
- 19 *Ibid.*, Article 2.
- 20 *Ibid.*, Article 5 § 2 and Article 7 § 2.
- 21 Equal Treatment Act 1994, Chapter 2.
- 22 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC ; and Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.
- 23 See the Equal Treatment (Disability and Chronic Illness) Act of 3 April 2003 (DCI Act); the Equal Treatment in Employment (Age Discrimination) Act of 17 December 2003 (AD Act); the Act on Equal Treatment on the Ground of Working Hours of 3 July 1996 (WH Act); and the Act on Discrimination Between Persons with a Flexible and Fixed Labour Contracts of 7 November 2002 (FFLC Act).
- 24 DCI Act, Article 12; AD Act, Article 14 ; WH Act, Article III, Para 3; and FFLC Act, Article 2, Para 3.
- 25 For further information on the Equal Treatment Commission, see Commissie Gelijke Behandeling, *Equality law and the work of the Dutch Equal Treatment Commission*, Undated, available at: <http://www.cgb.nl/english/about>.
- 26 Carver, R., "A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law", *Human Rights Law Review*, Vol. 10(1), 2010, pp. 1-32.
- 27 On the complications that the legal structure entails for the work of the Equal Treatment Commission, see also: Goldschmidt, J.E., "Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Developments in the Supervision of Equality Law in the Netherlands", *Maastricht Journal of European and Comparative Law*, Vol. 13(3), 2006, pp. 323-337.
- 28 A draft bill was published for consultation in 2010, with the process ending in November 2010. No further action has been taken. The draft bill is available at: <http://www.internetconsultatie.nl/integratiewetawgb>.
- 29 Parliamentary Documents 31 832, Staatsblad 2011, 554.
- 30 For Dutch readers, a very helpful factsheet on the state of the legislation has been published by E-Quality, available at: <http://www.e-quality.nl>.
- 31 Equal Treatment Act 1994, Article 20 § 2.
- 32 Commissie gelijke behandeling, *Derde evaluatie AWGB, WGBm/v en artikel 7:646 BW*, May 2011.
- 33 See above, note 28.
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- 62 As the reader may notice, the name used in the official English version coincides with the name of SIM, being the Netherlands' Institute of Human Rights. Confusion will most likely be avoided because of the reputation of the acronym SIM and because the institute itself uses the name Dutch Human Rights Institute, or by referring to the National Human Rights Institution of the Netherlands. Further information about the National Human Rights Institution (NIHR) is available at: <http://www.naarenmensenrechteninstituut.nl/62/english/>.
- 63 Unpublished Report of Meeting at the Ministry of Justice with Civil Society Organizations and the Steering Committee on 15 December 2009.
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- 65 Statute of the Association International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Articles 24(1) and 38.
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- 67 See above, note 3.
- 68 See above, note 38.
- 69 Equal Treatment Act 1994, Article 16 § 3.
- 70 National Institute of Human Rights Act 2011, Articles 15 and 16.
- 71 National Institute of Human Rights Act 2011, Article 18.
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- 73 Parliamentary Documents 2009/10, 32 467, nr. 3, p. 23.
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- 76 For example, in relation to the European Court of Human Rights, Rule 44 § 3 of the Rules of Court (April 2011) provides as follows: "(a) Once notice of an application has been given to the respondent Contracting Party under Rules 51 § 1 or 54 § 2 (b), the President of the Chamber may, in the interests of the proper administration of justice, as provided in Article 36 § 2 of the Convention, invite, or grant leave to, any Contracting Party which is not a party to the proceedings, or any person concerned who is not the applicant, to submit written comments or, in exceptional cases, to take part in a hearing."



(b) Requests for leave for this purpose must be duly reasoned and submitted in writing in one of the official languages as provided in Rule 34 § 4 not later than twelve weeks after notice of the application has been given to the respondent Contracting Party. Another time-limit may be fixed by the President of the Chamber for exceptional reasons.”

77 Parliamentary Documents, 32 467, nr. 24.

78 Algemene wet Binnentreden van 1994, Article 12.

79 See above, note 77.

80 The National Institute of Human Rights Act, Article 16.

81 *Ibid.*, Article 17.

82 See above, note 77, p. 19.

83 Parliamentary Documents 32 467, nr. 3, p. 9-10.

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# Will Sexual Minorities Ever Be Equal? The Repercussions of British Colonial “Sodomy” Laws

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This paper discusses the development of equal rights for sexual minorities by examining homosexuality and the law. By looking in depth at the origins of “sodomy” laws we can understand the way in which discrimination against, and persecution of homosexuals has been justified, and why many countries – in recent years – have, and have not, repealed such laws and promoted equal rights for lesbians, gays and bisexuals (LGB).

## International Standards

A human’s sexuality is an integral part of who they are, and their sexual orientation makes up a large part of this. It is today widely appreciated that different individuals have different sexualities, which the law should recognise and not criminalise. However, before 1994<sup>2</sup>, international law did not expressly protect any sexual minority. The norm was heterosexuality, i.e. a man and a woman who, in most circumstances, had to be married before their sexual activity was sanctioned by the law. Some have declared that “love is a human right”<sup>3</sup>: Amnesty International, for example, argues that when countries criminalise homosexuality, this deprives individuals of their right to love one another, and so breaches the principle of equality.

Article 1 of the Universal Declaration on Human Rights (UDHR) states that: “All human

beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”. This article is the fundamental basis of human rights law. Prosecuting homosexuality is a clear violation of this article. In 2008, Article 1 of UDHR was reaffirmed to include sexual orientation by many members of the United Nations.<sup>4</sup> But it is not only this article which outlaws the outlawing of homosexuality. Article 2 of the UDHR<sup>5</sup> and certain articles of international covenants and of the European Convention on Human Rights (ECHR) also make the prosecution of homosexuality a violation of human rights, through interpreting protection from discrimination on the basis of “other status” to include sexual orientation.

Decriminalising homosexuality can be tackled from two different perspectives: the right to equality and non-discrimination, and the right to privacy. While most arguments discussed below rely on both of these human rights, this article looks at how the fundamental right to equality can be used to progress the LGB movement.

In the 1960s, the United Nations drew up two major covenants which have mechanisms of enforcement internationally. The most relevant covenant for sexual orientation is the International Covenant on Civil and Political

cal Rights (ICCPR), which came into force in 1976 and is enforced by the Human Rights Committee (HRC). The HRC's main role is to monitor human rights around the world, and to make sure that the rights enshrined in the covenant are respected, protected and fulfilled by the state parties. In 1994, ICCPR was held by HRC to encompass sexuality.<sup>6</sup> The other major covenant, the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>7</sup>, also does not explicitly mention sexual orientation but has been interpreted to cover it as a prohibited ground for discrimination.

In 2006 a team of experts gathered together in Yogyakarta to discuss recent violations of individuals' human rights because of their sexuality. In an attempt to fill a gap in international human rights law consisting in the fact that there was no major international document or agreement relating directly to the legal status of sexuality, to which countries could look for guidance, the experts developed and adopted the Yogyakarta Principles on the application of international human rights law in respect to persons of different sexual orientation or gender identity<sup>8</sup>.

In 2011, the United Nations Human Rights Council for the first time officially addressed the issue of homosexuality and asked the UN Human Rights Commissioner to prepare a report on human rights violations suffered by persons of different sexual orientation or gender identity. The report, published in November 2011, stated that homosexual conduct should be decriminalised in every country, and called on all states to promote equality and work to eradicate homophobia<sup>9</sup>. It is too early to be able to see the full effects of this report, but it is definitely a step forward.

A number of recent reports by human rights organisations, including Amnesty Interna-

tional, have revealed some of the methods that different countries have been using to identify and persecute gay men.<sup>10</sup> These mainly revolve around physical appearance and dress, and are of a nature to instil fear into homosexuals who live in countries where they can be prosecuted for their sexuality. The criminalisation of homosexuality also perpetuates violence and gives society an excuse to abuse individuals who are lesbians, gays, bisexual, trans or intersex (LGBTI) persons. Some countries which have legislation against homosexuals, such as Singapore, have tried to defend it by saying that the law is very rarely enforced and that homosexuals will not be persecuted. But in fact having these laws on the statute books stigmatises sexual minorities as criminals.

Criminalisation of homosexual conduct has a hugely detrimental effect on homosexuals not just within the legal sphere but also socially: because the state has identified this group of individuals as criminals, it creates state-sponsored homophobia that is quickly passed down to members of society who feel that, in certain situations, this gives them the right to discriminate, and quite often bully and harass homosexuals. Criminalisation makes homosexuals feel isolated and deviant in the face of the law. They are not able to be themselves without fear of being arrested by the authorities purely because of their sexuality, or harassed by their peers.

Criminalising homosexuality also has an adverse effect on the treatment of HIV and AIDS, as hospitals and medical professionals may be less likely to treat homosexuals who have HIV/AIDS compared to their heterosexual counterparts. Gay men and other members of sexual minorities are frequently denied essential lifesaving treatment that they are entitled to, on an equal basis with others.

Therefore it is essential that laws that criminalise homosexuality are repealed, not just so that members of sexual minorities are not punished by the state for their sexuality, but further, so that they can live an equal life to their peers who do not identify as LGB.

### **The Scale of the Problem**

There are around 80 countries worldwide, including a number that belong to the Commonwealth, where homosexuality remains illegal to date, although exact numbers differ from source to source, depending on how certain legislation in some countries is interpreted.<sup>11</sup> Out of these, according to Amnesty International, there are seven countries that still retain the death penalty for “sodomy”. These laws deprive sexual minorities of basic human rights and promote inequalities in those countries. If laws are in place against sexual minorities, this discriminates against this small group in society and makes them unequal to their peers who identify as heterosexual. This has led to increasing international and domestic pressure to repeal such discriminatory laws, with partial success but also setbacks.

It is difficult to ascertain what percentage of the population may be homosexual. The Kinsey report in 1948 stated that ten percent of the American population were gay,<sup>12</sup> though modern studies suggest that this figure is actually much lower.<sup>13</sup> In the United Kingdom a recent estimate concluded that about six percent of the population are lesbian, gay or bisexual.<sup>14</sup> The failure of governments to monitor and identify these groups is itself an indication of the lack of official concern. However, it must be stressed that concern with the equal rights of sexual minorities must not depend on the numbers. Regardless of the proportion of LGB persons in the general population, each person with a dif-

ferent sexual orientation still needs equality before the law, and should be treated equally. Still, when one considers the high number of countries that prosecute homosexuality, the scope of the problem is all the more worrying, and it is critical that the campaign for equality and decriminalising homosexuality continues internationally.

It should be noted that there is a difference between those countries which prosecute only gay men and countries which prosecute both gay men and lesbians. This is partly due to the basic definition of “sodomy”.<sup>15</sup> Amnesty International points out that the limitation of the criminalisation of same sex conduct to men has the perverse effect of perpetuating the view that women are not sexual beings under the law. It is said that the British Queen Victoria refused to sign the Bill outlawing homosexuality against women as well as men because she did not believe that lesbianism existed! Treating women as objects and not subjects of the law can legitimise gender inequality and perpetuate gender violence.

### **Origins of Criminalisation: British Colonialism and “Sodomy” Laws**

To fully comprehend the reasons for which so many countries still criminalise homosexuality, it is relevant to examine the origins of such laws. Currently 42 countries, that is over half of the countries which maintain criminal sanctions against homosexuals, are former British colonies. In the colonial period, very strict anti-“sodomy” laws were imposed on all the colonies of which Britain took control. Before the effects of colonialism can be discussed, it is important to look at why Britain had originally decided to introduce such strict laws. This article does not aim to give a full account of the history of “sodomy” laws, but only highlights a few points that are deemed relevant to the cam-

paign for equality between sexual minorities and sexual majorities.

The Bible may be the starting place for looking at the origins of homophobic laws, because it served as the basis of medieval law-making on the subject. In Britain of the thirteenth and fourteenth centuries, the Bible was taken as authoritative guidance for setting the law of the land. The most explicit Biblical mention of same-sex intercourse was in Leviticus 18:22 (“Do not have sexual relations with a man as one does with a woman; that is detestable.”) and 20:13 (“If a man has sexual relations with a man as one does with a woman, both of them have done what is detestable. They are to be put to death; their blood will be on their own heads.”).<sup>16</sup> There is also a mention of unnatural acts in Romans 1:26-28 urging that men and women should only sleep with each other and never give in to unnatural lusts to have intercourse with one another. The word “sodomy” comes from the tale of Sodom and Gomorrah, in Genesis 19, where God sent angels to the city of Sodom to see if it was as detestable as Gomorrah. The story of Sodom has been interpreted in a way making same-sex intercourse at least part of the reason for the destruction of the city to punish its citizens for their sins.

There are as many interpretations of the Scriptures as there are readers, but most interpreters have read the passages referred to above as implying negative views of “sodomy”. The Christian rulers put these interpretations into Canonical and common law, developing the doctrine over centuries. While the Christians were codifying these laws, “sodomy” was never deemed to be something that one could consent to, and therefore “sodomy” laws did not take consent into account when delivering sentence: all “sodomy” was regarded as rape. Age did not play a part in this either, and anti-“sodomy” laws

were often coupled with crimes of bestiality and incest.

The first legal appearance of criminalisation was in a treaty called Fleta written in 1280 that stated:

“Apostate Christians, sorcerers, and the like should be drawn and burnt. Those who have connections with Jews and Jewesses or are guilty of bestiality or “sodomy” shall be buried alive in the ground, provided they be taken in the act and convicted by lawful and open testimony.”<sup>17</sup>

This provision was reiterated in the 14th Century by a treaty called Britton, which also stated that sodomites among other people should be publicly convicted.<sup>18</sup>

However, it was not until the reign of Henry VIII (1509-47) that common and Canonical laws against “sodomy” were codified.<sup>19</sup> When Henry decided to break away from the Catholic Church, much of the country’s common law needed to be changed, having been founded in Catholic law and implemented by Catholic courts. The original Acte for the punysshement of the vice of Buggerie which Henry passed was repealed by Mary I as she felt that “sodomy” should lie still within the jurisdiction of the church. However, Elizabeth I re-enacted this law in the Buggery Act 1563. There were many writers opining upon “sodomy”<sup>20</sup> at that time, with one of the strongest commentaries coming from Edward Coke who stated:

“Buggery is a detestable, and abominable sin, amongst Christians not to be named. ... [It is] committed by carnal knowledge against the ordinance of the Creator and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast”.<sup>21</sup>

It was not until the 19<sup>th</sup> Century that section 61 of the Offences Against the Person Act 1861 replaced the death penalty for buggery with ten years' imprisonment.<sup>22</sup> The gay population, using the utilitarian ideas of the philosopher Jeremy Bentham, pressed for this reform. Bentham had argued that homosexuality does not weaken men, society or the marriage of women.<sup>23</sup>

This liberalisation of views did not, however, extend to the colonies. Throughout the 19<sup>th</sup> Century, those who administered the British Empire felt that there was a need to correct and Christianise the "native" customs of the colonies under their control.<sup>24</sup> One aspect of this process was the codification of colonial laws, to reflect the decisions of their colonial masters. India was the first country to have a codified criminal law imposed on it by the British. Indian codified laws were first published in 1860.<sup>25</sup> Section 377 of the Indian Criminal Code provided that sodomites would be punished by sentences of up to life imprisonment. The Indian Criminal Code included explanatory notes to clarify that penetration was needed in order to characterise an act as "sodomy", and that it was irrelevant whether or not semen was ejaculated. It should be noted that in the initial drafting of this section, there was a differentiation between acts committed with or without consent, but this was changed before the final version was agreed. Section 377 provided:

**"Unnatural offences:** Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine."

**"Explanation:** Penetration is sufficient to constitute the carnal intercourse

necessary to the offense described in this section."

Although slightly different codifications were produced in various colonies, every one of them introduced a clause against "sodomy", which was seen as a "uniform feature of British imperial rule".<sup>26</sup> Section 28 of the Queensland penal code (also referred to as the Griffith Penal code of Queensland) included a subsection providing that anyone who allowed another person to have sexual relations with someone else of the same sex would also be prosecuted.<sup>27</sup> There were similar provisions in other Australian states, as well as in Papua New Guinea and in the African colonies of Kenya, Nigeria, Tanzania and Uganda. These provisions are still in force in all of these countries today, apart from Australia.

Other colonial empires around the world did not implement "sodomy" laws during colonisation. At roughly the same time, the French Empire was also growing. But interestingly, none of the French colonies introduced anti-"sodomy" laws. In fact, Napoleon ensured that any existing "sodomy" laws were repealed during colonisation. "Sodomy" was abolished as a crime in France when a new penal code came into force in 1810. This code did not have a clause on "sodomy". The Netherlands, another colonial power, had repealed their "sodomy" laws already at the end of the 18<sup>th</sup> Century.

The former British colonies generally kept the prohibition of "sodomy" after decolonisation in the 1950s and 1960s. Ironically, this happened at the same time as Britain started a major move towards equality for sexual minorities. Governments of former colonies said they would not contemplate following Britain's footsteps and repeal criminalising laws, on grounds such as "The population is

not ready” and “Reform on this subject is not a priority”.

The 1950s saw the first improvement to sexual minority rights in the UK that had a positive effect worldwide. The Wolfenden Report published on 4 September 1957 looked into homosexual offences and discussed whether or not these provisions should still be enforced. This was the first step forward since the repeal of the death penalty for “sodomy”. The report concluded that homosexual acts should no longer be a criminal offence and stated that this matter belonged in “[the] realm of private morality and immorality which is, in brief and crude terms, not the law’s business”.<sup>28</sup> At the time, there was significant social pressure to retain the criminal prohibition of homosexual acts. It was only after ten years of heated debate and many amendments that in 1967 homosexual acts were legalised in England and Wales.<sup>29</sup> However, there was still a discriminatory age of consent for same sex relationships that was not equalised with that of heterosexual relationships until 2001.<sup>30</sup> Scotland took 13 years to follow England and Wales and did not change her anti-gay laws until 1980, when the Criminal Justice (Scotland) Act 1980 was passed. Homosexuality was now decriminalised throughout Great Britain. This was a major step forward for equal rights, though not by any means the end of the battle. When a country legalises homosexuality, there may still be a strong legacy of homophobia entrenched in the community, and thus, there is a need for another difficult campaign.

The 1980s saw the introduction, by a Conservative government, of Section 28 of the Local Government Act 1988 which stated:

“(1) A local authority shall not—  
(a) Intentionally promote homosexuality or

publish material with the intention of promoting homosexuality.”

Allegedly this section was brought in because the Conservative government felt that the standard nuclear family unit was the best type of family for the economy. Although equality in the classroom with respect to sexual minorities is outside the scope of this article, it is evidently the case that this clause had major repercussions on equality for young people who identified as homosexual. In England, this section was not repealed until 2003.<sup>31</sup>

### **The Role of International Jurisprudence in Pressing for Decriminalisation**

It was only through pressure from the courts that the law for one part of the United Kingdom, Northern Ireland, was changed. The case of *Dudgeon v the United Kingdom*<sup>32</sup> was one of four cases decided within a 30-year time frame in international jurisdictions that had significant influence on the repeal of homophobic legislation. It is interesting to examine the reasons why each of these cases was decided in a positive light towards homosexuality. These cases can be compared with more recent cases that failed to advance the gay rights movement.

The European Court of Human Rights decided the case of *Dudgeon* in 1981, at a time when Northern Ireland still had “sodomy” laws that had not been altered since the 19<sup>th</sup> Century; nor had Northern Ireland legislated to accept the recommendations from the Wolfenden Report, possibly due to the greater influence of the Catholic and Protestant churches in that country compared to the rest of the UK. *Dudgeon* argued that Article 8 of the ECHR, which protects the right to a private and family life, and Article 14, which prohibits status discrimination, should apply

to same sex conduct. The Court held in favour of Dudgeon and stated that there had been a breach of his rights under Article 8. The right to a private family life included private sexual relations and therefore not extending this right to homosexuals resulted in a breach of this article. As this was definitive, the Court saw no purpose in examining Article 14. It can therefore be said that Article 8 was interpreted to imply full equality in terms of sexual orientation. This case represented a leap forward for the gay rights movement across Europe, since the ruling applied to all countries that had ratified the ECHR.

The next case that could be argued to have had an even wider impact is *Toonen v Australia*.<sup>33</sup> This case was heard by the United Nations Human Rights Committee, as there had allegedly been certain breaches of articles of the ICCPR. The complainant communicated to the Committee that sections 122(a) and (c) and 123 of the Tasmanian Criminal Code did not comply with articles 2(1) and 26 of the ICCPR which deal with discrimination and article 17 which deals with the right to privacy. The Tasmanian Criminal Code outlawed various forms of sexual contact between men, including between consenting males. The complainant therefore argued that certain sections breached his right to privacy as well as being discriminatory. The Committee noted that apart from Tasmania, every other state in Australia had already repealed laws concerning "sodomy". The Committee decided the case solely on the basis of the right to privacy and, like the European Court of Human Rights, did not feel the need to decide the case on grounds of an infringement of the right to equality. Article 17 of the ICCPR was now affirmed to extend to sexuality as an aspect of private life. Recently, the United Nations High Commissioner for Human Rights, Navi Pillay, stated that this case was ground-breaking and it has prompted

30 different countries to start to change their laws in regards to homosexual acts.<sup>34</sup>

Chronologically, the next case that had a strong impact on the repeal of "sodomy" laws around the world was *Lawrence v Texas*, decided by the United States Supreme Court in 2003.<sup>35</sup> At the time of this judgment, there were still thirteen states in the U.S which enforced "sodomy" laws. In the case of *Lawrence*, two men had been found in an apartment bedroom together by police and were charged with committing illegal homosexual acts. Although this was only a misdemeanour (a minor criminal offence), it would still have resulted in a criminal record as a sex offender. Interestingly, Mr Lawrence initially contacted lawyers because of the way he had been treated: he had been arrested, even though the maximum penalty for "sodomy" was a fine of \$500. He pleaded guilty but at the same time challenged the validity of "sodomy" laws as being contrary to the Equal Protection Clause in the U.S. Constitution. The Supreme Court began by examining the case of *Bowers v Hardwick*<sup>36</sup> decided in 1987 that had similar facts to those of *Lawrence*. *Bowers* did not change "sodomy" laws, and in that case it was held that "sodomy" laws had been a large part of American history and did not violate any part of the Constitution. The approach taken in *Lawrence* was different from that of *Bowers* and put forward personal liberty as the decisive consideration. The Court noted that originally "sodomy" laws had been used to prosecute rapists and any act where there was a lack of consent because of a particular reason such as age. In the present case, there had been no issue of consent as both participants of the act had freely consented and were past any age where maturity would have needed to be considered. This case took into consideration *Dudgeon* and also made reference to the Wolfenden report. By a vote of 6-3 the Su-



preme Court decided in favour of Lawrence, and consequently struck down the Texas law prohibiting homosexual conduct. This case affirmed that it was unconstitutional to discriminate against homosexuals anywhere in the United States.

The most recent landmark case with a potentially huge impact on decriminalisation is that of *Naz Foundation*, which has overruled “sodomy” laws in India.<sup>37</sup> In 2005, a group called Voices against Section 377 published a report setting out the many flaws of this notorious clause from the Indian Criminal Code. First of all, the report stated that a human’s sexuality is an integral part of who they are and not something that can be consciously changed. Voices against Section 377 also argued that Section 377 of India’s Criminal Code did not identify sexualities but only the sexual act, thus dehumanising many individuals.<sup>38</sup> It was only a few years later that the validity of Section 377 was challenged in the Indian Courts. It was brought to court by the Naz Foundation, an organisation that helps support people with HIV/AIDS. Section 377 prevented the state from taking effective action against the HIV/AIDS epidemic in respect of gay men. The Ministry of Health and Family concurred with the arguments of the Naz Foundation. The Ministry of Home Affairs, opposing the Naz Foundation position, put forth many concerns about repealing this section, including the fear that homosexual rape would thereby not be a crime, nor would any actions surrounding sexual activities with children. In its landmark decision, the High Court of Delhi declared that section 377 of the Criminal Code did not extend to prohibiting consensual same sex conduct among adults.<sup>39</sup> In this judgment, the Court was concerned not only with the right to a private family life, but – remarkably – also with the right to equality. The Court held that applying section 377 to consenting homo-

sexuals was in breach of Article 14 (equality before the law) and Article 15 (prohibition of discrimination) of the Constitution of India. The court made reference to the Equal Rights Trust’s Declaration of Principles on Equality.<sup>40</sup> This was deemed to be “the current international understanding of Principles of Equality”. This case was an important victory for gay activists and sexual minorities.

In response to the *Naz* judgment, Amnesty International commented:

“The decision is a significant step toward ensuring that people in India can express their sexual orientation and gender identity without fear or discrimination. This British colonial legacy has done untold harm to generations of individuals in India and across the Commonwealth.”<sup>41</sup>

The “sodomy” laws that *Naz* repealed were direct remnants from British colonialism. Hopefully, many other countries which still have these “sodomy” laws in place will be able to look at the reasoning in *Naz* and apply it to their statute books.

At the time of writing, the *Naz* case is being tried at the Indian Supreme Court. During the hearings, the Ministry of Home Affairs referred to homosexuality as unnatural and immoral.<sup>42</sup> The decision that will come out of the Supreme Court will have a major impact not only on the validity of section 377, but on “sodomy” laws worldwide.

In terms of repealing anti-homosexual legislation, South Africa is a very special case, as the laws concerning homosexuality were affected by the country’s first democratic constitutional Bill of Rights, which explicitly included a clause banning discrimination on the grounds of status including sexual orientation.<sup>43</sup> Many countries look at this con-

stitution in awe.<sup>44</sup> South Africa later became the first country in Africa and only the fifth in the world to allow same sex marriage.<sup>45</sup> In 2007, Desmond Tutu, the Archbishop of Cape Town, gave a very powerful interview to BBC Radio 4 where he stated: "If God, as they say, is homophobic, I wouldn't worship that God."<sup>46</sup> A different view has been taken by influential clergy in other African countries, supported by evangelical American Christian groups.

From the cases noted above, it is evident that there has been much progress in the movement for equality of sexual minorities. Hopefully these cases will set precedent for other countries. The case of *Toonen* has global jurisdiction, so should be followed by all the countries which have ratified the ICCPR. Unfortunately there are still many countries, predominantly in Africa and Asia, which have not made any progress toward equality for sexual minorities.

### **Africa and Asia**

The majority of countries in Africa and Asia still have legislation in place prohibiting homosexuality. The report stated that in Africa this status quo was partly due to the culture introduced by Europe during colonialism, and that before the colonial era, African cultures were characterised by a very high tolerance towards homosexuality. On the other hand, many parts of Asia as well as most of the Middle East are under the influence of Islam. Islamic Sharia Law, based on the Qur'an which also tells the story of Sodom and Gomorrah, is harsher on certain grounds such as private family relationships, as compared to Christian Law. For instance, women who are raped must provide four male witnesses – otherwise the Sharia courts may deem the act to be adultery, resulting in the woman being punished, in-

cluding in some cases by stoning to death. However, it must be emphasised that the majority of countries which criminalise homosexuality today are Christian countries.

In Africa, there are strong evangelical Christian movements, supported by American fundamentalist Christian groups, which campaign vigorously against homosexuality. Robert Mugabe, the President of Zimbabwe, is one of the best known figures at the front of the homophobic movement. Recently, Mugabe criticised David Cameron for supporting gay rights and referred to him as "satanic".<sup>47</sup> Mugabe also made this speech in 1997 at Zimbabwe's annual independence celebrations stating, when referring to "sodomy", that:

"If dogs and pigs do not do it [homosexual acts], why must human beings? We have our own culture, and we must re-dedicate ourselves to our traditional values that make us human beings."

Later, Mugabe apologised to dogs and pigs for comparing them to homosexuals! In 2006, laws were passed in Zimbabwe providing that any actions such as holding hands or kissing someone of the same sex were a criminal offence. Canaan Banana, former President of Zimbabwe, was convicted of homosexual assault and sentenced to ten years' (nine suspended) imprisonment. Banana argued that "sodomy" laws were contrary to constitutional principles, and that no individual should be criminalised because of their sexual orientation. When highly regarded political figures are sentenced on the basis of "sodomy", it brings such laws into the public sphere and initiates much controversial debate around the subject. This can be seen in the recent prosecution of Anwar Ibrahim, leader of the opposition in Malaysia, on the charge

of “sodomy”. Recently, Anwar was acquitted of such allegations. This has led to Malaysia contemplating the repeal of the “sodomy” section of the Criminal Code which Anwar had been accused of breaching.<sup>48</sup>

In Uganda, there have been major setbacks for sexual orientation equality. On 26 January 2011 David Kato, who was described as “the most outspoken gay rights advocate in Uganda”,<sup>49</sup> was brutally murdered. This is a result of the aggravated homophobic culture which had been brought over by America’s extremist Christian right wing religious groups. The media have also played a large role in encouraging homophobia throughout Uganda. One paper published an article that named many gay rights activists, including David Kato, calling for all of them to be hanged.<sup>50</sup> A bill proposed in the Ugandan Parliament aims to punish aggravated homosexuality, which includes either repeated offences or the act of engaging in homosexual intercourse when one party has AIDS.<sup>51</sup> This bill was “shelved” in May 2011 by the parliament after strong pressures from around the world but was brought back for debate at parliament in October of the same year. It would also result in imprisonment for any “promotion of homosexuality” and any failure to notify the authorities of any homosexual acts that someone may know about.

There have been many international pressures trying to stop this bill, including from non-governmental organisations. For example, The Equal Rights Trust (ERT) wrote to the President of Uganda, calling for this bill to be rejected in its entirety, as well as to review current section 146 of the Ugandan Penal Code that criminalises homosexuality.<sup>52</sup> ERT firstly noted that this bill is contrary to the Ugandan constitution, especially Article 21 that relates to equality and non-discrimination. ERT went on to analyse the

obligations of Uganda under important international treaties including the ICCPR and the ICESCR which cover sexual orientation as a protected status. However, at the end of 2011 the Ugandan President, Yoweri Museveni, controversially stated that he cares much more about improving the railways of Uganda than improving equality for different sexual orientations.<sup>53</sup>

Evidently there is a vast difference in where some of these countries stand on LGB equality. Overall there has been progress, but countries such as Uganda demonstrate that there is still much advocacy and campaigning to be done to create the pre-conditions for equality.

### **The Present-Day Dynamics**

The United States Government would probably hope to see itself as the pioneer for gay rights around the world. President Obama issued a statement of condolences soon after David Kato’s brutal death, saying that the United States highly regarded his work in championing gay rights. Soon afterwards, he repealed the infamous “Don’t Ask, Don’t Tell” policy that had been applied in the military for many years. Gay people in the armed forces now have the right to be open about their sexuality without facing any negative consequences. The state of New York introduced same-sex marriages in 2011. Finally, President Obama declared that the U.S. may withhold aid from countries that persecute homosexuals, and he hoped that this would influence countries to change their laws. A similar statement as also been made by the UK Prime Minister David Cameron.<sup>54</sup>

In response to this threat, Malawi has stated that it would review the “sodomy” clauses within its Penal Code. However, other countries including Ghana, Uganda and Zimbabwe

have expressed strong reluctance to repeal any “sodomy” laws and have condemned western conditionality “bullying”. John Nagenda, advisor to the Ugandan President, summarising the Ugandan government reaction to these threats, stated that tactics used by the United Kingdom were reminiscent of colonialism and reminded the United Kingdom that Uganda was now a sovereign state and will not have bigger nations dictate policy.<sup>55</sup> Ghana has followed closely with Uganda and also referred to the threats as bullying. A government spokesperson stated that Ghana would not compromise morals for money.<sup>56</sup> Importantly, local LGB activists and organisations have expressed their frustration with western tactics of gay rights conditionality. Many of them have recently argued that trade sanctions with the purpose of promoting gay rights will only segregate sexual minorities even more, and that if the aid cuts do go ahead this would affect the most vulnerable, many of whom may be homosexual.<sup>57</sup>

Soon after the statement by President Obama, on 6 December 2011, U.S. Foreign Secretary Hillary Clinton made a speech in Geneva to diplomats from around the world. She stated that although gay people may commit crimes, it should never be a crime to be gay. She went on to insist that gay rights are human rights, and that every country should take active steps to repeal any legislation in place which is discriminatory to people of different sexual orientations.<sup>58</sup>

Elections in Jamaica also brought gay rights into the headlines. The Jamaican Labour Party had been accused of homophobia that included “misogynistic and violent rhetoric”,<sup>59</sup> while the party that won the election, the People’s National Party, was explicitly in favour of repealing discrimination laws. Portia Simpson-Miller, the Prime Minister-designate, stated: “No one should

be discriminated against because of their sexual orientation”.

On 9 January 2012, the Pope gave a speech to the diplomatic corps at the Vatican in which he spoke strongly in favour of traditional family units being the best environment to bring up children.<sup>60</sup> This has been interpreted in two different ways. For example, *Pink News* has reported that the Pope stated that gay marriage is a threat to the future of humanity<sup>61</sup>, whereas a blog in the *Guardian* noted that the only relevant statement he made was that “policies which undermine the family threaten human dignity and the future of humanity itself” and that there was no explicit reference to gay marriage.<sup>62</sup> The Pope might not be in favour of gay marriage itself, but could this be a step forward that the Pope may be making in terms of gay rights by not explicitly criticising homosexuality?

2011 also marked steps toward sexual orientation equality by the United Nations. In June of that year, the UN General Assembly adopted a resolution which expressed grave concerns over the violence and discrimination against persons due to their sexual orientation or gender identity.<sup>63</sup> It called for all of these abuses to be documented. In December 2011, the United Nations published its first ever report specifically on sexual orientation. The report concluded that “Governments and intergovernmental bodies have often overlooked violence and discrimination based on sexual orientation and gender identity”.<sup>64</sup> This document reiterates that gay people should not face any form of criminal sanctions, and encourages all states to make sure that equality for sexual minorities is included in the political agenda.

It should be noted that recent developments in the United Nations have been influenced by the Yogyakarta Principles<sup>65</sup>. Although this

document has not been in the press often since it was launched in 2007, it has had and continues to have a substantial impact on the gradual acceptance of the issue at UN institutions, and indirectly – on the life of sexual minorities. These principles do however focus on more than just decriminalisation, and summarise many fundamental human rights, explicitly applying them to sexual minorities. One of the important references to these principles has been in the *Naz* case judgment, where Principle Two stating that no country should criminalise homosexuality was relied upon.

In addition to the Yogyakarta Principles, the Declaration of Principles on Equality adopted on the initiative of The Equal Rights Trust in 2008<sup>66</sup> adds substantial weight in to the legal basis for calling for all countries to decriminalise homosexuality. This document is relevant to sexual minorities' equality through providing general legal principles on equality from a unified human rights perspective, covering all protected ground of discrimination. Both documents should be made use of in campaigning for decriminalisation.

Of course, the battle does not stop once a country has decriminalised homosexuality.

Although this is the most important and urgent fight, even after it has been won, it will not result in equality for sexual minorities. Whilst it is outside the boundaries of this article, there are many campaigns for equality for sexual minorities carried out globally at present, including for equal marriage, family rights such as adoption, and equal rights in terms of the age of consent, which in many countries is different between heterosexual and homosexual relationships.

In conclusion, it is evident that there is much variation in countries around the world in respect to their stance on criminal sanctions for people who have different sexual orientation from the “norm”. This raises old but important questions of sovereignty, in the context of human rights and humanitarian conditionality, as well as questions as to how much influence the various international documents actually can have on states that criminalise homosexuality. The backlash from some African countries has shown that there is still strong resistance. But the growing international movement developing in the spirit of the Yogyakarta Principles and the Declaration of Principles on Equality, both of which draw on the international bill of human rights, is now unstoppable.

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1 Josh Hepple is completing his third year as a law student at the University of Stirling, Scotland, and is active in projects related to human rights and equality.

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3 See article by the Director of Amnesty International UK, Allen, K., “Love Is A Human Right”, *The Guardian*, 17 May 2008.

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5 Article 2 of the UDHR states “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty” (Universal Declaration of Human Rights, G.A. Res. 217A (III) (1948)).

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# SPECIAL



*“There has been, and continues to be, a pattern of disproportionality in the use of exclusions, impacting adversely on certain ethnic minority groups and special education needs pupils, many of whom are disabled.”*

*Brenda Parkes*



# Mutable Meanings: Gender Equality in Education and International Rights Frameworks

Elaine Unterhalter<sup>1</sup>

Gender equality in education has considerable prominence in a wide range of international treaties and declarations, encompassing those concerned with human rights, gender equality, the expansion of education and the reduction of poverty. Despite this, however, it has not been easy to realise gender equality in education at the national and local level in many countries. Although statistics on rising numbers of girls and boys enrolling in school and the improvements in attainment by many girls suggest large steps towards equality, these often mask persistent inequalities in which gender features prominently. This article examines why the international frameworks relating to gender equality in education are so difficult to realise. The discussion draws mainly on data collected from a three year research project in Kenya and South Africa on how international frameworks concerned with poverty, gender equality and education were negotiated in a range of local settings.<sup>2</sup> The first part of the article reviews different ways in which gender equality in education can be understood, and associates these with contrasting approaches within the relevant international frameworks. The second part distinguishes between: (i) those international frameworks that work with a very restricted notion of gender equality and education, and (ii) those which deploy a more expansive meaning. In the third section some of the findings from a research study in Kenya and South Africa

are presented in order to demonstrate which features of the conventions and declarations are implemented in different sites, highlighting how the conceptual distinction between different meanings of gender and equality and forms of international framework have a bearing on the forms of implementation.

## 1. Conceptualising Gender Equality in Education

The very ubiquity of concern with gender equality in education masks considerable conceptual confusion with regard to what is meant by gender inequality and equality and the particular sense of education that is evoked.<sup>3</sup> At least four different frameworks can be distinguished and a number of metaphors are useful for analysing the different relationships at play within each.

Firstly, in thinking about education as enrolling in school, attaining literacy or completing a phase of study, one can conceptualise education as “a line”. This has similarities with views of poverty as a particular level of earnings or consumption. Thus one can count the numbers of women and men, girls and boys, which are above or below an education attainment or poverty line. The UNESCO Global Monitoring Report draws directly on this notion in understanding education as those who are above or below a distributional level of two or four years at school.<sup>4</sup> These ideas

about education and poverty work with an understanding of what I have called “gender as a noun”.<sup>5</sup> In this view, gender is a descriptive identification of numbers of girls and boys in or out of school, or achieving particular grades or levels of employment. Using this approach, gender equality in education can be understood as parity, that is equal numbers, and gender inequality as the number of girls as a proportion of the number of boys in any particular phase of schooling or form of attainment. What this very limited notion of equality misses out is the structural relations of power and inequality in a range of political, economic, social and cultural spheres, and the many connected sites in which equality needs to be realised. Despite this very limited meaning of “gender as a noun” (i.e. education as attainment at school, and equality as sameness or parity), this is the meaning most often deployed in some widely used international frameworks as discussed below.

A second way to think about gender is one which draws out the interconnections of relationships associated with power and meaning in different sites, both between men and women, and girls and boys. This is linked with a view of education that is wider than that limited to years of enrolment in school or attainment in particular tests. It explores how schools and processes of learning operate both to reproduce and to transform inequalities. This approach highlights the way in which (i) the curriculum is gendered, (ii) particular assumptions are made by teachers and managers about what kinds of knowledge are appropriate for girls and boys, and (iii) there are subjects defined as being either those which girls are “good” at or those which they are not. This approach notes the ways in which girls are channeled into lower status subjects and career paths. Many studies of textbooks document how they are com-

PLICIT with the reproduction of stereotypes about women and men, while key works look at the question of learning in terms of how school relationships might be complicit with gender based violence.<sup>6</sup> This view of gender and schooling resonates with discussions of poverty, where what is noted is not a particular level of earnings, but rather the structural relationships of subordination, exploitation and exclusion. I have referred to this as the notion of poverty as “a net”. Relationships at school may also be interwoven within such a net. This is a net in which the economic relations of survival, including the sexual division of labour in the household, mean that, despite what may open up at school, it is difficult to transform gender relationships which are enmeshed with particular relations of production concerning the kinds of work that are available for women and men. In this type of analysis, gender is understood as a feature of interconnected household, community and national power relationships. I have termed this “gender as an adjective”; an attribute of the relationships of power which form structures of inequality.<sup>7</sup> Hence gendered relationships in schools articulate with wider relationships in both meanings of the term. The boundaries and networks that discursively form the net of poverty or schooling (and speak or articulate it) are as much constituted by coercive economic and political relations as by inequality maintained over generations associated with divisions of race, ethnicity, caste or location (which are all connected). Gender equality in education is thus a process of both naming and changing the relationships of inequality, which is undertaken in the knowledge that schooling is a necessary, but not a sufficient, process to ensure that this is achieved.

A third way to think about the relationship between the concepts of gender, equality, inequality and education is associated with

the ways in which gender is discursively formed and reformed in language and action. Discourses, evident in policy, media, and everyday talk, set limits on how it is possible to think and act with regard to gender relationships, identities and the possibilities of change. In writing about poverty, I have drawn attention to the way in which one can think about poverty as “a fuel”, using two meanings of the word fuel.<sup>8</sup> Fuel is what can propel you forward, energise, and result in an activism that can move an individual or a community out of poverty. But a fuel, such as petrol, is also a toxin. Some forms of identification evident in studies of the “voices of the poor” are associated with adaptive preference and satisfaction with very little education. Some studies report that poor women think that because they are poor they are stupid. These forms of enactment of poverty, just like crime and violence as the forms of survival, are often toxic for the poor. Anger at a certain ascribed gender identity could propel a community, or groups of girls or boys, out of poverty or lack of schooling. It could also, however, take the form of “acting out” dangerous gender identities associated with masculinity and femininity of toughness, rejecting schooling and inflicting harm. I have referred to these processes as entailing “gender as a verb”. It may be that girls and boys repeatedly act out and consolidate particular gender identities at school. This may happen because they are trying to use school as a platform to escape from particular identities and relationships, to cross the borders or cut the mesh of “the net”, or because they accept that schools are “good enough” because they are poor and hence “deserve” no better. From this standpoint, gender equality in education is about setting the conditions and processes that allow people critically to review processes and to act in relation to their own wellbeing.

The three different approaches to thinking about gender equality and education may each be useful, but when applied in isolation, each is limited. The three approaches to thinking about gender equality in education need to complement each other and there is therefore a need for a fourth framework which is associated with capabilities and empowerment.<sup>9</sup> Gender inequalities in education are multidimensional. They involve crossing the line of enrolment or attendance. Formal gender equality may well be in place in the public space of the school and visible in figures on enrolment and attainment, observations of teacher engagement with pupils and analysis of learning materials. Much gender inequality, however, is associated with informal school spaces, private relations within families and public inequalities in the labour market or particular institutions. Forms of co-operation and conflict within households, and deeply entrenched codes of behaviour confirmed by legal and economic frameworks often relate to who takes care of small children, the sick, the disabled and the elderly, and how heteronormative social interactions between young people play out. These all shape the forms of opportunity which schooling may guarantee. Formal gender equality in schools may co-exist with widespread media representation of inequality or the tenets of religion or legal frameworks which limit the mobility of women or their capacity to own or inherit property. Overt or covert condoning of violence against women can also undermine or render fragile the achievements of gender equality in education institutions. Gender equality in the public sphere of the school may contribute to shifting some of the gender inequalities of the private sphere or certain public institutions, but its capacity to do this without shifts in other areas of social, cultural, political and economic relations is limited. This becomes an even more intense

struggle in countries where large proportions of women and girls do not attend or complete school. Thus concern with equality understood in terms of girls and boys crossing a line need to be complemented by a meaning of equality which entails changing the “netlike” relationships of inequality and eradicating the destructive “fuels” associated with particular forms of femininity and masculinity. This multi-dimensional notion of equality may be called “empowerment” for shorthand, but this idea still lacks a coherent institutional form or clear indicators to monitor progress. In synthesising some recent work on empowerment and education, I have tried to draw out the importance of thinking about empowerment in relation to multiple institutional locations and critical professional discussion in order to realise the potential for gender equality in education. Among the many processes entailed would be addressing (i) the problem of labour market segmentation, (ii) political, cultural and social exclusions, (iii) girls’ and boys’ adaptive preferences, (iv) limited information flows, and (v) the importance of both intellectual and political alliances.<sup>10</sup>

These four different approaches to thinking about gender equality and education can be usefully deployed when looking at the existing international frameworks.

## **2. International Frameworks and Gender Equality in Education**

In reflecting on ten years work in taking forward the international framework associated with the Millennium Development Goals (MDGs) – in which concern with gender and education feature, as discussed below – Charles Gore has drawn attention to the Faustian bargain which the framework represents. He argues that it represents a shift from a “procedural conception” of interna-

tional society with a “common respect for a set of rules, norms and standard practices”, such as those associated with the Universal Declaration of Human Rights (UDHR)<sup>11</sup> or the Beijing Declaration and Platform for Action<sup>12</sup>, to a “purposive conception”, where the stress is on a “co-operative venture to promote common ends”.<sup>13</sup> For Gore, a “procedural conception” entails a maximalist view of development in which aspects of equality and flourishing are goals for rich and poor countries. Conversely, a “purposive conception” is associated with a minimalist view, which ensures that the most deprived cross a threshold of adequate provision. This might mean earning a dollar a day or completing a primary cycle of schooling.

By implication, both the procedural and the purposive approach face a problem relating to the nature of the social contract that underpins them. The more demanding the social justice content of the procedural approach, the more difficult it becomes to secure full human rights or gender equality through agreements at all levels, from multinational conventions, to national governments, down to local assemblies. The more minimal the purposive agreement, the easier it might be for governments to sign up and follow through with action. However, this begs the question of whether governments are able to implement purposive agreements and how these are understood at the sub-national level. This point is often made in relation to the difficulties of realising the MDGs in many countries in Africa, which came to the project in 2000 from a very low base.<sup>14</sup> A separate question is whether the purposive agreements associated with the MDGs represent a wide enough range of ideas of wellbeing and gender equality in education, or whether a more expansive purposive arrangement is necessary and feasible.<sup>15</sup>

The next section reviews certain international frameworks on gender equality and education using Gore's distinction between purposive and procedural approaches, and draws on my own differentiation between the four different frameworks for thinking about gender equality and education.

### 3. Purposive or Procedural? International Frameworks on Gender Equality and Education

In terms of Gore's analysis, the minimal purposive framing of the MDGs represented a shift from the more procedural concerns of the previous frameworks which stressed rights and equality. However, the initial specification of rights in the UDHR is quite close to the first notion of gender equality in education I outlined, with a notion of "gender as a noun" and education as a particular level of school provision. Article 26 of the UDHR sets out the universal right to education, irrespective of gender. It also sets out a universal right to free and compulsory schooling only at the "elementary and fundamental stages"<sup>16</sup> – i.e. crossing a particular line. While technical and professional education are to "be made generally available" and higher education "shall be equally accessible to all on the basis of merit",<sup>17</sup> there is no strong or explicit commitment to gender not being used in an exclusionary way at these levels. Further, the concern to protect the prior right of parents "to choose the kind of education that shall be given to their children"<sup>18</sup> has subsequently been used to rationalise girls being taken out of school early in order that they might marry or fulfil particular duties associated with forms of identification.<sup>19</sup> Thus the fuller understandings of gender equality and education set out in the formulations associated with "gender as an adjective" and "gender as a verb" are not fully addressed in this initial procedural formulation.

However, later international law instruments work with wider understandings of gender and education and set out the procedural vision in greater depth. The International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>20</sup> which came into force in 1976, affirmed "the equal right of men and women to the enjoyment of all economic, social and cultural rights",<sup>21</sup> ICESCR explicitly recognises that free and compulsory education should not be confined just to the primary level as it states that secondary education should be made "generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education".<sup>22</sup> Further, it also sets out the prospect of higher education being made widely available at no cost and "on the basis of capacity".<sup>23</sup> There is a commitment here to the continuous improvement of the material conditions of teachers,<sup>24</sup> and while the rights of parents to choose schools other than those provided by the state are acknowledged to "ensure the religious and moral education of their children in conformity with their own convictions",<sup>25</sup> it is specified that neither this nor any other clauses on the provision of education should be implemented so as to undermine the general specifications regarding education set out in Article 13.<sup>26</sup> Education should be:

"[D]irected to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms (...) that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace".<sup>27</sup>

These clauses attempted to deal with the ambiguity in the UDHR that could be interpreted as sanctioning parents taking adolescent girls out of school because religion required early marriage, or parents choosing, on religious or ethnic grounds, schools that presented a form of indoctrination under the guise of education. ICESCR thus extended considerably the range of education rights and widened the scope of where gender equalities must be seen to interlock. However, it did not deal in any detail with questions of educational content. Thus to some extent it may be seen to be addressing the concerns of the second framework for thinking of “gender as an adjective” and schooling as “a net”, enabling or restricting the protection of rights.

Much more detailed attention to addressing these concerns is evident in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>28</sup> and the Convention on the Rights of the Child (CRC).<sup>29</sup> CEDAW was adopted by the UN in 1979 and has been ratified and/or acceded to by all but seven member states, albeit often with provisos and reservations regarding certain obligations. CEDAW does not explicitly address the question of how much education women have a right to, but it does give more detail on features of gender equitable education. It stipulates that states “shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education”.<sup>30</sup> It also calls for equality in a range of different educational sites including (i) adult education, (ii) career and vocational guidance, (iii) access to the same curricula, (iv) examinations and teaching staff, (v) the elimination of gender stereotypes in textbooks, (vi) access to scholarships, (vii) sport, and (viii) the establishment of special programmes for young women who have left

school prematurely.<sup>31</sup> There is also a particular provision which deals with the importance of access to educational information.<sup>32</sup> Although this is phrased in terms of information with regard to family planning, it has some important implications, as outlined further below.

CRC, ratified by the General Assembly in 1989, is the fullest statement of the nature of rights in education regardless of gender or any other differences. Some of the most notable provisions protect the rights of children to (i) preserve their own identities,<sup>33</sup> (ii) participate in discussions and affirm views,<sup>34</sup> (iii) access through the media to information of “social and cultural benefit”,<sup>35</sup> (iv) protection from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse”.<sup>36</sup> With regard to schooling, CRC affirms that primary and secondary education should be made available and accessible and that measures should be taken to make secondary education free and to support school attendance.<sup>37</sup> Ignorance and illiteracy are also to be eliminated by “modern teaching methods”.<sup>38</sup> With regard to the content of education, CRC envisages education which develops (i) “the child’s personality, talents and mental and physical abilities to their fullest potential” and (ii) respect for human rights and fundamental freedoms,<sup>39</sup> but it does not address in any detail contesting ideas about gender inequality. Thus, ICESCR, CEDAW and CRC – the three UN human rights instruments with the strongest purchase on implementation by member states – while containing full statements on access to education, are much less explicit on the content of that education, the teaching process, and the treatment of children at school, although CRC does have a clear statement on children’s protection from violence. Together, the three treaties



do, however, provide some procedural approaches relating to the second framework for thinking about gender equality in education – “gender as an adjective” and schooling as “a net” of relationships of power.

A further version of the procedural approach has been articulated in a number of declarations associated with women’s organisations and these may be read as versions of the “empowerment” approach which I classified as a fourth framework. The Beijing Declaration and Platform for Action, adopted by virtually every UN member state in 1995, gave particular prominence to the education and training of women in Strategic Objective B<sup>40</sup> and to the concerns of the girl-child in Strategic Objective 12.<sup>41</sup> Under Strategic Objective 2, detailed attention is given to gender equality and women’s rights with regard to access, progression and completion of different levels of schooling, the quality of education provision, particularly content and organisation, and addressing inequities through monitoring and research, building lifelong learning pathways and enhancing women’s participation in leadership and decision-making, access to information, and participation in sport and artistic and cultural arenas. The Beijing Declaration and Platform for Action is the fullest statement of gender equality in education as an international aspiration, but paradoxically, the least implemented.

In 2010 there was an attempt at a conference organised by The UN Girls’ Education Initiative (UNGEI) to update and expand upon some of the gender equality and education vision expressed at Beijing.<sup>42</sup> According to the resulting Dakar Declaration on Accelerating Girls’ Education and Gender Equality (the Dakar Declaration),<sup>43</sup> despite the progress that had been made in enrolments and attainment, “poor quality of education, extreme poverty, structural inequality and

violence against girls continue”.<sup>44</sup> The Dakar Declaration spells out a meaning of gender equity as follows:

“Achieving equity in education will entail putting in place a rights-based empowerment framework that will target the most vulnerable and transform power hierarchies in learning spaces, communities and policy structures in order to give poor and vulnerable girls a voice and ensure that their right to quality education is sustained.”<sup>45</sup>

It then goes on to highlight the need to think about gender in relation to “quality” education in multiple learning environments, to consider the multidimensionality of poverty, and to work on questions of violence against women and girls. The Dakar Declaration concludes:

“We envision a world in which a special initiative for girls’ education is no longer needed — a world in which all girls and boys are empowered through quality education to realize their full potential and contribute to transforming their societies, so that gender equality becomes a reality.”<sup>46</sup>

The Dakar Declaration expresses a full version of the intersecting views of gender, equality and education which I have associated with the empowerment framework, and it is based on a procedural view of global society. Despite being adopted at a UNGEI conference, the Dakar Declaration was subsequently very rarely used by UNGEI.<sup>47</sup> Its procedural empowerment framing did not mesh comfortably with the stress on purposive approaches to international frameworks that had gained in prominence since 2000.

In the period after 1995, the focus of work on gender equality and education carried out by multilateral organisations, gatherings

of governments and the work of NGOs has largely moved away from the expansive vision of the Beijing Declaration and Platform of Action and the more progressive aspects of CRC towards more limited interpretations of gender equality in education drawing on Gore's version of a purposive approach. In 2000, governments, multi-lateral organisations and civil society coalitions signed up to the Dakar Framework for Action, Education for All: Meeting our Collective Commitments (EFA)<sup>48</sup> and the Millennium Development Goals (MDGs). The EFA has six goals, with one explicitly focussed on gender equality and three concerned with aspects of girls' and women's rights.<sup>49</sup> The six goals are:

- The expansion and improvement of early childhood education;
- Access to free, compulsory education of good quality for all children;
- All learning to be appropriate for children and life skills to be included in learning;
- Improvement in adult literacy;
- Gender disparities in primary and secondary education to be removed; and
- All aspects of the quality of education to be improved including measurable learning outcomes.

The EFA gives much more detail regarding education systems than had previously been set out in ICESCR, CEDAW, or CRC, and identifies literacy, quality and learning outcomes as important features of education. With regard to gender equality, however, its vision largely addresses "gender disparities", and apart from its concern with women's literacy and early childhood education, it did not set out a vision regarding how gender equality in education might be understood. It can largely be read as working within the framework of "gender as a noun" and equality as parity, although its concern with some sites beyond school nudges it

slightly towards the second framework associated with "gender as an adjective". However, the stress on monitoring and evaluating the implementation of EFA through particular indicators concerned with gender parity in annual Global Monitoring Reports published by UNESCO made it very difficult for the EFA to be used in relation to a procedural, rather than a purposive, approach.

An even more purposive approach and minimalist understanding was evinced in the MDGs adopted by virtually every government at the UN General Assembly in 2000. The MDGs were organised so that governments could monitor progress towards particular goals against specified targets, each of which was further delimited by an indicator. MDG2 aims to achieve universal primary education. The target entailed that by 2015 all children will have completed primary school. The indicators comprised: (i) net enrolment ratios in primary school, (ii) the proportion of children who complete a primary cycle, and (iii) the literacy rate of 15-24 year old women and men. MDG3 aims to promote gender equality and empower women. The target is to eliminate gender disparity at all levels of education, and the indicators are (i) the ratio of girls to boys in primary, secondary and tertiary education (gender parity), (ii) the share of women in wage employment in the non-agricultural sector, and (iii) the proportion of seats held by women in national parliaments.<sup>50</sup> It can be seen that the MDG targets and indicators move away from the more substantive views articulated in ICESCR, CEDAW, CRC, the Beijing Declaration and Platform for Action and the Dakar Framework for Action, about gender equality which aim to promote human rights and redress stereotypes and violence. These approaches have been replaced with a stress on processing girls and boys through school, the attainment of literacy and employment in

waged work. The MDG framework works explicitly with the notion of “gender as a noun” and schooling and poverty as set by particular kinds of “lines”.

This brief review of the international frameworks relating to gender equality in education highlights a number of trends. Firstly, the tighter the form of legal agreement between states (with ICESCR, CEDAW and CRC representing the most binding instruments), the less detail there is to aspects of education organisation (such as curriculum, teacher training, management, or language policy) that might bear on gender equality. Secondly, the declarations associated with large-scale international convening regarding education – the EFA and the MDGs – give little substantive attention to gender equality, and dilute the idea to no more than gender parity. Thirdly, the more expansive the articulation of a vision of women’s rights and gender equality in education in declarations such as those adopted at Beijing in 1995 and in the Dakar Declaration, the more limited the international, national and local bodies to give them institutional form. In order to show how these processes work in particular country settings, the next section reports some findings from the Gender, Education and Global Poverty Reduction Initiatives (GEGPRI) project. I will refer to the deployment of the different approaches to gender equality and education discussed above and show how difficult the implementation of the more procedural frameworks on the ground has been.

#### **4. Negotiating International Frameworks on Gender Equality and Education in Kenya and South Africa**

The GEGPRI project aimed to examine empirically initiatives engaging with global aspirations to advance gender equality in and

through schooling in contexts of poverty. Between 2007 and 2011, ten case studies were conducted. These comprised six government bodies, namely the Department of Education in South Africa, the Ministry of Education in Kenya, a provincial department of education in each country, and a school in each country in a matched neighbourhood on the edge of a large city serving a poor population. In addition, four case studies were made of non-statutory bodies – an NGO working on questions of poverty and schooling in a rural setting in each country, and an NGO working at the national level engaged in discussions with global networks. The case studies were supported by a number of interviews with staff working on aspects of gender and education in selected global organisations. Research methods comprised documentary analysis (including review of websites and publications over ten years), interviews and focus group discussions (133 hours), observations, field notes, and report back meetings in each research site on preliminary findings. The research was conducted over three years to enable some documentation of change. In all of the research settings, engagements with the global frameworks were examined, and the particular meanings attributed to gender, poverty and education were explored.

Comparative case study allowed investigation of similar processes – such as negotiations with global policy agendas on gender, education and poverty reduction – in somewhat different sites, selected as locations of different levels of engagement with the global policy agenda (vertical comparisons) and different state and non-state formations (horizontal comparisons). Kenya and South Africa were selected as the research settings because both countries had put in place policies to address poverty reduction, the expansion of education provision, and

gender equality, and were active players in relation to the global policy frameworks in these areas.<sup>51</sup> It is notable, however, that the respective situations of these two countries in relation to global policy-making are very different. South Africa is a member of the UN Security Council and the G20, while Kenya has been the recipient of a substantial aid package and is subject to constant international scrutiny regarding corruption and political violence.

South Africa and Kenya are both highly unequal societies, with high Gini co-efficients and large populations of very poor people living close to people who are comfortably off and many who are very wealthy. Both have active women's movements, although their emphases have been different. In South Africa, gender equity has enjoyed policy attention since 1994, although the extent to which it is seen as a priority has fluctuated. In early post-apartheid policy, discussion of gender equity in education expressed an early promise of non-discrimination and equality of opportunity. This orientation has moved through a phase with a stress on gender-neutrality to the current period where gender is often seen as a moral issue closely associated with sexuality. In Kenya, the movement towards more gender equity in policy came from the "bottom-up", through women's rights groups mobilising on a wide range of issues from political leadership to environmental degradation, and from the "top-down", through global institutions engaging in different ways with ruling elites. A gender and education policy was developed in 2007, and gender equity figures featured prominently in the policy language associated with aid relationships. These similarities and differences between the two countries offered the potential for the research to yield rich insight into how the cases did and did not vary.

Both Kenya and South Africa have signed up to a large number of international instruments on gender equality and education. (see Table 1). Prominent political leaders from both countries played a high level role in supporting EFA, and both sent large delegations to the UNGEI 2010 conference in Dakar.

Despite these commitments on paper, however, the statistics highlight areas of concern regarding the realisation of gender equality in education, particularly for the poorest members of society and even in terms of the limited measures associated with measuring gender parity and enrolment. Two measures of enrolment are frequently used. The net enrolment ratio (NER) measures the proportion of the age group required to be in school which is enrolled. The gross enrolment ratio (GER) measures the total enrolment in a specific level of education, regardless of age, and is expressed as a percentage of the population in the official age group corresponding to the level of education. If there are large numbers of overage or underage children at school, the gross enrolment may be over 100%. The Gender Parity Index (GPI) is the ratio of female to male values in NER or GER. If there are equal numbers of women or men, the GPI is 1.00. A GPI of less than 1 indicates there are more men, and a GPI of more than 1 indicates more women.

The gender parity levels in primary net enrolment were equal in Kenya in the early 1990s and in both countries in 2007. In the 1990s, slightly more girls than boys were enrolled in primary school in South Africa, and this is also evident in Kenya in 1999. However, the general trend over this period is for parity at primary level. For secondary education, there is only comparative data on the gross enrolment ratio. It can be seen that in Kenya this is much more in favour of boys than girls, while in South Africa the

Table 1

	Kenya	South Africa
ICESCR	1972	Signed in 1994 but not yet ratified.
CEDAW	1984	1995
CRC	1990	1995
World Declaration on Education for All (1990)	1990	Readmitted to UNESCO in 1994 and filed first report
Beijing Declaration and Platform for Action (1995)	1995	1995
Dakar Framework of Action on Education for All (2000)	2000	2000
Millennium Development Goals (2000)	2000	2000
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)	Party to protocol in 2003	Party to protocol in 2003
African Union Gender Policy	2009	2009

trend is in the opposite direction. Despite relatively good enrolment rates at primary and secondary school in South Africa and at the primary level in Kenya, girls' attainment, particularly for those from the lowest quintiles, is a matter of concern in both countries. Some effects of this can be seen in the adult literacy figures in both countries. Thus although for youth aged 15-24, more young women than men are literate, and young women are a smaller proportion of youth illiterates than young men, in both countries there are high numbers of adult illiterates – nearly 3 million in Kenya and nearly 4 million in South Africa, and in both countries women are a majority (see Table 2<sup>52</sup>).

The many facets of gender inequality in education in each country are apparent in studies of conditions within school concerning discrimination in relation to curriculum,<sup>53</sup> pedagogy,<sup>54</sup> conditions of employment of teachers<sup>55</sup> and head teachers,<sup>56</sup> and gender-based violence in and associated with school.<sup>57</sup> The low educational attainment of the poorest is manifest not only in low test scores and high rates of illiteracy, but also in lack of knowledge regarding how to access health and welfare services. A number of commentators in both countries also draw out how, despite girls' enrolment in school and some high profile women in political leadership, women still earn less than men, struggle to advance gender equality

Table 2

	Kenya	South Africa
GPI primary NER 1991	1.00	1.03
GPI primary NER 1999	1.01	1.01
GPI primary NER 2007	1.00	1.00
GPI secondary GER 1991	0.85	1.18
GPI secondary GER 1999	0.96	1.13
GPI secondary GER 2007	0.88	1.05
Youth (15-24) literacy GPI 2008	1.01	1.01
Numbers 000 (% women) of youth 15-24 illiterate	634 (46.3)	322 (38.9)
Adult (15 & over) literacy GPI 2008	0.92	0.98
Numbers 000 Adults - 15 & over - (% women) illiterate	2989 (64.2)	3790 (55.3)

demands in public and private settings, and have to endure sexist media.<sup>58</sup>

Why, despite the commitment of both governments to many international instruments concerned with gender equality in education has this been so difficult to realise in practice? Looking at the data collected from the interviews and discussion groups conducted by the GEGPRI researchers in different sites, a number of key problems emerge. The first relates to process. Thus, although part of the argument for taking a purposive approach in the MDGs and EFA, was that it was much more achievable, because the process would be simpler and more easily understood than the complex interlocking rights invoked by the procedural approach, in practice the sense of dislocation from the MDG project was just as evident as that often attributed to

more procedural human rights frameworks. In many sites of implementation, there was a sense that the international instruments had been adopted in places that were both geographically and socially far away from the sites of implementation. There was a strong sense at the Ministry of Education in Kenya that the MDGs were important, partly because they were linked with a substantial aid package, and a sense in South Africa that the MDGs had done no more than confirm what was already in the Constitution.<sup>59</sup> The national staff of the global NGO working in a large city in each country shared a sense of ownership in relation to the MDGs and the EFA and their presuppositions with a global community,<sup>60</sup> potentially as a result of contact through email, visits and access to shared literature. At some distance from the city hubs, however, provincial government

officials, teachers and local NGO workers knew only vaguely about the international framework, and the issues which it raised. In the place of knowledge and a sense of engagement, there was a feeling of confusion, exclusion and sometimes cynicism. Although the South African provincial officials did feel connected to the MDG process, in Kenya, provincial officers felt that the MDGs had been devised a long way away from their day-to-day experiences. Some had heard about the MDGs, but did not know what they were. One officer explained:

“I tell you the first time I heard about the MDGs and you will not believe, it was last year when I went for a Ministry of Planning (...) workshop organized at the province here. I went to represent my boss (...) That’s the first time I heard about MDGs (...) Really, it’s like they belong to other people.”<sup>61</sup>

Similarly the teachers at the two schools saw the MDGs and EFA, to the extent they knew of them, as very “far away” from their own experiences. The MDGs are seen as remote and spoken about in the public media, with little bearing on the things that people experience or have capacity to effect. Examples of some of the responses given are as follows:

“I do hear about it [MDGs and EFA] but I’ve never given my time to get an explanation about it because it’s never touched [me]. I’ve never get the real explanation about it.”<sup>62</sup>

“[T]here is the Millennium Development Goals but where? And what the Millennium Development Goals say to whom too? You know that [...] they must come down. Don’t just say when we have TV and say that there is something, that there’s change what – but we don’t have that change!”<sup>63</sup>

For participants in the case studies in the provincial NGOs in both countries, the global policy framework was either something they had heard of very generally or not at all. In South Africa, most of the six village-based facilitators who participated in a focus group discussion in June 2009 had only heard of the global goals by name and did not know what they meant. Village-based NGO officials in South Africa, interviewed also in June 2009, reluctantly recognised that gender equality was a legal right in the national Constitution, and that there were policies governing these rights in schools. But gender was not part of the NGO remit, even though much of their work was with women. A village facilitator in South Africa said: “The NGO never talks about the global goals.”<sup>64</sup> In Kenya, there was a similar sense that the organisation’s priorities were not being framed by, or linked to, the global policy framework. One NGO worker said: “There are so many policies around here (...) we don’t disseminate those policies.”<sup>65</sup> On the MDGs, the view was one of indifference and distance. One NGO worker noted sceptically that “another issue is whether the people own the global declarations. The issue is not even whether they own the MDG’s but rather understand, comprehend and know them.” In another exchange with an interviewer, the issue of how the MDGs could be discussed at the grassroots was raised. The view was that the MDGs were too particular, and that the nature of the work which the organisation did was general and integrated with its own programme of education, not the steer from the MDGs:

“Interviewer: How do you make them comprehend these MDG’s?”

NGO worker: You see when you talk to people it is general. Among the people we have educated, semi-educated, illiterate, semi-illiterate and illiterate people.”

It can be seen that the locus of concern with the international frameworks clusters at centres of power in the national department of education or a global NGO, but translating a sense of engagement and concern with global processes in this purposive form and a sense that they might develop and support local work has not been happening.

This links with a second problem which relates to meaning, information and the way in which ideas about rights have been translated by practitioners. A number of papers have drawn out how the emphasis within the MDG and the EFA on results-based management has generated a nexus of attitudes referred to as “blaming the poor”.<sup>66</sup> Thus when teachers or provincial officials are tasked in a hierarchical system with ensuring enrolment or attainment and ensuring that girls are in school, they tend to blame poor parents for not sending children to school, not giving them adequate nutrition to ensure they concentrate and/or not providing sanitary protection. The critique does not go to governments that may not be able to collect sufficient taxes, to an international economic order that does not distribute wealth equally or to employers that make it difficult for parents to combine work and child-care, but rather to the poorest who struggle to enrol their children in school at enormous cost. In South Africa, where the government had provided Child Support Grants to help the poorest families, expressions of “blaming the poor” singled out young girls, who it was alleged got pregnant intentionally to claim the grant. Ideas of “blaming the poor” coincided with another set of ideas on gender referred to as “gender lite”, in which officials at all levels of government and the NGOs tended to essentialise girls, thinking about them primarily in terms of vulnerability or sexuality.<sup>67</sup> This attenuated meaning of gender, which often went with a very basic notion

of equality associated with parity, blocks a fuller meaning of the nature of gender equality in education and has limited the development of a critically-engaged language of practice in this area.

A third problem relates to measurement, monitoring and research processes. Because the MDGs and EFA have used gender parity as the key instrument for measuring, and because the research community has been slow to come up with instruments that might develop more multi-faceted approaches to reviewing how gender equality is being institutionalised in education settings, the policy language has stayed in a limited zone concerned with parity and has not developed more fully. While an innovative project such as the Right to Education Project (a collaboration between ActionAid, Amnesty International, the Global Campaign for Education and the Open Society Institute) works to promote social mobilisation and legal accountability focussing on legal challenges to the right to education and has developed a wide range of indicators on how rights are being implemented in education in terms of affordability, accessibility, availability and adaptability,<sup>68</sup> this approach has not been widely adopted by government departments or NGOs and its potential remains largely unrealised.

## 5. Conclusion

The data from the GEGPRI project therefore demonstrates how the purposive approach of the international legal architecture on gender equality in education associated with the MDGs and EFA is being frustrated in its realisation in Kenya and South Africa. This is partly due to a lack of processes to domesticate, popularise and educate key policy-makers, government officials, teachers, and school communities regarding its content



and concerns. It also highlights how the attempt to kick-start work on delivery of the larger rights frameworks through setting more limited and possibly easily attainable targets, such as those associated with the MDGs and EFA, does not necessarily precipitate work on poverty or equality. Indeed, without a vigorous language associated with rights and gender equality in the context of hierarchical government systems, these approaches appear to develop social distance from those whose rights are sorely in need of protection and advancement. Lastly, while the processes of measurement are not themselves the reason it has been difficult to realise rights for gender equality, the very limited indicators which stress parity confirm the notion of “gender as a noun”, rather than reveal the nature of the problem of gender inequality in multiple and interlocking sites. This prohibits the development of a political culture that can give substance to the more procedural approaches adopted in some international rights instruments.

None of these processes on their own explain why the international frameworks as-

sociated, for example, with the Beijing Declaration and Platform for Action or CEDAW, have been difficult to implement in Kenya and South Africa. They also do not fully explain why there has been a retreat in some international decision-making fora from more detailed substantive engagements with gender equality in education or why the Dakar Declaration was not popularised. However, they do show that even a purposive approach cannot make gender equality in education “just happen”. Gender equality in education, in all its multi-faceted forms, cannot be brought into being through the leverage provided by a purposive or a procedural approach confined to top-down strategies. The critical examination of how the relevant international frameworks approach (i) different meanings and aspirations concerning gender equality and education, (ii) the institutional forms to realise these and (iii) the shifts in power and practice that might need to take place, through participatory processes, institutional assessment, and rich flows of information does seem a fruitful place to begin to take the steps towards effective implementation.

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# Educational Equality for Gypsy, Roma and Traveller Children and Young People in the UK

Brian Foster and Peter Norton<sup>1</sup>

The UK has a strong tradition of equality in education dating back to the 1944 Education Act. Laws such as the Race Relations (Amendment) Act 2000, the Human Rights Act 1998 and the Equality Act 2010 not only provide citizens with protection against discrimination but also impose duties on public authorities to promote equality and prevent discrimination. Since the Second World War, every child in England and Wales<sup>2</sup> has been entitled to free education between the ages of five and fifteen.<sup>3</sup> In 1972, the school leaving age was raised to 16, and in 2013 and 2015, the “participation age”<sup>4</sup> will rise to 17 and 18 respectively.<sup>5</sup> Parents are not obliged to send their children to school but they have a duty to ensure that children receive an efficient, full time education which is suitable to their age, ability, aptitudes and any special educational needs they might have.<sup>6</sup>

Although there is a robust legal framework for equality in the UK, practitioners working with families and schools recognise that the UK has a long way to go before genuine equality is achieved in education for Gypsy, Roma and Traveller Communities. This article provides evidence that, in the field of education, Gypsy, Roma and Traveller communities suffer manifestly unequal outcomes. Drawing particularly on the authors’ first hand experience of working to advance educational equality for these communities in one area of London, the article explores some of the

reasons why this is the case, highlighting the day-to-day experiences of Gypsy, Roma and Traveller families. It also considers some of the efforts that have been made to improve outcomes. It concludes by considering the emerging policies of the current Coalition Government and attempts to assess their likely impact on equalities.

## 1. Background

Before embarking on an analysis of the educational experience of the Gypsy, Roma and Traveller communities in the UK, it is important to establish (i) the basis of the terminology which will be used throughout the article, not least due to the fact that such terminology has been a controversial issue in relation to this field of study; (ii) the historical background to the existence of Gypsy, Roma and Traveller communities in the UK, and (iii) the context of racism in which educational inequality for these communities occurs.

### 1.1 Terminology

The authors recognise that many Europeans regard the term “Gypsy” as racist and, indeed, there was a time when the term was avoided in the UK because it was felt to have negative connotations. Subsequently, “Traveller” was used as an umbrella term which covered a range of nomadic or nomadic her-

itage groups. This term, however, was very general (sometimes getting confused with commuters and backpackers), encompassed a very wide range of disparate groups (including Minceir and Nawkins, Circus and Fairground families, New Travellers and waterway dwellers), and fed further generalisation and stereotyping. Romanichal families sought to reclaim the term “Gypsy” and for a while “Gypsy Traveller” became the standard term used by professionals and voluntary organisations as the umbrella term for the communities they worked with. When Roma arrived from Eastern Europe in the mid-1990s, they were included in the terminology, with the use of “Gypsy Roma Traveller” and then as “Gypsy, Roma and Traveller”. For some reason, probably brevity, the term Traveller Education Service, and more recently Traveller Education Support Service (TESS) (discussed further below) have persisted, as has the term Traveller Teacher.

The use of the umbrella terminology – Gypsy, Roma and Traveller – is not intended to suggest that all these communities have common cultures and heritages, or face the same challenges. Indeed, we are aware of the significant diversity within the communities and extended family networks and would argue against generalisation, positive or negative, and focus more on addressing barriers to equality.<sup>7</sup>

## 1.2 Gypsy, Roma and Traveller Communities in the UK

English Romanichal Gypsies arrived in the British Isles in the early 16th Century, as part of the gradual eastward migration of Roma groups across Europe from the 1430s.<sup>8</sup> The first undoubted record is of “Egyptianis” receiving payment from King James IV of Scotland in 1505, but most scholars agree that the unremarkable reference suggests they

had been present in the country for some time;<sup>9</sup> Gypsies were present in force in Paris in 1427, so it is likely that the first arrival of Romanies in Britain was at some time between 1427 and 1508. Sir Thomas More referred to an “Egyptyan” witness to the death of Richard Hunne in London in 1515<sup>10</sup> and an account dated 1528 claimed that there were ten thousand Gypsies in the British Isles.<sup>11</sup> Two years later, the first anti-Gypsy act was passed, as a result of which any Gypsy entering England could have his property confiscated, and be ordered to leave within two weeks.<sup>12</sup> From 1550 to 1640, a number of laws resulted in deportations, slavery and executions of persons being, appearing to be or keeping the company of “Egyptians”.<sup>13</sup>

Despite this repressive climate, and a series of laws continuing up to the present time that effectively outlawed their way of life, Romanichal and Kale have survived as distinct cultural groups in the British Isles, with language and traditions indicative of their origins in the Roma migration from Asia. Kale living in North Wales, who came originally via France and the West Country, spoke a pure form of Romanes until the late 20th Century,<sup>14</sup> although Kale in South Wales and most Romanichals speak Anglo-Romanes, which mixes Romani and English words with an English grammatical structure.

In 1988, the ethnic status of Romanies was established when a pub landlord put up a sign saying, “Sorry, no Travellers”. It was brought to the attention of the Commission for Racial Equality, which supported a test case. The judgement, on appeal, resulted in Gypsies being recognised as a racial group on the following grounds:

“[t]he evidence was sufficient to establish that, despite their long presence in England, gypsies [sic] have not merged wholly

in the population, as have the Saxons and the Danes, and altogether lost their separate identity. They, or many of them, have retained a separateness, a self-awareness, of still being gipsies.”<sup>15</sup>

Travellers of Irish heritage are indigenous nomadic people with a heritage stretching back many centuries. There is evidence which points to the existence of nomadic groups in Ireland as early as the fifth century AD, and by the twelfth century, the name “Tynkler” or “Tynker” is said to have been given to a group of nomads who maintained a separate identity, social organisation and dialect.<sup>16</sup> Others have argued that they are the descendants of the dispossessed from the war with Cromwell in the 17th century or the “Great Famine” in Ireland in the mid-19<sup>th</sup> century, but it is likely that these events merely swelled the numbers of a pre-existing, distinct community.<sup>17</sup>

Irish Travellers sometimes are referred to as “Minceir” or “Pavees” in their own language - Cant or Gammon. They were recognised as an ethnic group in the UK in 2000 following a High Court case<sup>18</sup> and, like Romanies, are protected under the Race Relations Acts (and now the Equality Act). Their claim to recognition as an ethnic group has not been accepted in Ireland although the case has been eloquently made by Sinead Ni Shunear.<sup>19</sup> Irish Travellers do not claim Roma heritage, but they have close links with Romanichal and Kale communities throughout the UK, sharing with them many cultural traditions.<sup>20</sup>

There are two main groups of Scottish Travellers – Lowland Travellers or Romani Gypsies and Highland Travellers. Lowland Travellers share their heritage with English Romanichal Gypsies and Roma, while the Highland Travellers are believed to have their roots in

Northern Europe. They gained recognition as an ethnic group in 2008.<sup>21</sup>

### 1.3 Racism

#### Public Attitudes

Sir Trevor Phillips (as Chair of the Commission for Race Equality) described racism towards Gypsy, Roma and Traveller communities (GRT Communities) as “the last respectable form of racism”, in that there seems to be little or no social stigma attached to expressing such racist attitudes.<sup>22</sup> In making the above statement, Phillips drew on a MORI survey of 1,700 adults throughout England showing the extent of prejudice against minority groups in England.<sup>23</sup> There were four minority groups against whom respondents most frequently expressed prejudice. These were refugees and asylum seekers, Travellers and Gypsies, people from minority ethnic communities, and gay or lesbian people. Although, most interviewees had no personal contact with Travellers and Gypsies, these groups (along with asylum seekers) were found to be the subject of aggressive prejudice and open and explicit animosity, often backed with the threat of violence. Actual violence against Gypsy, Roma and Traveller communities is not uncommon. Petrol bombs have been tossed into sites, and children and their parents have been attacked on their way to and from school.<sup>24</sup>

Prejudice towards Travellers and Gypsies is expressed both through a casual attitude towards derogatory language, and through stereotypes relating to the economic role of Travellers and Gypsies. Generally in society, there is an awareness of acceptable and unacceptable ways of referring to differing groups of people. The use of the word “pikey” is particularly offensive to the GRT communities, but there is some sense that it is less offensive than other racist abuse used

against other ethnic minority groups.<sup>25</sup> Common stereotypes affecting GRT communities are that they (i) are considered not to conform to the system by paying taxes, (ii) have a reputation for unreliable business practices, and (iii) do not respect private property and cultural terms, (iv) do not belong to a community and (v) allegedly having a negative impact on the environment.

We still see “No Travellers” signs, or crudely coded equivalents, outside pubs, although the test case outlawing them took place in 1989.<sup>26</sup> The photograph below was taken of a sign in a window of The Prince of Wales Public House, Walthamstow, London E17, on 26 January 2012. The sign was reported to the police, and removed three days later.

The situation of the Roma arrivals to the UK since the later 1990’s has also been difficult. Roma from the A8 countries<sup>27</sup> sought some respite in the UK from being visible, scape-

goated and victimised in their home countries. Until 2004, they were able to become invisible within the multicultural society of many UK cities. With the accession of the A8 countries to the EU in 2004, however, there have been a range of issues of racism from non-Roma A8 migrants towards Roma from the same home countries, including racist graffiti – “Gypsy slaves go home” – sprayed on a Waltham Forest house.<sup>28</sup> Discriminatory practices were also evident in the work of local authorities, including the variable quality of interpreters used to communicate with Roma members of the community. For example, agencies would use ethnic Polish speaking interpreters to interpret for Roma who speak Polish. There is sometimes real or perceived tension in these relationships.

### **The Role of the Media**

The press in general and the “red-tops”<sup>29</sup> in particular delight in Gypsy (usually with





a small “g” and often with an “i”) scare stories and campaigns, such as *The Sun’s* headline “Meet your neighbours” with an out-of-date photo of an unauthorised camp and an encouragement to join the “Stamp on the camps campaign”.<sup>30</sup> Such copy often appears in the run-up to elections because playing the anti-Traveller racial card is seen as a risk-free strategy. The *Daily Express* ran a story about land being compulsorily purchased to provide Gypsy sites in response to the Government’s decision to set targets for site provision.<sup>31</sup> Newspaper headlines, in the main, characterise Traveller Communities as dirty, thieving, scrounging, anti-social strangers in our otherwise well-ordered communities. The lack of positive information and lack of capacity to celebrate the strengths and achievements of Traveller communities has resulted in high levels of prejudice and discrimination.

There have also been two television documentaries, which have been accused of being unrepresentative and sensational – *Gypsy Child Thieves*,<sup>32</sup> broadcast in September 2009 on BBC 2, and *The Secret Lives of Britain’s Child Beggars*, a Panorama report broadcast on BBC1 in October 2011.<sup>33</sup>

### **The Role of the Police**

In 2007, John Coxhead carried out interviews with police officers, which produced statements indicative of the attitude of the police to Gypsy, Roma and Traveller communities.<sup>34</sup> Some of the responses given during these interviews are as follows:

“We all have our prejudices but we know that it is not acceptable to express them (...) but with Travellers this isn’t the case and people will express it openly.”

“A lot of people still view Gypsies and Travellers as subhuman and treating them as

such is seen as some sort of achievement that should be bragged about.”

“I would go further than that - prejudice against Travellers is not only acceptable in the force, it is expected.”

The other disturbing issue concerning (mainly) Romanian Roma has been Operation Golf, a Joint Investigation Team involving the Metropolitan and the Romanian Police with funding from the European Union, aimed at tackling child trafficking. Headlines such as “Romania child-trafficking ring operating in Britain busted by police” have appeared in the UK press.<sup>35</sup> This article described how a child-trafficking ring in Romania had been raided by police, who subsequently said that the gang had sent kidnapped children to beg, steal and sell sex in Britain. Other derogatory headlines include: “How the 21st century Artful Dodgers are making Romanian villages rich”<sup>36</sup> and “The Fagin gangs who make millions from child slavery”.<sup>37</sup> Each of these articles made clear that the families involved were Roma. The most sensational suggested that as many as 1,000 children had been trafficked from a single town in Romania by a Roma gang. This was followed by dawn raids on a number of homes in Slough. Much of the information in the articles came from press releases by Operation Golf.<sup>38</sup> The press subsequently published articles admitting that the dawn raids were a “cock-up”.<sup>39</sup>

This was a series of high profile police raids and lurid claims, but no one is to face child trafficking charges as a result. On 12 October 2010, there was another dawn raid, this time in Ilford. The press release began:

“Twenty-eight children have been safeguarded as part of a major operation carried out by the Metropolitan Police in east London this morning (Tuesday 12 October). The

operation's primary aim was to safeguard potential victims of a Romanian-based Roma gang of child traffickers. There were 103 children and 52 adults present in the 16 addresses in Ilford entered by officers under Operation Norman. Chief Inspector Colin Carswell, of Operation Golf, said: 'The aim of today's operation was to safeguard and identify victims, safeguard and identify any 'new' victims not previously identified, secure evidence, arrest suspects, and minimise any community impact that might occur.'

"The trafficking and exploitation of children for forced criminality is a gross violation of their human rights. Our primary purpose, in tandem with our expert colleagues from the Specialist Crime Directorate, local authority and health trust, is to ensure these vulnerable children get any professional help they may require to remain safe and free from abuse."<sup>40</sup>

There can be little doubt that these raids were very traumatic for the children living at these addresses. The situation has been made worse by sensational reporting, based on police press releases, by papers that are traditionally hostile to Gypsies in the UK. Roma have experienced relatively little overt prejudice because they were largely indistinguishable from other groups of Asian origin. The exaggerated claims and careless language of Operation Golf has allowed tabloid newspapers to connect Roma with child-trafficking and thus begin the process of demonisation, which continues to feed prejudice.<sup>41</sup>

Whilst there are issues of crime and criminality among the Romanian Roma community which have safeguarding implications for professionals, virtually all of these issues stem from extreme poverty.<sup>42</sup> Anecdotally, professionals or voluntary agencies generally have no evidence that any children have

been trafficked away from their families or are being exploited or abused by "handlers". All Gypsy, Roma and Traveller communities put the highest value on their children and abuse is rare.<sup>43</sup> Neglect may occur where families have difficulties accessing services or understanding the requirements of the society in which they are living but, in the experience of the authors, parents are willing to cooperate with professionals to improve their standards of care. For example, where children have come to the notice of authorities through their involvement in petty crime, families have cooperated in enrolling them in school and maintaining their attendance.

These various manifestations of racism have led Phillips to remark that, for Travellers, "Great Britain is still like the American Deep South (was) for black people in the 1950's."<sup>44</sup>

## 2. Educational Outcomes

From January 2003, the Department of Education and Skills revised the ethnic monitoring categories to include Gypsy/Roma and Traveller of Irish Heritage (the groups protected under the Race Relations Act<sup>45</sup>) among the options offered to parents on school admission, and began to compile statistical data that confirmed what practitioners and inspectors already knew.

Hard data was difficult to avoid, particularly for a government committed to a ruthlessly data-driven approach to school improvement. Currently, there is more concern about the achievement of poorer children indicated by eligibility for Free School Meals (FSM).<sup>46</sup> The priority with underachieving groups is to show evidence that the gap is narrowing. Gypsy/Roma and Travellers of Irish Heritage surpassed all other ethnic groups, "free school meals eligible" pupils and even "looked after children" in levels of absence,

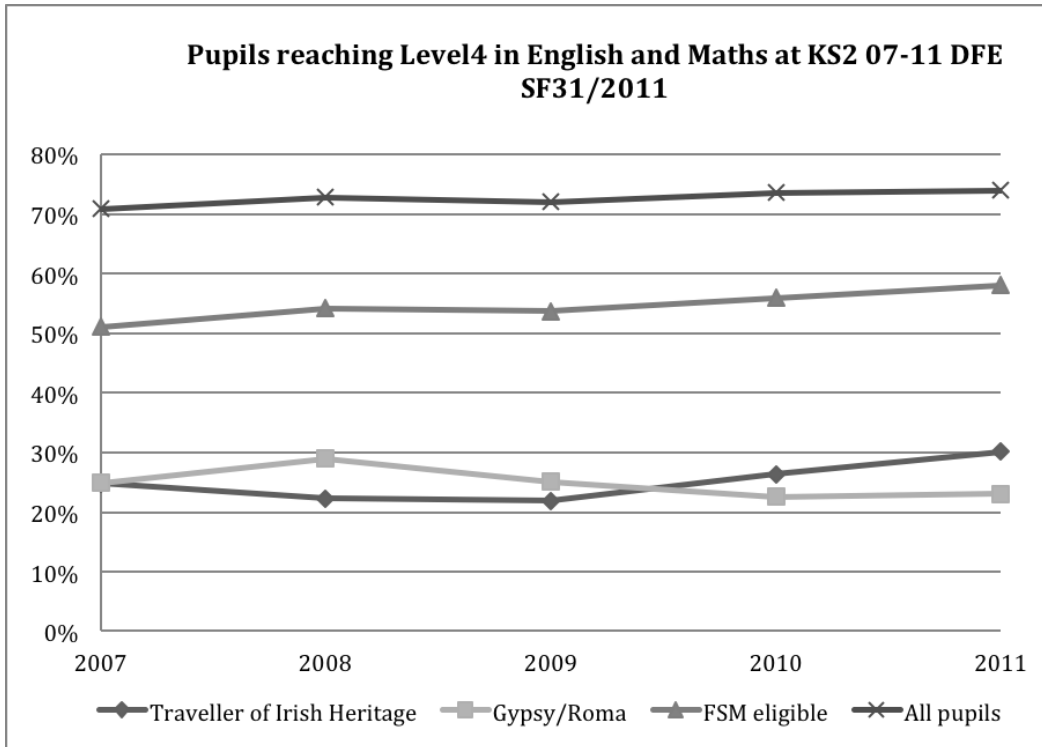


Figure 1

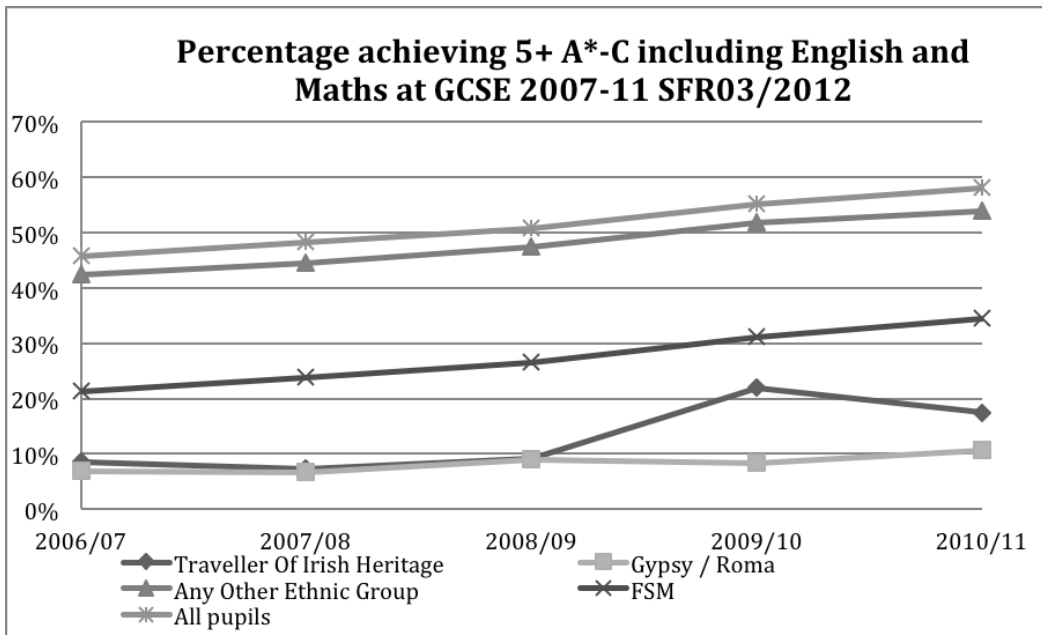


Figure 2

exclusion, “special educational needs” (SEN) and secondary school drop out; they were the lowest achieving minority ethnic groups at all key stages.<sup>47</sup>

More recent data, compiled by the authors from published statistics, indicates how little has changed in the past five years.<sup>48</sup> Na-

tional tests at the end of the Primary phase (age 11) and Secondary phase (age 16) are taken as benchmarks. Figure 1 suggests that the achievement gap between Gypsy/Roma and all pupils has widened, probably due to increasing numbers of European Roma in the cohorts. The gap between Travellers of Irish Heritage and other pupils would appear to

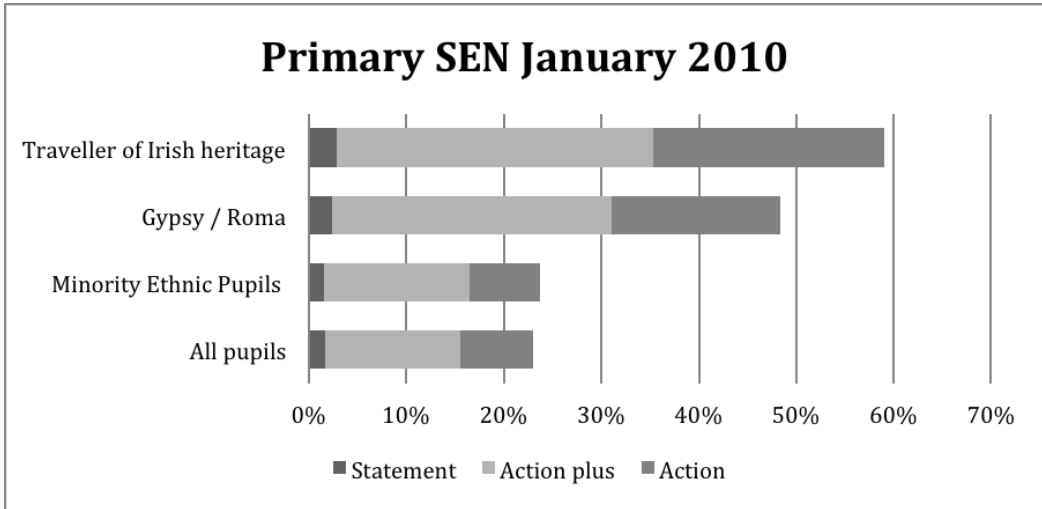


Figure 3

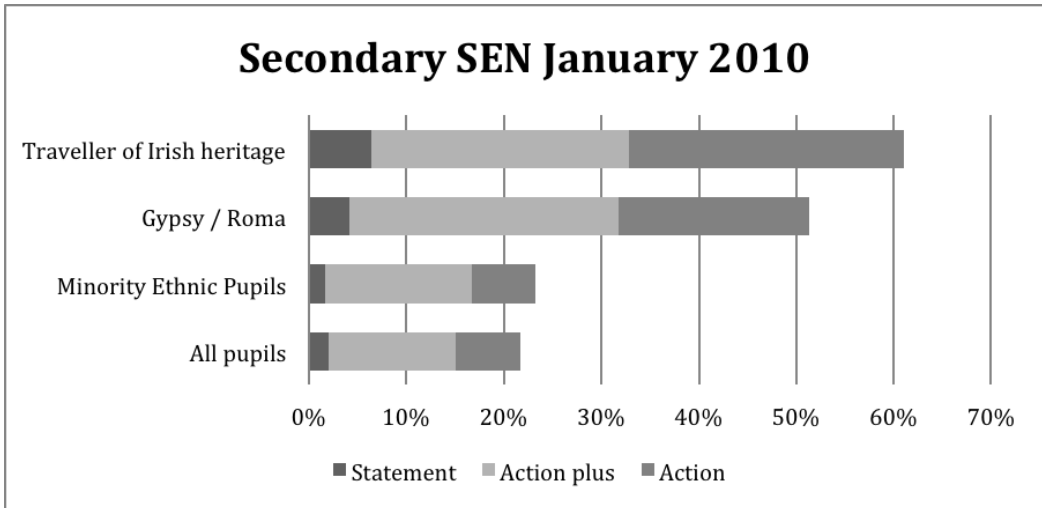


Figure 4

be beginning to close, but the gap is very wide and will take a long time to close at the present rate.

Although an increasing number of Gypsy, Roma and Traveller pupils stay on into the secondary phase (for example, in 2003, 80% of Gypsy/Roma and Traveller of Irish Heritage pupils transferred from primary to secondary school), around half drop out by the end of Key Stage 4 and only 37% were in school for all 5 years between Years 6 and 11.<sup>49</sup> Boys are more likely to drop out than girls (except Roma, where the opposite is true) and Irish Travellers are more likely to drop out than Gypsies and Roma.

The attainment gap at age 16 is also widening: while the proportion of all pupils (and those eligible for free school meals) achieving the expected level of 5 or more good (A\*-C grade) GCSEs including English and Maths is increasing, this trend is not discernible in respect to the Gypsy/Roma or Travellers of Irish Heritage (see Figure 2). The significant improvement of Irish Traveller achievement in 2010 may be due to an increasing number of students following a vocational curriculum, offering qualifications equivalent to GCSEs. These courses have been criticised by the Education Secretary, Michael Gove, and may not in future carry the same GCSE equivalences.<sup>50</sup> In practice, the authors have found that around half of Gypsy, Roma and Traveller students are likely to have become disengaged from education by the end of KS4 (16 years old).

The rates of absence, as well as Special Education Needs (SEN) and exclusion are all disproportionately high, as indicated by the graphs in Figures 3-7. High levels of SEN identification have alarming parallels with the treatment of Roma in some Eastern European countries where many children attend special schools.<sup>51</sup> “Action” means the

school provides additional support to meet SEN, “Action Plus” indicates the involvement of external agencies and “Statement” indicates that the pupil is receiving individual support from an adult for some or all of their time in school. Although the principles of support are sound, the practice is sometimes variable.

Gypsy, Roma and Traveller pupils (boys in particular) have the highest exclusion rates of all ethnic groups. The high levels of exclusion also have parallels of the experiences of African Caribbean pupils.<sup>52</sup>

There are many reasons why children from Gypsy, Roma and Traveller heritages may underachieve. These include:

- (i) disrupted educational experience;
- (ii) different educational experiences;
- (iii) educational disadvantage of their parents;
- (iv) social and economic reasons;
- (v) health reasons;
- (vi) cultural reasons;
- (vii) dispersed extended family demands;
- (viii) lack of cultural sensitivity within the education system;
- (ix) racism in employment sector;
- (x) lack of role models;
- (xi) English as an additional language (EAL) issues;
- (xii) accommodation issues; and
- (xiii) refugee and asylum seeker issues.

These factors are not unique to Gypsy, Roma, and Traveller families, but most families experience a number of them, often interacting with each other to undermine the families’ ability to reach their full potential.<sup>53</sup>

### **3. Pressures and Challenges Impacting on Gypsy, Roma and Traveller Education**

Based on the authors’ experiences, this section explores in more detail the pressures

and challenges affecting Gypsy, Roma and Traveller families in trying to ensure that every child reaches their full potential.

Primary and secondary school staff frequently recognise the factors which pull Gypsy, Roma and Traveller children towards their own community and culture and away from that of the school. These factors include:

- (i) the expectation of early financial independence, marriage and parenthood;
- (ii) concerns about community values being undermined by formal (e.g. sex education) and informal (drug culture) aspects of education;
- (iii) the emphasis on family based learning and self-employment;
- (iv) perceived irrelevance of secondary curriculum and formal qualifications; and
- (v) allowing children to remain at secondary school being seen as an indication of group disloyalty.<sup>54</sup>

Gypsy, Roma and Traveller students and the staff who teach them have also identified factors pushing Gypsy, Roma and Traveller pupils away from school. These include:

- (i) early exposure to racism and bullying;
- (ii) social and cultural isolation;
- (iii) conflict with teachers or peers;
- (iv) a perceived lack of support in accessing the curriculum; and
- (v) low teacher expectations in relation to attendance and achievement.

### 3.1 Employment and Financial Challenges

Since 2007, with the accession of Bulgaria and Romania (the “A2” countries) to the European Union, there has been an increasing number of Romanian Roma arriving in the UK. In Waltham Forest, Romanian Roma form the majority of the Gypsy, Roma and

Traveller population, with 270 children out of a total number of 601 Gypsy, Roma and Traveller children.<sup>55</sup> They are often returning to the area where they first claimed asylum pre-2004, before removal, or more often, joining other extended family in a chain of migration. Issues facing the Romanian Roma mainly centre on the unequal treatment of the A2 countries in terms of the employment restrictions placed on them by the UK government prior to EU accession.<sup>56</sup> Typically, many Roma families from the A2 countries encounter a range of difficulties that often impact detrimentally on the education (and general welfare) of their children. The restrictions placed on the employment opportunities of A2 country nationals mean that self-employment is often restricted by many Roma’s lack of formal education and skills. Self-employment is often based around practical skills gained through experience, not through formal training. Painting and decorating, collecting scrap metal, repairing, buying and selling cars and selling *The Big Issue* are all opportunities. However, the difficulties in registering as self-employed and accessing a range of benefit entitlements are becoming increasingly complex and difficult. Further, the impact of the type of employment of their parents on children’s experiences in education is seen clearly in Case Study 1.

Without access to benefits in order to supplement self-employment income, the children of such families have no entitlement to Free School Meals. School uniforms, sports equipment and footwear are expensive and often unique to a particular school. Most schools, certainly in Waltham Forest, but generally throughout the UK, require children and young people to wear a school uniform. While this may be only a sweatshirt in primary schools, it can be considerably more, especially in secondary schools. Gypsy, Roma and Traveller families are often quite large

### **Case Study 1: Ilie Family**

*There are five children in the Ilie family. Three are in primary school and two are in secondary school. The family is Romanian Roma, and like many Romanian Roma families in Waltham Forest, they collect and recycle scrap metal. The increased number of adults collecting scrap metal has led to collecting happening at all hours and on every day. At weekends, sometimes the older secondary age girls go out collecting metal in the truck too. School "friends" have seen them out and about collecting metal, and this in turn has led to some pejorative "gypsy" name calling. The children started to be more frequently absent from school because of this. In turn, this also spread to the three children at the primary school too.*

and the poorest families are often the most mobile. Insisting that children have all the equipment required before they can be enrolled can disadvantage the most vulnerable families and either disrupt their education, deter them from seeking admission or cause additional financial hardship to the family, especially where several children in one family attend school.

Schools vary in their response to these financial disincentives. The best schools almost always are flexible in their response. They see solutions, not the problems; for example, schools may (i) keep a supply of second hand uniform, (ii) arrange low cost repayments, or (iii) have some kind of hard-

ship fund to help Gypsy, Roma and Traveller families financially. However, in other schools, these may be used as reasons to exclude (informally) children and families. For example, in 2005, John Lee, an English Gypsy boy, was bought a pair of black shoes, which had a thin white stripe around the edge of the sole. He was not allowed into school as the shoes were not black! This was the start of poor attendance and subsequent school refusal for John.<sup>57</sup>

The employment restrictions on A2 nationals also impact on the accommodation opportunities for Gypsy, Roma and Traveller families from these countries. Often, extended families live together in one house, as a way of sharing rental costs. These living arrangements frequently cause high mobility, which in turn makes school attendance and changing schools an increasing area of concern for local authorities.

Anecdotal evidence from a range of professionals working with the Gypsy, Roma and Traveller communities, including teachers and charities, point to an increasing number of referrals made to Children's Social Services departments concerning Romanian Roma families. Such referrals are often made by either schools or next door neighbours, for whom there is sometimes a mismatch between the cultural values and practices of Roma families and their own set of standards.

For example, on one occasion, social workers carried out a family visit/core assessment of one Roma family, during which the fridge was inspected. The lack of food was noted. This could be viewed as neglect, albeit enforced by poverty, but it is also demonstrative of the practice of Roma families who shop on a daily need basis, even down to bread being made at home rather than bought. On

another similar occasion, a social worker on an accompanied core assessment home visit inspected the children's bedrooms. Her comment was, "there is no evidence of educational board games here".<sup>58</sup>

These examples demonstrate the challenges posed by financial and employment factors on the education of Gypsy, Roma and Traveller children which contribute to the unequal educational outcomes for these children.

### **3.2 The Relationship between Gypsy, Roma and Traveller Families and Schools**

Most professionals working with the communities would recognise that in the primary phase, most schools have good and improving relationships with the Gypsy, Roma and Traveller families with children in the school, particularly if they are relatively settled and if the parents had a reasonable school experience themselves. The Gypsy, Roma and Traveller Achievement Programme (GRTAP) booklets<sup>59</sup> and a recent publication by the National Foundation for Education Research – *Improving the Outcomes for Gypsy Roma and Traveller Pupils*<sup>60</sup> – have much to offer schools by way of guidance for interacting with Gypsy, Roma and Traveller families and pupils.

Relationships between schools and parents at secondary level are more distant than at primary level for all pupils, but for Gypsy, Roma and Traveller families it is particularly the case. The argument in favour of secondary education is still to be won for most Gypsy, Roma and Traveller families. In the authors' experience of contact with Gypsy, Roma and Traveller communities, most parents were ambivalent about secondary education; schools were thought of as large, impersonal institutions where bullying was rife. Children who attended secondary schools frequently

reported racist abuse and bullying. There is concern amongst parents that their children will be discriminated against if they defend themselves against such bullying (see Case Study 2). The curriculum wasn't thought relevant to the lives they expected their children to lead. Those without a positive primary school experience struggled to access the curriculum. Parents feared their children would mix with other children during puberty, potentially undermining their strictly held beliefs about sex education and chastity. Further, if pupils achieve well, parents are afraid their children will be drawn away from their culture and family.

Schools which have, or aspire to have high standards put particular emphasis on the parental contract. Although this can be positive, emphasising the partnership between the school and the parents, the requirements of some schools may put demands on parents they cannot reasonably be expected to meet. The contract has no legal basis, but most parents will sign it rather than risk a confrontation with the school from the outset. The school may well use a parent's failure to keep to their side of the contract as a basis for suggesting that "this might not be the right school for your child."

Practicalities of the admissions processes can operate so as to exclude or disadvantage Gypsy, Roma and Traveller pupils. Firstly, there is the problem of how to apply for a school place; this can be complicated, and even more difficult if English is not one's first language. Secondly, the letter offering a school place poses the same English language issue, and it is also problematic whether or not families are still at the same address to which a letter is posted, in view of their high mobility. Offer letters not replied to within five working days may be rejected by schools, at their discretion.



### **Case Study 2: O'Driscoll Family**

*A large extended Irish Traveller family arrived in Waltham Forest in late 2000, after having bought a piece of Green Belt land. They retrospectively applied for planning permission to settle on the land (similar to the recent situation regarding the residents of the Dale Farm traveller encampment that was recently evicted in Essex).*

*Prior to 2000, the family had always been travelling and stopping on the roadside. The seven children had had various educational experiences depending often on the Local Authority area in which they had stopped and also how long they stayed in a particular place. Children from this family started attending school regularly for the first time in their lives, two started in a primary school, and one in a secondary school.*

*In 2005, Waltham Forest TESS received a call from a secondary school, to say that E.O, a 14 year old Irish Traveller, from the Traveller site, and a pupil at their school, had gone into the toilets and called the police emergency services, to say she was in fear of being beaten up. The police traced the call to the school, and asked the school to get E.O.'s parents to attend the local police station for a "reprimand". The mother was accompanied by E.O. and her adult older sister to the police station, where they were treated appallingly. The officer was rude and surly, and when the family requested a toilet, he refused to let them use one. The family were kept waiting without any explanation for an unreasonable length of time. There was no attempt to address the bullying issues and safety fears of the girl from either the school or from the police.*

A further challenge is that siblings may not be offered places at the same school, which can be problematic for communities that may have poor experiences of schooling in their home country, or no previous schooling at all. Transport can also be an issue, especially as places offered can be some distance away. This has financial (bus fares/transport) and time implications; for example, children have bus passes, but their parents accompanying them to school do not. The logistical difficulties of getting children to different schools for the same time by public transport can be significant.

### **3.3 Bullying and Racism**

The most common reason given by Gypsy, Roma and Traveller parents for their reluctance to send the children to school is "racist bullying", which can range from generalised abuse to physical attacks. Nearly 9 out of every 10 children and young people from a Gypsy, Roma or Traveller background have suffered racial abuse and nearly two thirds have also been bullied or physically attacked.<sup>61</sup> In 1996, the Office for Standards in Education (Ofsted) also found that Gypsy and Traveller children are often subject to bullying of a racist nature.<sup>62</sup>

Schools do not always tackle allegations of racist bullying effectively. Families and children can therefore lose faith in the ability of schools to deal effectively with these incidents. The impact of racism on the children and families can also be underestimated or in some ways belittled. Teachers working with Gypsy, Roma and Traveller children in Waltham Forest and Hackney have reported that recent television programmes, such as *My Big Fat Gypsy Wedding*, and high profile Traveller stories, such as the eviction of the Dale Farm Travellers, have heightened the tensions that some Gypsy Roma and Traveller children and young people feel in schools and other institutions.

Schools should have clear policies and strategies to deal with the prevention of bullying and the punishment of such behaviour. A school that fails to investigate and take action where bullying is alleged to have occurred may find itself subject to a claim for judicial review to force the school to act. Alternatively, a parent may bring a claim for negligence and/or possibly make an allegation that the school has subjected the child to degrading treatment by failing to prevent bullying behaviour by other pupils.

### 3.4 Mobility

The most vulnerable pupils are those who are highly mobile (see Case Study 3). These are not the economically nomadic children, those of fairground or circus heritage (although this group has suffered from the withdrawal of their entitlement to laptop

and internet connectivity<sup>63</sup>) but ethnic Gypsy, Roma and Traveller families who move due to social or economic difficulties. Mobile families might include Roma who have fled poverty in Eastern Europe, families who are housed but feel isolated from their extended families, families involved in neighbour disputes and families in caravans with nowhere legal to park. There are also cultural reasons for the high mobility that disrupts education. The Gypsy, Roma and Traveller culture puts a high value on the extended family and children have a duty to care for adults. If a grandparent is taken ill in Birmingham, Ireland or Romania, the family will not think twice about relocating; they would be regarded as negligent if they did not. Most families do not plan to leave at short notice, but they do and they will be gone until the crisis is over. Crises such as these could be regarded as exceptional circumstances, but, in our experience, for some families they are surprisingly frequent.

By way of example, the mobility of all Gypsy, Roma and Traveller children and young people, who both arrive in and leave from Waltham Forest, is high. The table below shows, in the third column, the increasing number of Gypsy, Roma and Traveller Children and young people at the end of each academic year. The considerable mobility among the families can also be seen through the evidence of turnover in the middle column. The high percentages in 2008-09 and 2010-11 show the increase in mobility quite clearly.<sup>64</sup>

Academic year	Turnover	Number of GRT children & young people
2008-09	37%	462
2009-10	72%	538
2010-11	62%	557

### **Case Study 3: Dragomir Family**

*I. is an 8 year old boy and has been in the UK for some 4 years. His family has moved frequently, often between Manchester and London. This is mainly for work, accommodation and family reasons. I. has been to various schools and always likes school when he attends. But the high mobility and the lack of stability of accommodation mean that he has attended several schools, some schools twice over. Although when in one place I. does attend well, there has been a lack of general progress and compared to his peers he is falling behind.*

Schools sometimes have a lack of commitment to children and young people who they know to be highly mobile, due to concerns regarding how long they will actually stay. This can sometimes lead to children not being put onto regular literacy and numeracy intervention programmes, as the school makes the decision that mobility and poor attendance will mean an intervention place could be wasted.

Currently children from mobile families have to wait months before they are allocated a school place due to the often bureaucratic centralised admissions system. In many places across the UK, and certainly in most London local authorities, school places are allocated by a central admissions department according to published criteria. The introduction of centralised admissions has reduced the potential direct discrimination in school admissions, but has introduced a greater time-lag between application and admission which continues to affect some marginalised groups, such as Gypsy, Roma and Traveller pupils, disproportionately. Schools which are inclined to be flexible, admitting pupils at short notice and for limited periods, such as may be required by Gypsy, Roma and Traveller families, are no longer able to help in that way. Schools update local authorities on their vacancy status at regular

intervals (monthly or half-termly) which can result in applicants waiting several months for a place. With highly mobile families who repeatedly go through this process, a system that ensures they are treated fairly in one way also contributes to their disrupted education. Once schools are sourced, another change in location by the family can lead to another lengthy wait for a suitable school place – sometimes, in our experience, up to four or five months.

### **3.5 Attendance**

Although families and children are frequently held responsible by schools for poor attendance, it can be influenced by other aspects of the Every Child Matters agenda - health, safety, enjoyment of education, economic well-being and social inclusion.<sup>65</sup> Chris Derrington has identified several “pull and push” factors that affect engagement and retention in secondary school.<sup>66</sup> Of these, cultural dissonance (a result of conflicting expectations between home and school) and social exclusion featured strongly. Of a sample of 44 pupils, only 13 remained in school to the age of 16, and they displayed more adaptive strategies such as cognitive re-framing (finding positive interpretations or responses to potentially negative experiences), develop-

ing social support networks and adopting a bicultural identity. Those who dropped-out of school adopted “maladaptive” strategies referred to as fight (physical and verbal retaliation and non-compliance), flight (self-imposed exclusion and non-attendance) and playing white (passing identity by concealing or denying their heritage).

A 2007 report published by The Children’s Society, based on interviews with pupils about their experiences, identified more factors pushing pupils away from school than ones pulling them back to their communities. Pupils gave the following reasons why they did not attend school regularly: (i) travelling (pull); (ii) non-relevant curriculum (push); (iii) bullying (push); (iv) failure to deal with bullying (push); (v) other children’s behaviour inhibited learning (push); (vi) difficulty understanding the work (push); and (vii)

parents wanting girls to stay at home after puberty (pull).<sup>67</sup>

Poor attendance has become a major concern for schools and a feature of Ofsted school inspections. Poor attendance can trigger an inspection, and very recently two Waltham Forest schools have alluded to the fact that the increasing number of Gypsy, Roma and Traveller children joining the school and subsequent “poor attendance” will cause the school to be inspected before its due date. Obviously there are concerns that schools may be increasingly reluctant to admit children from groups known to have a poor attendance profile.

### 3.6 Exclusions

The graphs in Figures 5-7 demonstrate the disproportionate impact of the exclusions regime on Gypsy, Roma and Traveller pupils.

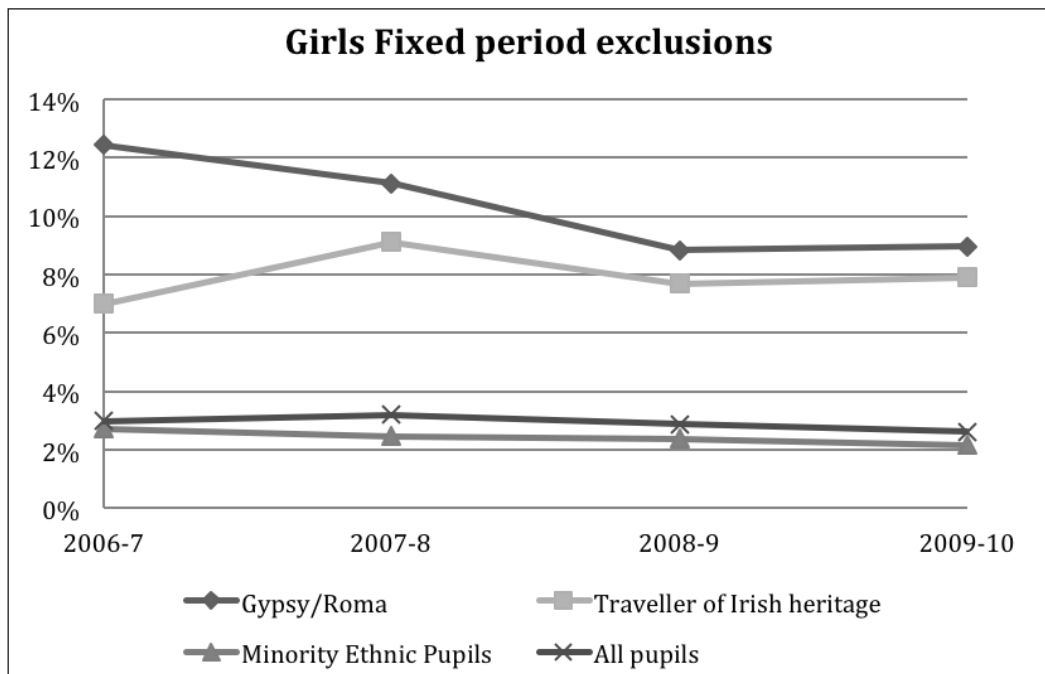


Figure 5

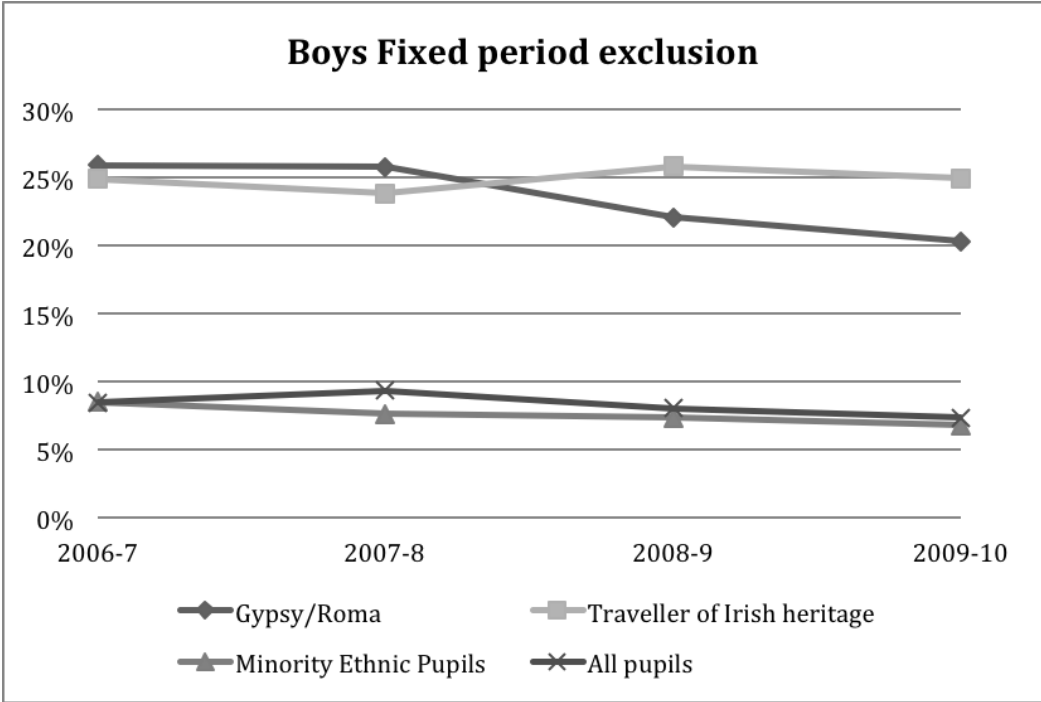


Figure 6

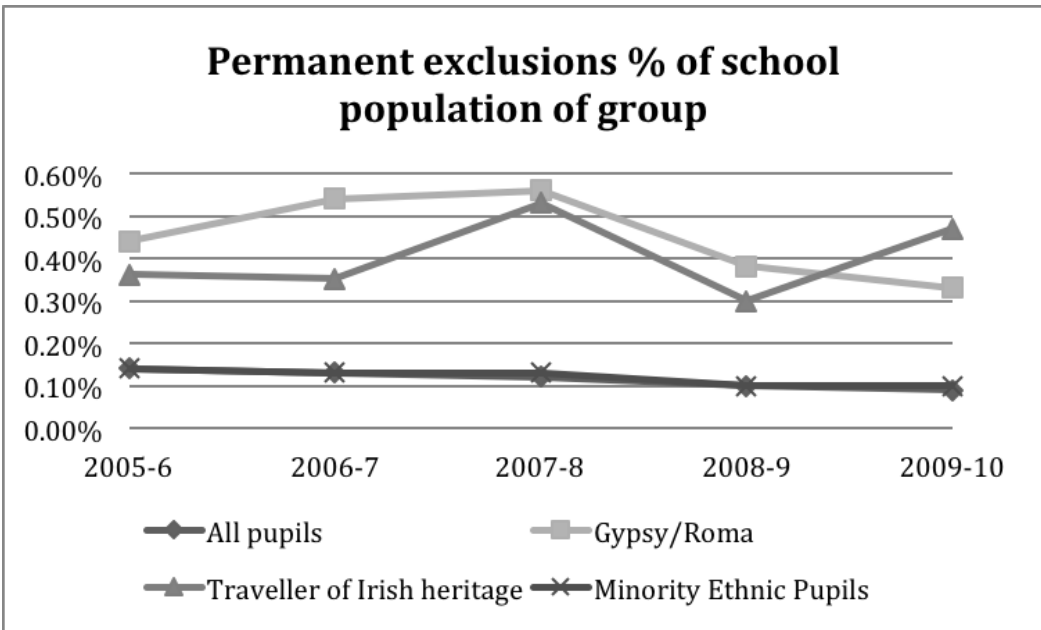


Figure 7

The reasons for such exclusions are complex, but include issues such as:

- (i) the way some students talk to teachers (without due deference);
- (ii) pupils responding to racial harassment (sometimes not effectively addressed by the school) in an aggressive way;
- (iii) some students seek to self-exclude because their attendance has been enforced;
- (iv) failure to complete homework or attend detentions leads to a slippery slope of non-compliance culminating in exclusion; and
- (v) lack of parental cooperation resulting in the school running out of alternatives.

### 3.7 Culture and Values

Ethnicity, culture and religion are closely linked. They can all influence the experience of Gypsies, Roma and Travellers in the education system. Further, a lack of understanding in schools can mean that cultural differences are not appropriately dealt with.

Most Gypsies, Roma and Travellers are opposed to sex education and dissemination of information about contraception. It is not unusual for Roma students to “marry” in the eyes of their community soon after they reach puberty. There can be complex child protection issues. It is not always clear whether the issue is religious, cultural or patriarchal, and whether the rights of the child are protected by the deeply held views of the parents. All the Gypsy, Roma and Traveller communities oppose premarital relationships and expect their children to marry and start a family whilst they are in their teens; by that stage, young women are expected to have the knowledge and skills to keep a home and start a family, and young men are

expected to be able to earn a living and keep them. If school cannot equip their children for this future, most families will be sceptical of the value of secondary education and if their children lose their resolve to attend school, they will receive support in pursuing other alternatives from their parents. The strict gender roles among Gypsy, Roma and Traveller communities can mean that girls do not trust boys to do things which they regard as their domain, such as cooking. Schools should not accept these attitudes uncritically, but should also understand that they are based on a recognition and respect for the skills of women, especially with respect to cleanliness taboos.

In view of the value system of some Gypsy, Roma and Traveller families it is possible that boys (and in some cases girls) will act and speak in ways which constitute sexual harassment, and which could and should not be tolerated. It remains important, however, not just to punish such actions, but ensure that the full learning potential is derived from the incident. It may be appropriate to choose some form of reparation which acknowledges the inappropriateness of the action.

## 4. Promoting Educational Equality

### 4.1 The Development of Traveller Education Support

In 1967, Bridget Plowden, the Chairman of the Central Advisory Council for Education (England), presented a report, entitled *Children and their Primary Schools*, to the Department of Education and Science (the Plowden Report).<sup>68</sup> The Plowden Report identified Gypsies as “probably the most severely deprived children in the country” and argued that committed teams of professionals would be needed to successfully “arrest

the cycle” of educational disadvantage they experienced.<sup>69</sup> As a result, TESS developed from the mid-1970s in order to support the educational access, inclusion and opportunities of a range of different “Traveller” groups, including Romanichal Gypsies, Roma, Travellers of Irish heritage, fairground families or show people, circus families, New Travellers and bargees or canal-boat families. The term “Traveller” was thought to be neutral and inclusive, but members of the communities it embraced argued that it denied their unique identities and shared heritages. “Travellers” became “Gypsy Travellers”, then “Gypsy Roma Travellers” and finally “Gypsies, Roma and Travellers”. Probably for reasons of brevity and familiarity, Traveller Education Services and more recently, TESS, did not change their name.

For the next two decades, Traveller Education Services were funded centrally, and theory and practice were developed by teachers working closely with Gypsy, Roma and Traveller families and the Department of Education, with Her Majesty’s Inspectorate (the Inspectorate) monitoring and supporting their work. The role of TESS is to build the capacity of families, schools and other agencies, including the Local Authority, to address these issues. In some cases, a watching brief may be sufficient, while in others, complex inter-agency interventions may be required. There are many parallels with the situation of “Looked After Children”, where the need for a virtual head-teacher has been recognised to pull together a range of professionals who might be working with a child.<sup>70</sup>

As discussed above, day-to-day TESS practice in one London borough with a high number of Roma families illustrates how practitioners are required to mediate a range of intractable issues. TESS emphasised the relationship of trust they had with parents,

the importance of networking and the development of policy and practice as a partnership between professionals, officials and the Inspectorate. There was much common ground; the families, in general, wanted their children to learn to read and write, and were eager for them to attend primary schools, so TESS gave priority to ensuring every child had a positive “early years” and “primary” experience. While an effective TESS cannot prevent education being disrupted owing to the challenges described above, its staff would have contacts with other members of the extended family of the Gypsy, Roma and Traveller pupils and may be in a position to facilitate communication between the school and the family.

By way of example of the impact TESS can have, one outcome of the engagement of TESS with Gypsy, Roma and Traveller communities has been the emergence of a small but significant number of community activists who are taking an increasingly important role in voluntary organisations fighting for the rights of their communities.<sup>71</sup> Most, but not all, are young women who are taking difficult decisions relating to their future; they are giving the campaign for rights priority over the expectation that they marry and start a family. All have a level of education and confidence to be effective, but their communities expect them to fail, and the press and public have no intention of letting them succeed. In areas without TESS support, schools will need to develop these future role models, and either create employment opportunities for them or create pathways for them to move into positions where they can have an impact.

Although TESS practitioners were generally respected by mainstream colleagues, TESS tended to become marginalised along with the communities with whom they worked.

All this began to change with the election of the Labour government in 1997, with Tony Blair's commitments to "Education, education, and education"<sup>72</sup> and joined-up solutions. Then Education Minister Estelle Morris pledged to address "this complex and difficult issue".<sup>73</sup> Her successor, Charles Clarke, called on teachers of Travellers to achieve a step-change in progress towards the inclusion of children from these communities.<sup>74</sup> Ofsted subsequently undertook a thematic review of the minority ethnic groups whose achievement was giving cause for concern and found Gypsies and Travellers to be the group most at risk of under-achievement in the education system.<sup>75</sup> The Department of Education and Skills responded to the Ofsted report by issuing guidance to all schools, distilled from TESS best practice, advocating whole school approach with senior leadership promoting an ethos of inclusion and respect.<sup>76</sup>

Blair's Labour Government was determined to "narrow the gap" between under-achieving groups and other children. It attempted to do this through the National Strategies, which focused on literacy and numeracy, behaviour and attendance, mid-term admissions, new arrivals, minority ethnic achievement, social and emotional aspects of learning, and assessment for learning.<sup>77</sup> Most of these initiatives had a positive impact on Gypsy, Roma and Traveller children in school, but the Gypsy, Roma and Traveller Achievement Programme (GRTAP) specifically targeted these communities by encouraging schools to develop innovative practice to raise achievement and support transition. Through GRTAP, in November 2009 the National Strategies publicised guidance materials to support schools to raise the achievement of Gypsy, Roma and Traveller pupils. Regional advisers, TESS and school staff worked hard to make a difference. The documentation produced recognised the contri-

bution of racism to educational disadvantage, and devoted one booklet to relationships with parents.<sup>78</sup> However, the GRTAP coincided, around 2008-10 with the process that led to fall from grace of the National Strategies in 2011, with teachers complaining of initiative fatigue, and the government recognising that the huge expenditure had failed to reach the white, urban poor.

Although TESS had been brought into the mainstream, they were also in decline. The funding, which was ring-fenced until 2006, was incorporated into the Children's Services Grant which was launched in April 2006 and subsequently, from April 2008, into the Area Based Grant which covered a very wide range of services and could be used as the local authority saw fit. With Traveller education services funding coming from a local pot, local authorities sought ways to cut back on this expenditure and, at the same time, sought to integrate TESS into mainstream services.

Traveller education practitioners tended to focus on the whole family, across the whole age range, addressing issues across the Every Child Matters (ECM) agenda.<sup>79</sup> The ECM aim of a "framework of universal services which support every child to develop their full potential and which aim to prevent negative outcomes"<sup>80</sup> accurately describes the aspiration of most TESS. The National Strategies approach, however, focused on groups of pupils who had the potential to influence statistics. Schools are judged by their Key Stage results that are published at the end of Key Stage 2. The benchmark is the number of children achieving level 4 and above. Many schools have concentrated on "boosting" the borderline cohort to enable children to move from level 3 to level 4. This school improvement approach often overlooked



children who were not in school, as judgements became more results focused.

Then in 2010, in a climate defined by the economic downturn, came the victory of the conservative party, the policy of deep cuts of spending, and the end of the National Strategies. The Department for Children, Schools and Families became the Department for Education, signalling a withdrawal from the interagency approach and the narrowing of Ofsted's remit. The single crumb in the Education White Paper was that local authorities should be "champions of vulnerable families", although what that might mean in practice is open to speculation.<sup>81</sup>

#### **4.2 Gypsy, Roma and Traveller History Month**

There have also been important initiatives to changes societal attitudes and address the culture of intolerance. In June 2007, Lord Adonis, the then Schools minister, endorsed the first Gypsy, Roma and Traveller History Month (GRTHM) to celebrate the cultures and combat ignorance. The event has run successfully each year since, with significant participation by Gypsy, Roma and Traveller communities, schools, libraries and other institutions.

The GRTHM has been a great success, modestly funded by the (then) Department for Children, Schools and Families for its first three years, but continuing in 2011 without financial support. It has provided a wonderful opportunity for a range of Gypsy, Roma and Travellers to celebrate their histories and identities with a confidence that reflects the strength and resilience of these cultures. The fact that they are regarded as vulnerable within the education system may reflect more on the unresponsiveness of that system, than on the frailties of the Gypsy, Roma

and Traveller cultures. As the GRTHM undermines stereotypes and builds self-esteem, it helps children to reach their full potential.

The GRTHM is of potentially greater importance in the schools with no identified Gypsy Roma Traveller pupils and who do not reflect on their history from one year to the next, than it is in those schools which engage with the communities on a daily basis. In a multicultural society, in which everyone has a vested interest in developing an awareness and understanding of a range of different cultures and faiths, those schools and settings whose communities are not enriched in a multicultural dimension require extra input, through programmes such as GRTHM, to foster understanding and raise awareness.

Jake Bowers, a Romani journalist, described the impact of the invisibility of these communities as follows:

"Go to most museums, libraries and schools and nothing about our history and culture is kept or taught. The result is a widespread ignorance about who we are, which sometimes turns to hatred, fear and misunderstanding. In schools, children learn more about the Romans, Vikings or even fairies than they do about our cultures and what we have contributed to this world."<sup>82</sup>

This initiative, initially planned and implemented by community members and TESS professionals at national and local levels, seemed to elicit a matching response from schools, libraries, council departments and the voluntary sector. If the press sniped, no-one paid attention. Children in schools, apprehensive about having the spotlight turned on them, were surprised and pleased to find that other children showed real interest in aspects of their culture. They told stories and made films, shared photos and made art-

work. GRTHM is showing, in its fourth year, the potential to change the way society and the communities think about and celebrate culture and history.<sup>83</sup>

### 4.3 The Equality Act 2010

The Equality Act 2010 provides the opportunity to challenge directly the most blatant forms of discrimination affecting Gypsies, Roma and Travellers in schools. In the authors' experience, schools have discriminated against members of these groups by: (i) telling Gypsy, Roma and Traveller parents they had no vacancies when they did have some; (ii) expecting prospective parents to phone or visit the school regularly to check for vacancies; (iii) suggesting another school may be more appropriate to their needs; and (iv) imposing inappropriate conditions, such as a permanent address.

The Equality Act 2010 simplified, strengthened and harmonised over 116 separate pieces of legislation to provide Britain with a new discrimination law, which aims to protect individuals from unfair treatment and promote a fair and more equal society. It covers discrimination because of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.<sup>84</sup> It makes it unlawful for a school to discriminate against a pupil in relation to (i) admissions; (ii) the provision of education; (iii) access to any benefit, facility or service; and (iv) exclusions. It is also unlawful for a school to harass or victimise an applicant or pupil.<sup>85</sup> Under the equality duty in section 149 of the Act, schools must take active steps to ensure that discrimination is not occurring in the education or services that they provide.

Gypsy, Roma and Traveller pupils in secondary schools are more likely to identify

themselves by the “non-Traveller” ethnic codes, but even pupils who have not identified themselves as Gypsies, Roma or Travellers have the right to the protection of the Equality Act as members of an ethnic group. While the school may claim it did not know their ethnicity, the question would arise whether they could reasonably have been expected to. Furthermore, the ethnic code is not the only source of information a school should use when deciding which equalities to protect.

The Equality Act may be particularly helpful in tackling discrimination on grounds of sexual orientation affecting Gypsies, Roma and Travellers. Only in recent years has there been an acknowledgement of homosexuality among Gypsies, Roma and Travellers and the culture remains largely homophobic, including justifying physical attacks. Catholic attitudes to homosexuality tend to reinforce cultural values. Hostile homophobic attitudes tend to flourish on sites where there tends to be a consensus about what is acceptable, and most “out” Gypsies, Roma and Travellers often separate themselves from the culture. There are gay Traveller chat-rooms on the internet, and there may be a gradual change happening in attitudes of the communities towards homosexual Gypsies, Roma and Travellers, over time.

The impact of the Equality Act on the educational experience of Gypsies, Roma and Travellers will depend largely on the extent to which they are able to assert the rights the Act provides. There are several barriers to effective access to justice affecting Gypsies, Roma and Travellers. Gypsies, Roma and Travellers do not easily resort to using complaints procedures. They frequently require:

- knowledge of their entitlement,
- knowledge of how to complain,
- confidence that complaining will make a difference,
- the skills and tenacity to see the process through.

Most Gypsy, Roma and Traveller families assume the system is loaded against them and they are frequently surprised if they do receive their entitlement. In some cases, Gypsies, Roma and Travellers suffer abuse specifically because it is anticipated that they will not complain. Most complaints require some support from Citizens Advice Bureaus, a law centre or a voluntary organisation.

Parents are generally reluctant to come into school, and if they do come to complain they may not necessarily do so in the most tactful way. They are likely to be angry and upset, and this may come over as threatening or abusive to staff. Schools not only need to develop strategies to deal with angry parents but also to ensure that children do not become implicated. In practice, family loyalty will make it highly likely that the child will follow parental instructions and it is not difficult to see how the situation could escalate.

Older children in Gypsy, Roma and Traveller families have a duty of care towards their younger siblings, which can result in them becoming involved in disputes on their behalf. Each case must be resolved on its merits and the school may find it difficult to separate the actions of one member of a family from those of another. Victimisation of a pupil can occur where a school holds a pupil responsible for what their parent, carer or sibling might have done or has done. This is not a problem specific to Gypsies, Roma and Travellers, but may arise with any group which is tight-knit, has experiences of prejudice and misunderstanding, is unfamiliar with the working of

the education system, and has no confidence in systems for resolving disputes.

The positive action provisions of the Equality Act permit schools to take proportionate steps to help particular groups of pupils to overcome disadvantages which are linked to a protected characteristic. Where this results in more favourable treatment of pupils with a particular protected characteristic, this is lawful provided the requirements of the positive action provisions are met. The Equality Act provides that the circumstances in which a school may take positive action are where it acts to overcome disadvantage, to meet different needs or to increase participation of people in a particular equality group.<sup>86</sup>

Positive action has proved a significant benefit in Eastern European countries where schemes to increase the number of Roma in universities (by financial support and accepting non-conventional qualifications) has resulted in a developing elite who work in NGOs and in government to promote equal opportunities for Roma. Roma tend to be the main “black” minority in most of Eastern Europe and suffer huge social and economic disadvantage. In the UK, positive action is more difficult because of the differing circumstances of individual families, the size of the communities and the wide diversity within the population. In general, it should be appropriate for schools to seek positive interventions for groups of children or families, from which Gypsy, Roma and Traveller pupils can benefit. It is important that schools monitor whether or not these pupils benefit from such interventions and to be prepared to rethink if they are not.

It may be necessary to ensure that everyone understands that specific policies apply to Gypsy, Roma and Traveller pupils and families. Senior management need to take a deci-

sion about whether or not they can assume that the relevance of such policies to these communities can be taken for granted, or whether it might need to be made explicit. This is not to make a special case, nor is it to insult the intelligence of the school community, but experience has shown that there is widespread ignorance and misunderstanding across public services and it is probably better to tactfully spell out the relevance of the Equality Act to these communities rather than allow their situation to be overlooked.

### **5. The Future of Educational Equality for Gypsies, Roma and Travellers**

With the increasing deletion and scaling down of TESS, many families will no longer have a TESS to turn to when education gets rocky, but they may have the opportunity to stand back and decide whether or not education is something they really want and need. The seeds have been sown, and many, though not all, will decide that education can support their fight for rights and economic well-being. Research carried out by the Department for Children, Schools and Families suggests that schools deliver best where they feel they have been granted “ownership” of the children by their communities, i.e. that Gypsy, Roma and Traveller children are the school’s responsibility, and most guidance issued over the past ten years has encouraged them to do so; with the reduction of TESS there will now be less alternatives. Local authorities have tended to see Traveller Education Services as a marginal concern, a distraction from the core business of school

improvement, but now, if the White Paper proposals are enacted, they will have to develop their role as “champions of vulnerable children and families”.<sup>87</sup> Let’s hope they take the task seriously.

The financial cutbacks have thrown Gypsy, Roma and Traveller families and schools in at the deep end with cavalier confidence that all will be well. It is difficult to share that conviction, and those of us who campaigned to preserve TESS will be monitoring closely the impact of these changes.

Although the government has invested in a raft of education strategies over the last ten to fifteen years, and a range of equality initiatives and legislation has been enacted, the question of how to address the day-to-day challenges that many Gypsy, Roma and Traveller children and young people face and that lead to outcomes so much lower than those of their peers. It still remains for schools, institutions and society to deal with racism and inequality in a way that can be tangible for these communities. Flexibility is so often the key to moving things forward in a gradualist approach. It is timely to remember how the late Vaclav Havel described treatment of Roma as a “litmus test for a civil society”.<sup>88</sup>

However; Gypsies, Roma and Travellers are resilient, schools are resourceful, a committed voluntary sector is advocating for change with politicians fighting our corner, and TESS have not yet disappeared completely. Maybe there is light at the end of the tunnel, a stopping place at the end of the road.

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- 1 Brian Foster has been a teacher, educationalist, coordinator of seven Local Authority Traveller Education Services, and is currently a consultant working with the Gypsy, Roma and Traveller communities, a Trustee of the Irish Traveller Movement in Great Britain and also chairperson of ACERT (Advisory Council for the Education of Romany and Other Travellers). Peter Norton has coordinated the London Borough of Waltham Forest Traveller Education Service since 1999 and is a Trustee of the UK's longest established charity working with the Roma community, the Roma Support Group.
  - 2 Scotland and Northern Ireland have similar laws.
  - 3 Education Act 1944.
  - 4 This term recognises that older students may be in school, college or engaged in training.
  - 5 Education and Skills Act 2008.
  - 6 Education Act 1996, Section 7.
  - 7 Both authors have extensive experience of working with Traveller Education Support Services, which work in partnership with parents to help schools understand and respect the identity and culture of the family, setting it in a broader context through events such as the Gypsy, Roma and Traveller History Month. Effective practice in schools is based on general principles of inclusive education, identified by the National Foundation for Educational Research as safety and trust, mutual respect, partnership with parents, high expectations, flexibility and support for access and inclusion. (See Wilkin, A. et al, *Improving the Outcomes for Gypsy, Roma and Traveller Pupils: Final Report*, Department for Education, 2010, pp. 84-87, available at: <https://www.education.gov.uk/publications/eOrderingDownload/DFE-RR043.pdf>.) Distinct identities, cultures and values are recognised through the application of these principles in the day-to-day work of schools.
  - 8 Fraser, A., *The Gypsies*, Blackwell, 1992, p. 84.
  - 9 Personal communication between the authors and Professor Thomas Acton on 28 February 2012.
  - 10 See above, note 8, p. 111.
  - 11 Hancock, I. F., *Pariah Syndrome: An Account of Gypsy Slavery and Persecution*, 1999, Karoma, Chapter 11.
  - 12 *Ibid.*
  - 13 See above, note 8, p. 130.
  - 14 For further information on the Welsh Romany community, see the website of the Romany Wales Project, available at: <http://www.valleystream.co.uk/romany-welsh%20.htm>.
  - 15 *Commission for Racial Equality v Dutton* [1989] IRLR 8, Para 30.
  - 16 O'Riain, S., *Solidarity with Travellers: A Story of Settled People Making a Stand for Travellers*, Roadside Books, 2000.
  - 17 Helleiner, J., *Irish Travellers: Racism and the Politics of Culture*, University of Toronto Press, 2003.
  - 18 *P. O'Leary and others v Allied Domecq and others* (unreported), 29 August 2000 (Case No CL 950275-79), Central London County Court, Goldstein HHJ.
  - 19 Ni Shunear, S., "Irish Travellers: Ethnicity and the Origins Question", in McCann, M., O'Siochain, S. and Ruane, J. (eds.), *Irish Travellers: Culture and Ethnicity*, Institute of Irish Studies, 1994, pp. 54-77.
  - 20 Kenrick, D., "Irish Travellers - A Unique Phenomenon in Europe?", in McCann, M., O'Siochain, S. and Ruane, J. (eds.), *Irish Travellers: Culture and Ethnicity*, Institute of Irish Studies, 1994, pp. 20-33.
  - 21 *MacLennan v Gypsy Traveller Education and Information Project*, S/13272/07 f599/132; see also "Scottish gipsies are distinct ethnic group rules judge", *Herald Scotland*, 25 October 2008, available at: <http://www.heraldscotland.com/scottish-gipsies-are-distinct-ethnic-group-rules-judge-1.892997>.
  - 22 "CRE examines treatment of gypsies", *BBC News*, 17 October 2004, available at: <http://news.bbc.co.uk/1/hi/england/3751214.stm>.
  - 23 Ipsos MORI, *Citizenship 21: Briefing Notes on Profiles of Prejudice*, 2001, available at: <http://www.ipsos-mori.com/researchpublications/researcharchive/1401/Citizenship-21-Briefing-Notes-On-Profiles-Of-Prejudice.aspx>.
  - 24 For example, on numerous occasions between 2001 and 2004, a private site in the London Borough of Waltham Forest was subjected to bricks being thrown over the fence and caravan doors and windows being vandalised.
  - 25 Geoghegan, T., "How offensive is the word 'Pikey'?", *BBC News*, 11 June 2008.
  - 26 See above, note 15.

27 A8 countries were eight of the ten countries that joined the European Union in 2004, namely, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia. Workers from these countries had to register with the Worker's Registration Scheme, as a way of controlling the UK labour market.

28 The London Borough of Waltham Forest is one of 32 London boroughs. It is situated in North East London. It comprises built-up urban districts in the south with inner-city characteristics, and more affluent residential development in the north. Waltham Forest is one of the five London boroughs that are hosting the 2012 Summer Olympics. Waltham Forest has had a Traveller Education Service since September 1999, and is coordinated (Peter Norton) and supervised (Brian Foster) by the authors. The information relating to the treatment of the Gypsy, Roma and Traveller community in Waltham Forest is based on the direct experiences of the authors.

29 "Red-tops" or "tabloid" newspapers are those which target mass readerships, often with sensational and populist content. This is to contrast with the "broadsheets" which adopt a more thoughtful and reasoned approach.

30 Front page of *The Sun*, 9 March 2005.

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32 Sutcliffe, T., "Last Night's Television: This World – Gypsy Child Thieves, BBC2", *The Independent*, 3 September 2009, available at: <http://www.independent.co.uk/arts-entertainment/tv/reviews/last-nights-television-this-world-ndash-gypsy-child-thieves-bbc2-1780881.html>.

33 Irish Traveller Movement of Great Britain, *News Release: ITMB press release ITMB lodge complaint with BBC regarding the public lynching of the Travelling Communities*, 1 February 2012, available at: <http://www.irishinbritain.org/demo/files/files/statement%20travellers.pdf>.

34 Coxhead, J., *The Last Bastion of Racism: Gypsies, Travellers and Policing*, Trentham Books, 2007, pp. 48,58.

35 *Metro Reporter*, 9 April 2010, available at: [www.metro.co.uk/news/821054-romania-child-trafficking-ring-operating-in-britain-busted-by-police](http://www.metro.co.uk/news/821054-romania-child-trafficking-ring-operating-in-britain-busted-by-police).

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37 Fresco, A., "The Fagin gangs who make millions from child slavery", *The Times*, 25 January 2008.

38 Metropolitan Police, *Freedom of Information Disclosure*, available at: [http://www.met.police.uk/foi/pdfs/disclosure\\_2010/december/2010110004069.pdf](http://www.met.police.uk/foi/pdfs/disclosure_2010/december/2010110004069.pdf).

39 Pidd, H. and Dodd, V., "From brilliant coup to cock-up. How the story of Fagin's urchins fell apart", *The Guardian*, 2 February 2008.

40 "Children safeguarded in major operation", *Metropolitan Police*, 12 October 2010, available at: <http://content.met.police.uk/News/Children-safeguarded-in-major-operation/1260267437629/1257246745756>.

41 In a presentation at the East European Roma Conference in Nottingham on 1 February 2012, Chief Superintendent Colin Carswell stated that in 2007, 1107 children were "moved" (trafficked) out of Tandarei in South East Romania. He also stated that at the conclusion of Operation Golf in 2011, a total of 40 children had been "safeguarded", with one in the care of a Local Authority.

42 Romanian Roma are A2 nationals and as such have employment restrictions placed on them in the UK. The authors' experience of many Romanian families is one of poverty. They often have no access to benefits of any kind, they are in multiple residential occupancy, and they have no access to "Free School Meals". Employment opportunities are limited often to low paid work, cleaning, repairing cars, collecting scrap metal and selling *The Big Issue* (a magazine sold by homeless people).

43 Hancock, I., *We Are the Romani People*, UHP, 2002, Chapter 11.

44 See above, note 22.

45 Race Relations (Amendment) Act 2000.

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47 Department for Education and Skills, *Ethnicity and Education: The Evidence on Minority Ethnic Pupils aged 5-16*, 2005, available at: <http://dera.ioe.ac.uk/6306/1/0208-2006dom-en.pdf>.

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49 See Wilkin et al., above note 7, pp. 58-59. The National Curriculum is divided into four Key Stages that children are taken through during their school life. The four Key Stages are:

Key Stage 1	Ages 5-7	Years: Reception, 1 and 2
Key Stage 2	Ages 7-11	Years: 3, 4, 5 and 6
Key Stage 3	Ages 11-14	Years: 7, 8 and 9
Key Stage 4	Ages 14-16	Years: 10 and 11

50 Gove, M., *It's not simply an academic question – why we need radical reform of vocational education*, Speech to the Edge Foundation, September 2010, available at: <http://www.education.gov.uk/inthenews/speeches/a0064364/michael-gove-to-the-edge-foundation>.

51 European Roma Rights Centre and Roma Education Fund, *Persistent Segregation of Roma in the Czech Education System*, 2011, available at: [http://www.errc.org/en-research-and-advocacy-reports-intro-details.php?article\\_id=3049](http://www.errc.org/en-research-and-advocacy-reports-intro-details.php?article_id=3049).

52 Osler, A. and Hill, J., “Exclusion from School and Racial Equality: an examination of government proposals in the light of recent research evidence”, *Cambridge Journal of Education*, Vol. 29(1), 1999, pp. 33-62.

53 Foster, B. and Walker A., *Traveller Education in the Mainstream: The Litmus Test*, Hopscotch Publishing, 2010, pp. 51-52.

54 This list is based on the authors’ experience over many years of working in Traveller Education Services.

55 Figures from Waltham Forest Traveller Education Service database.

56 HM Revenue and Customs, *HiPGTM03280 - Entitlement: Residency rules: Right to reside - A2 nationals*, available at: <http://www.hmrc.gov.uk/manuals/hipgtmanual/hipgtm03280.htm>.

57 Taken from the case files of the Waltham Forest Traveller Education Services. The child’s name has been changed in order to protect his identity.

58 *Ibid.*

59 Department for Children, Schools and Families, *Moving forward together: Raising Gypsy, Roma and Traveller achievement*, 2009, available at: <http://webarchive.nationalarchives.gov.uk/20110809101133/nsonline.org.uk/node/248709>.

60 See Wilkin et al., above note 7.

61 Ureche, H. and Franks, M., *This is Who We Are: A study of the views and identities of Roma, Gypsy and Traveller young people in England*, The Children’s Society, 2007.

62 Office for Standards in Education (Ofsted), *The Education of Travelling Children*, Ofsted, 1996.

63 Laptops and internet connectivity were provided by the E-Learning and Mobility Project (e-lamp) which began in 2003 and ended in July 2010. Further information about the project is available at: <http://www.natt.org.uk/elamp-initiatives>.

64 Taken from the Waltham Forest Traveller Education Services database.

65 Chief Secretary to the Treasury, *Every Child Matters*, 2003, pp. 29-34, available at: <http://www.education.gov.uk/consultations/downloadableDocs/EveryChildMatters.pdf>.

66 Derrington, C., “Fight, Flight and Playing White: An Examination of Coping Strategies Adopted by Gypsy Traveller Adolescents in English Secondary Schools”, *International Journal of Educational Research*, Vol. 46(6), pp. 357-367.

67 See above, note 61.

68 Department of Education and Science, *Children and their Primary Schools*, Her Majesty’s Stationery Office, 1967, available at: <http://www.educationengland.org.uk/documents/plowden/>.

69 *Ibid.*, pp. 595-600.

70 The “Virtual School Head-teacher” (VSH) acts as a local authority co-ordinator and champion to bring about improvements in the education of “Looked After Children” (or “children in care”). “Looked After Children” attend a range of local schools but the role of the VSH is to improve educational standards as if they were attending a single school. Further information is available at: <https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DCSF-RR144>.

71 For example, the Roma Support Group, the London Gypsy and Traveller Unit and the Irish Traveller Movement of Great Britain.

72 Tony Blair told the Labour Party Conference in 1996: “Ask me my three main priorities for government and I tell you education, education, and education”. (See Blair, T., *Leader’s Speech*, 1996, available at: <http://www.british-politicalspeech.org/speech-archive.htm?speech=202>.)

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76 Department for Education and Skills, *Aiming High: Raising the Achievement of Gypsy Traveller Pupils*, 2003, available at: <http://www.southglos.gov.uk/NR/rdonlyres/D682F1B0-48D0-4EFE-B649-BCB8687F93D7/0/CYP030037.pdf>.

77 The National Strategies were first introduced in 1998 and since then were a key national delivery vehicle for many new and existing government learning priorities. The programmes provided a mix of resources and services that support improvements in the quality of learning and teaching in schools, colleges and “early years” settings. A key aim of the National Strategies was to help these educational settings raise children’s standards of attainment and improve their life chances. The National Strategies programme concluded in 2011.

78 See above, note 59.

79 “Every Child Matters” was a UK government initiative for England and Wales launched in 2003, at least partly in response to the death of 8-year-old Victoria Climbié, tortured and murdered by her guardians in London in 2000. It is one of the most important policy initiatives and development programmes in relation to children and children’s services of the last decade. Its main aims were for every child, whatever their background or circumstances, to have the support they need to “be healthy, stay safe, enjoy and achieve, make a positive contribution and achieve economic well-being”.

80 Chief Secretary to the Treasury, *Every Child Matters*, 2003, available at: <http://www.education.gov.uk/consultations/downloadableDocs/EveryChildMatters.pdf>.

81 Department for Education, *The Importance of Teaching*, 2010, p. 61, Para 5.28.

82 Bowers, J., “What is GRTHM?”, *Gypsy Roma Traveller History Month*, available at: <http://www.grthm.co.uk/whatis.php>.

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84 Equality Act 2010, section 4.

85 *Ibid.*, section 85.

86 *Ibid.*, sections 158-159.

87 See above, note 81.

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# Exclusion of Pupils from School in the UK

Brenda Parkes<sup>1</sup>

## Introduction

In a recent speech to a school academy, Michael Gove MP, Secretary of State for Education, described those participating in the summer riots in the UK as an “educational underclass”, and made the link between educational underachievement, truancy, exclusions and crime.<sup>2</sup> For Gove, the riots were well-timed as an Education Bill (the Bill) with an aim to address discipline in school was going through parliament. The Bill received Royal Assent in November 2011, becoming the Education Act 2011 (EA2011). Amongst its changes, which included some positive measures such as free “early years” provision to two-year-olds from disadvantaged backgrounds, were changes to the exclusions regime, including the abolition of exclusion appeal panels (EAPs), and the creation of independent review panels (IRPs), with no power to direct reinstatement of a pupil, in their place.

The “equality impact assessment” on the Bill referred to the adverse impact bad behaviour can have on teachers, and how it can be a demotivating factor to those working in school and a deterrent to people who may be considering entering into the teaching profession.<sup>3</sup> It states that “[a] sharper focus on discipline will improve school ethos and raise the attainment of all. We are on the side of teachers and will not be deflected from laying down lines which those who behave badly must not cross.”<sup>4</sup> This “siding” with teachers has resulted in reforms to the dis-

cipline system which give increased powers to teachers to manage bad behaviour. It has also raised concerns, however, about the impact on the rights of children in school and the impact on equality.

For decades, there have been concerns about the disproportionate numbers of pupils from certain ethnic minority groups, as well as those with disabilities and special educational needs (SEN), who are affected by the exclusions regime. This article will examine the current debate and evidence regarding school exclusions, and consider whether there has been any improvement, and any examples of good practice, in attempts to address disproportionality in the numbers of particular social groups who are excluded. It will consider the equality and human rights context of exclusions and whether the recent changes to the exclusions system are likely to assist or hinder the advancement of equality and protection of the rights of pupils.

## 1. Legal Framework

The legal framework relating to the exclusions regime in the UK is found in statutes specifically relating to education. In order for this framework to be critically analysed, however, it is also necessary to examine the impact of equality and human rights legislation on the implementation of the regime. Each of these areas is explored in more detail below.

## 1.1 Education Law

The Education Act 2002 (EA2002) and the Education and Inspections Act 2006 set out provisions relating to permanent and fixed term exclusions.<sup>5</sup> These statutes provide that a school can permanently exclude a pupil if: (i) he/she has seriously broken the school behaviour policy, and (ii) when allowing the pupil to remain in the school would seriously harm the education or welfare of the pupil or others in the school. The local authority must provide full-time education from the sixth school day of a permanent exclusion.

A school can exclude a pupil for a fixed period for persistent disruptive behaviour where it is not serious enough to warrant permanent exclusion. The school must not, however, exclude pupils for more than a total of 45 days within any school year. If a pupil is excluded for more than one day then they must be given work and the school must mark it. From the sixth consecutive school day of a fixed term exclusion, the school has responsibility for finding alternative suitable education for the pupil.

The governing body of the school is required to review the head teacher's decision to exclude, and the parent is allowed to meet with them. If the decision is upheld then the parent may appeal to the EAP, which has the power to direct the head teacher to reinstate the pupil. The EAPs also deal with disability claims in relation to permanent exclusions from maintained schools, short stay schools and pupil referral claims. Disability claims against fixed term exclusions are heard in the First Tier Tribunal (the FTT). Discrimination claims in respect of any other protected characteristics are heard in the County Court. The EA2011 referred to below introduces new review panels to replace existing appeal panels in September 2012.<sup>6</sup>

## 1.2 Equality Act 2010

In exercising all of its functions, including those related to the exclusions regime, a school must comply with equality legislation, and in particular, the Equality Act 2010 (the Equality Act).<sup>7</sup>

### *Direct and Indirect Discrimination*

Direct discrimination occurs when a person treats another person less favourably than they treat or would treat another because of a protected characteristic.<sup>8</sup> For example, direct discrimination in the exclusion process would occur if a pupil who is black or is disabled is excluded for a longer period in comparison to a white or non-disabled pupil who has behaved in a similar way. Direct discrimination could also occur if a disabled pupil is excluded as a result of the failure by the school to make reasonable adjustments.<sup>9</sup> Sometimes exclusions may occur when a pupil has responded to prejudicial bullying in circumstances which can amount to direct discrimination.

A high proportion of exclusions involve pupils with SEN, many of whom have learning disabilities. By way of example, in 2009, the High Court ruled in favour of a nine-year old disabled student who had been excluded for disruptive behaviour linked to his disability, Attention Deficit Hyperactivity Disorder (ADHD).<sup>10</sup> The school argued that the decision to exclude was made on grounds of health and safety. However the court upheld the Special Educational Needs & Disability Tribunal's decision that, under the Disability Discrimination Act 1995 (DDA), the school had failed to make reasonable adjustments, as it should have involved the help of a specialist team that was available to them prior to the incident. The judge ruled that the pupil's scratching which tended to

lead to physical abuse was not covered by the DDA but his ADHD was. Many cases involving pupils with SEN arising from a particular disability could also involve failure to make reasonable adjustments and other forms of discriminatory treatment.

Indirect discrimination would occur if the exclusion process results in a disproportionate adverse impact on a group with a protected characteristic, without any justification for the policy being provided by the school or local authority, which is not found to be a proportionate means of achieving a legitimate aim.<sup>11</sup> In relation to the latter, questions could be asked about the effectiveness of excluding pupils from school as a policy generally.

The case of *D.H. and Others v Czech Republic*<sup>12</sup> involved discrimination under Article 14 (Non-discrimination) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and included comments that exclusion could relate to a pattern of discrimination as well as a specific act. This case related to Roma children who were generally segregated within the education system by being placed in remedial special schools. The case was brought under Article 14 and Article 2 of Protocol 1 (Right to education) of the ECHR. The European Court of Human Rights (ECtHR) concluded that even if a law is neutral, if its effect is racially disproportionate without justification, it would be unlawful.

An example of a “pattern of discrimination” in another area of social policy is the use of stop and search. Following the publication of a report into the use of this historically controversial police tactic,<sup>13</sup> the Equality and Human Rights Commission (EHRC) carried out inquiries into certain forces which had demonstrated high levels of disproportionality in

their use of stop and search, and which had not convinced the EHRC that they had taken the necessary steps to comply with equality and human rights legislation. In the absence of a satisfactory explanation for the evident disproportionality, an indirect discrimination claim could be made. The EHRC served letters before action on two forces, and entered into formal legally binding agreements with them following their undertaking to take the necessary steps to address the disproportionality rates.<sup>14</sup>

Similarly to the “stop and search” process, school exclusions have historically been applied disproportionately to different social groups. Whether the exclusions system is objectively justified in any particular circumstance is not an entirely straightforward matter, however, and could involve a number of different interpretations of the usefulness and legitimacy of the principle of exclusion and the likely consequences that follow. Furthermore, the statistical interpretation may be particularly complex given the distribution of exclusion figures between schools and the increase in autonomy within the school system. Many of those who have researched this issue have highlighted the role that alternative measures can play in addressing behavioural issues – measures such as early intervention and restorative justice, which may often be more effective in meeting the aims that the exclusions system sets out to achieve.<sup>15</sup>

#### *Public Sector Equality Duty*

Under the Equality Act’s new public sector equality duty, which came into effect in April 2011,<sup>16</sup> listed public authorities (including maintained schools) and others who carry out public functions must, in the exercise of their functions, have due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Equality Act;
- advance equality of opportunity between people who share a protected characteristic and those who do not share it; and
- foster good relations between people who share a protected characteristic and those who do not share it.<sup>17</sup>

Furthermore, the Equality Act states that having due regard to advancing equality involves having due regard in particular to the need to:

- remove or minimise disadvantages suffered by people who share a relevant protected characteristic that are connected to that characteristic;
- take steps to meet the needs of people from protected groups who share a relevant characteristic that are different from the needs of persons who do not share it; and
- encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.<sup>18</sup>

The Equality Act states that meeting different needs involves taking steps to take account of disabled people's disabilities. It describes fostering good relations as tackling prejudice and promoting understanding between people from different groups. It states that compliance with the duty may involve treating some people more favourably than others.<sup>19</sup> The new public sector duty is important because case law for the previous duties has established that the principles of a general duty require the public authority to ensure

that, when taking decisions and developing policies, those exercising these functions must be fully aware of the requirements of the duty and have a conscious approach and state of mind.<sup>20</sup> They must approach the issue with rigour, and ask themselves the right questions.<sup>21</sup> There must also be advance consideration.<sup>22</sup> Having "due regard" is the level of "regard" that is appropriate in all the circumstances.<sup>23</sup> Under previous legislation, there were specific duties which made it a requirement for schools to have equality policies and schemes and to monitor their policies and practices.<sup>24</sup> The regulations for the new Equality Act duty are more light touch than those relating to the previous equality regimes, and require the setting of objectives and publishing of information that shows how public authorities (including schools) have complied with the general duty.<sup>25</sup> There is less prescription in the new regulations which could lead to some public authorities failing to comply with their general duty if they do not introduce the relevant systems and procedures for collecting the necessary evidence base to facilitate the paying of "due regard" required under Section 149 of the Equality Act. Where, for instance, there is disproportionality, but a school does not adequately monitor its exclusions or consider how it should address such disproportionality, then it could be failing in its duty to have "due regard", as well as being at risk of breaching the provisions in the Equality Act relating to indirect discrimination.

### *Human Rights*

A decision to exclude a pupil from school must also comply with the Human Rights Act 1998, particularly in relation to Article 2 of Protocol 1 of the ECHR (Right to education) as well as Article 14 (Non-discrimination). There is a difference of opinion as to whether Article 6 (Right to a Fair Trial) applies

to school exclusions. In the case of *Oršuš v Croatia*,<sup>26</sup> the ECtHR determined that Article 6 of ECHR applies to educational disputes. However the UK Department for Education's (DFE) position is that this case can be distinguished on its facts and that, as a result, Article 6 does not apply to exclusions. This is discussed further below. Exclusion policies and procedures must also comply with international law, including in particular the Convention of the Rights of the Child (CRC),<sup>27</sup> the International Convention on the Elimination of All Forms of Racial Discrimination<sup>28</sup> and the Convention of the Rights of Persons with Disabilities,<sup>29</sup> which includes obligations to protect both the rights of children with disabilities and the right to education.<sup>30</sup> Much of the CRC is relevant to school exclusions, including Article 3 relating to the best interests of the child, Article 12 giving every child the right to say what they think in all matters affecting them and Article 28 which affirms the right to education. Exclusion policies and procedures have therefore become subject to scrutiny by the relevant UN treaty bodies.<sup>31</sup>

## 2. Disproportionality: The Evidence Base

Having outlined the legal framework which governs the exclusions regime in the UK, this section will now explore the ways in which the regime may have failed to comply with equality law obligations due to its disproportionate impact on particular social groups.

For decades, exclusions have been the subject of much research and many inquiries due in particular to their disproportionate impact on certain ethnic minority groups, including, in particular, Black Caribbeans, Gypsies and Travellers, as well as those with SEN and disabilities. The purpose and aims of the whole exclusions system have also been the subject of great scrutiny, as links have been made between the exclusions sys-

tem, underachievement, the family environment, crime and gang culture. Reports have generally been consistent in highlighting disproportionality, with some also identifying examples of good practice in the approach adopted by certain schools in relation to discipline, with a greater emphasis on early and preventative interventions rather than exclusion. This section provides an overview of some of the evidence which demonstrates continuation of the disproportionate impact of the exclusions regime on certain social groups, and illustrates the failure of the state to effectively address inequalities within the exclusions system.

The latest Department for Education figures on exclusions for 2009/2010 record an estimated 5,740 permanent exclusions and 331,380 fixed-term exclusions.<sup>32</sup> What the statistics show is that the previous Government's objective to reduce the number of permanent exclusions appears to have succeeded, in that they have declined from 12,300 permanent exclusions in 1997/1998. The number of fixed-term exclusions recorded for 2009/2010 was the lowest since 2003/2004.

Despite this decrease in the number of exclusions overall, the 2009/2010 report highlights Black Caribbean pupils being four times more likely to be excluded and those with a statement of SEN being eight times more likely to be permanently excluded and six times as likely to have been excluded on one or more occasions.<sup>33</sup> Those with SEN formed nearly three quarters of pupils permanently excluded in 2009/2010, while Gypsies and Travellers were the ethnic group with the highest proportion of exclusions although some caution had to be adopted due to the smaller numbers involved.<sup>34</sup> The figures include those with SEN who have been excluded but do not capture all disabled pu-

pils. The absence of disability related information in education has been highlighted by a report commissioned by the DFE itself.<sup>35</sup>

As far back as 1985, the Commission for Racial Equality (CRE) published a report of its investigation into what were then called “suspensions” in Birmingham which found disproportionate numbers of black pupils suspended from school.<sup>36</sup> It concluded that black pupils were four times more likely to be suspended than white pupils. The explanation for this difference could not be attributed to standard references to pressures and problems of living in the city or the incidence of one-parent families. The report concluded that these factors did not stand up to scrutiny. It was more a case of institutional discrimination rather than direct or intentional discrimination although there was clearly evidence of stereotyping. Institutional discrimination was defined as all the practices and procedures employed by a school or authority which, unintentionally or otherwise, have the effect of placing members of one or other racial or ethnic group at a disadvantage and cannot be justified.<sup>37</sup> The CRE found, for instance, that black pupils were more likely to be recommended for suspension units rather than other schools and that there was evidence of misinterpretation of black pupils’ behaviour, which often involved a failure to take into account cultural characteristics such as hair style.<sup>38</sup> The report also highlighted the importance of record keeping and monitoring and looking at reasons for over-representation.<sup>39</sup>

Over twenty years later, in 2006, the Department for Education and Skills (DFES) produced its own “Priority Review” report on black pupils and exclusions (the Priority Review Report).<sup>40</sup> It noted that black pupils are less likely to fit the profile of typical white excluded pupils, who generally

have (i) SEN or are eligible for Free School Meals (FSM), (ii) longer or more numerous previous exclusions, (iii) poor attendance records, (iv) criminal records or (v) more looked-after children. The findings challenged the assumption that racial inequalities are due to socio-economic inequalities. Instead, there was evidence that there is an “x-factor” linked to ethnicity. The report pointed out that while there is a lot of academic common ground regarding this issue, some commentators focus on in-house reasons for inequality, such as policy and practice in schools and the education system generally, while others concentrate on outside factors within the wider community which cause black pupils to behave worse or differently. It used the term “institutional discrimination” to describe how disproportionate exclusions arise. A disproportionate exclusion could arise if, for instance, an overall policy is adopted to address socio-economic factors, but does not necessarily deliver equality outcomes for different ethnic groups. The report identified factors that are often put forward as leading to disciplinary action and exclusion:

- institutional racism and discrimination;
- negative stereotyping of black pupils as threatening;
- over-harsher disciplining of black pupils; and
- generally low teacher expectations.<sup>41</sup>

The report also acknowledged the link between school exclusions and social exclusion, and the high correlation with unemployment and involvement in crime. It noted that ethnic minority pupils are frequently put in lower academic sets, regardless of their attainment levels – a practice which, in itself, could be discriminatory. DFES concluded that failure to address the exclusions gap is not due to an insufficient legal basis within equalities

legislation that could challenge such a gap, or the non-existence of good practice models. Instead, the gap persists because of the marginal status of race equality in the education system. The report concluded that while there are both in-house and out-of-school explanations for the exclusions gap, a focus on in-house solutions is preferable to an emphasis on out-of-school factors which are difficult to address due to a lack of sufficient evidence. Further, it is important to avoid locating the problem within the black communities and therefore excuse inaction by the system. It also emphasised how important the issue of exclusions is for the black communities, and how the DFES should give it similar priority, stating that “[f]or black communities, exclusions are to education what stop and search is to criminal justice”.<sup>42</sup> DFES concluded its Priority Review Report with a series of recommendations including the targeting of 20 local authorities and the 100 schools with the worst record on exclusions for follow-up action.

In an article written for the Runnymede Trust – *Did they get it right?*<sup>43</sup> – published in 2010 as a follow-up to the Priority Review Report, Diane Abbott MP stated that the report was withheld from publication initially and only published because it was leaked to the press.<sup>44</sup> Furthermore, following her own inquiries, she found out that the implementation of the report was not as suggested in the review but involved the self-selection of a number of authorities for follow-up action.<sup>45</sup> This indicates that there was a reluctance on behalf of the government to be transparent about the evidence base for exclusions, and that some of those authorities where there is evidence of disproportionality may not be taking responsibility to address the issue.

The Runnymede Trust’s publication was referred to as a “re-examination” of the issue.

It brings together commentators with different perspectives, including various academics, representatives of charities and other organisations that work directly with excluded pupils or those at risk of exclusions, and teachers unions – the Association of Teachers and Lecturers, the National Union of Teachers and the Association of School and College Lecturers. There are various contributions which reflect issues that were referred to in the DFE report including what can be referred to as “in-house reasons” and “outward-looking factors” for disproportionate exclusion rates.

The Centre for Social Justice’s (CSJ) report on exclusions published in September 2011 highlighted various social and economic factors that it considered could contribute to school exclusions, including family influence and gang culture.<sup>46</sup> The report highlighted disproportionality of the impact of exclusions amongst certain ethnic minority groups as well as the large number of those excluded who have SEN.

The issue of this disproportionate application of the exclusions regime has also been brought to the attention of certain UN treaty bodies. The Children’s Legal Centre (CLC) submitted a report to the Committee on the Rights of the Child (CoRC) in 2008 on the extent to which the UK has complied with the right to education set out in Articles 28 and 29 of CRC.<sup>47</sup> The report referred to disproportionate numbers of ethnic minority and SEN pupils being excluded and made recommendations relating to the reduction of the number of discriminatory exclusions, highlighting how exclusion from school can lead to social exclusion and disengagement. Similarly, in its recent Concluding Observations on the UK and Northern Ireland, the Committee on the Elimination of Racial Discrimination (CERD) expressed concerns about the

continuing disproportionality in numbers of excluded pupils from ethnic minorities.<sup>48</sup>

The CLC's concerns about social exclusion and disengagement were subsequently proved justified by incidents which arose three years after the report was published. The interim report into the riots which took place in various UK urban centres in August 2011, by a committee chaired by Darra Singh, referred to Ministry of Justice statistics on those who were brought before the courts.<sup>49</sup> This revealed that 46% were black (including mixed race), 42% were white, 7% Asian, and 5% of "other" ethnicity. 26% of those who appeared before the courts were aged between 10 and 17 years of age. Of this age group, one third had been excluded from school for at least one fixed term period in the year 2009/2010, a percentage six times higher than the national average. Two thirds of this group had SEN, which is three times higher than for the population as a whole.

### 3. Unofficial Exclusions

One particular trend that has been highlighted as a potential cause for concern in many of the reports on exclusions is the use of unofficial or informal exclusions. The Priority Review Report suggested that unofficial exclusions which are not recorded could provide a partial explanation for the decrease in the overall numbers of pupils who are excluded from school.<sup>50</sup> The DFE produced guidance in 2008 (soon to be replaced by new statutory guidance) which emphasised the unlawfulness of unofficial exclusions.<sup>51</sup> These unofficial exclusions include various measures that in effect exclude pupils such as:

- i) schools encouraging parents to move their children from the school;
- ii) the use of part-time timetables;
- iii) placement of pupils in Pupil Referral

Units (PRUs) which are short stay centres for pupils who are educated in ways other than at a maintained or special school;

iv) managed moves which involve the transfer of a pupil from one school to another in the same area to avoid exclusion; and

v) dual registration where a pupil is registered at a main school as well as another educational establishment such as a PRU, or independent school.

These measures are forms of exclusion short of official exclusion as defined by the legislation. A 2011 CSJ report found that despite the number of exclusions falling in 2010/2011, the number of pupils being educated in PRUs almost doubled between 1997 and 2007.<sup>52</sup> It highlights the fact that they are being used illegally in some cases, and that there are no records on how these are being used. Furthermore, the use of onsite provision for the purpose of informal exclusion has the effect of reducing the numbers of pupils who are recorded as having been excluded.

In its shadow report to the CoRC in 2008,<sup>53</sup> the EHRC advised that the CoRC should explore with the government the increased use of informal as well as temporary exclusions and the effectiveness of PRUs.<sup>54</sup>

### 4. Identifying Good Practice and Recent Developments

Some reports that highlight concerns about bad and potentially unlawful practice in the use of exclusions also refer to some evidence of good practice, such as early intervention and alternatives to exclusion.

In its Priority Review Report, the DFES noted the importance of monitoring involvement of pupils in disciplinary processes and identifying those at risk early on. It also recognised the role of restorative and preventative ap-



proaches to behaviour management that seek to mediate the root causes of conflict rather than simply punishing the pupil.<sup>55</sup> The new EA2011 has, however, removed the requirement on schools to hold reintegration interviews for pupils who have been excluded, which could lead to certain opportunities to prevent further exclusions being missed.

The DFE is currently carrying out a pilot into the use of exclusions and potential alternatives (the DFE Pilot).<sup>56</sup> The three-year school exclusions trial launched in 2011 will require head teachers to take responsibility for every pupil admitted to its school and the placement of pupils it excludes permanently rather than leaving it to the local authority to make arrangements which is the current position. The aim behind this new approach is to encourage schools to take more responsibility for pupils who are at risk of exclusion and engage in early intervention and good practice.

In the same vein, those who provide advice and advocacy support to parents and pupils in relation to the exclusion process, such as the Communities Empowerment Network, have also highlighted the need for more preventative and early interventions.<sup>57</sup> The CoRC Concluding Observations on the UK emphasised the importance of early and alternative intervention, recommending the reduction of the number of exclusions as well as the use of social workers and psychologists in order to help children in conflict with the school.<sup>58</sup>

Barnardo's produced a report in 2010 in response to policy commitments made by the Conservative Party, whilst in opposition, which it was concerned could increase the rate of exclusions.<sup>59</sup> It highlighted the importance of early intervention and alternatives to exclusions that are effective using several case-studies looking at four different modes

of intervention as good practice examples. It pointed out that the costs of exclusions can be greater than expenditure on alternatives. The Office on Standards in Education (Ofsted) published a report in 2008 on ways of reducing the number of black pupils being excluded. It examined eleven schools and referred to good practice that had been identified by Her Majesty's Inspectors in an earlier review.<sup>60</sup> These examples included respect of the individual, and a systematic caring and consistent approach to behaviour, understanding causes of behaviour, empowering pupils to take control of their lives, and diverse role models.<sup>61</sup>

The Office of the Children's Commissioner (OCC) will be publishing the report of its inquiry – The School Exclusions Inquiry – in March 2012.<sup>62</sup> It will look in particular at whether (i) the exclusions regime, and particularly the related decision-making process, is consistent with children's rights under the CRC, and (ii) whether schools and public authorities are meeting the requirements of the public sector equality duty under the Equality Act. At the launch of the inquiry, the Children's Commissioner said that it would be looking at the government's proposals for changes to the exclusions system and whether the current system and the changes to it are consistent with the CRC. However, the findings will be too late to influence the most recent changes already introduced by the EA2011, although they could potentially impact on statutory guidance being produced by DFE on the new exclusion process which will commence in September 2012.

## 5. Future Research

The DFE Pilot may be informative if it can give some insight into the role of early intervention and preventative measures practiced by schools in handling discipline issues, and

lead to recommendations which encourage alternatives to exclusions as well as seek to fill gaps in knowledge. Future research could look at how schools and local authorities are meeting their obligations under the public sector equality duty under the Equality Act. This could include evaluating how schools and local authorities are collecting data and analysing the impact of exclusion policies on different groups of pupils, including ethnic minority pupils and those with disabilities and SEN as well as those with more than one protected characteristic, and whether they are taking any steps to address any evidence of disproportionality and other potential forms of discrimination. Any research should also look for evidence of the use of informal exclusions.

## **6. Reforms to the School Exclusions System under the EA2011**

As mentioned above, the Coalition Government has recently introduced reforms through the EA2011 to address discipline in schools, including amendments to the exclusions system. The reforms have been met with a number of criticisms from both equality and human rights organisations.

The EA2011 introduced certain measures intended to address bad behaviour in school by giving stronger powers to teachers to search pupils without consent,<sup>63</sup> to impose detention on a pupil without notice,<sup>64</sup> and to introduce IRPs with limited powers.<sup>65</sup> The requirement for schools to enter into behaviour and attendance partnerships to support early intervention and preventative measures has been repealed. All of these reforms have implications for both equality and human rights. This section will examine particularly the challenges presented by the introduction of IRPs and the criticisms of the new “appeals” process, which is argued

to (i) undermine equality obligations under the Equality Act by increasing the potential for disproportionate impact of the exclusions regime, and (ii) represent a contravention of the Human Rights Act 1998.

Following the amendment to EA2002 brought in by Section 4 of EA2011, parents of pupils who have been permanently excluded will now be able to appeal to an IRP which will have the authority to recommend that the school reconsiders its exclusion decision. In cases where the IRP considers that the decision was flawed when viewed in the light of the normal principles of judicial review, it may direct the school to reconsider its decision. In these circumstances, it also has the discretion to impose a fine. Review panels will replace appeal panels which had the power to reinstate permanently excluded pupils.<sup>66</sup> This new system of IRPs, therefore, allows the head teacher to make the final decision as to whether to reinstate an excluded pupil on the advice of an IRP. The reasoning behind this shift in power to the head teacher is to prevent pupils from being reinstated on a procedural point, without taking into account the needs of the pupils within school generally and with potential negative impact on the head teacher’s authority, staff morale and pupil safety. The assumption behind this policy is that the school knows what is best for the child and other pupils. Under the new regime of IRPs, those permanently excluded who allege disability discrimination will still be able to appeal to the FTT (Special Education Needs and Disability) which has greater powers than IRPs because they can order reinstatement.

The introduction of IRPs in replacement of EAPs has been criticised widely, not only by civil society. For example, the parliamentary Education Select Committee considered the proposal to introduce IRPs and supported

the retention of EAPs as currently constituted for reasons of justice and fairness.<sup>67</sup>

In various submissions and consultation responses to the 2010 Schools' White Paper – *The Importance of Teaching*<sup>68</sup> – and the Bill, several organisations expressed their concerns about what was being proposed in respect of the new appeal process. Concerns were expressed by the EHRC in its shadow report to CERD that the introduction of IRPs may lead to an increase in the already disproportionate numbers of particular ethnic minority groups affected by the exclusions regime.<sup>69</sup> The EHRC considered that removing the power to make reinstatement would decrease the IRP's ability to hold the school to account.<sup>70</sup> It also highlighted that, although one of the objectives of the change was to shorten the time it takes to determine an appeal, the practical effect on a pupil could be to delay the process as decisions are referred back for reconsideration.<sup>71</sup> It emphasised that the suspension of a child's education is detrimental to his or her development and delay of a decision is not in the "best interests" of the child. The EHRC also expressed its concern about the impact of reforms to the legal aid budget which will remove school exclusion from within its remit, making it more difficult for affected pupils to challenge the decisions to exclude them.<sup>72</sup> The EHRC reaffirmed its reservations about these proposals in its parliamentary briefing on the Bill, in which it criticised the failure of the equality impact assessment to consider the impact of its proposals for exclusions on equality.<sup>73</sup>

In a joint submission to CERD, a group of UK NGOs criticised the proposed amendment to the appeals process and the widening of powers to search pupils, and the likelihood of these powers being used disproportionately.<sup>74</sup> It suggested that this could in turn

impact on trust and confidence between ethnic minority pupils and teachers which could then impact on behaviour and thereby lead to further exclusions. It recommends that the government complies with the requirement to report on disproportionality in exclusion rates on the basis of ethnicity and demonstrate how they are meeting their public sector equality duty. The UK NGO group also recommended that the appeal process allows reinstatement of a pupil.<sup>75</sup>

The Children's Rights Alliance, in its annual review of the state of children's rights, expressed concern at the possibility that the introduction of financial penalties in the event that schools do not reinstate pupils following an IRP decision, and the requirement on the school to find alternative education for the excluded pupil, could lead to certain pupils who are at risk of exclusion being refused admission to the school in the first place.<sup>76</sup>

The view of the OCC in its formal submission of evidence to the Education Bill Committee in March 2011<sup>77</sup> was that (i) it was important that legal responses to issues around discipline are proportionate, especially so when changes affect the rights of children as in the case of the Bill,<sup>78</sup> and (ii) any weakening of protection of pupils under the new exclusions procedure could breach Articles 3, 12 and 28 of the CRC (which seek to ensure the best of interests of the child, respect for the views of the child, the right to education and the protection of a child's dignity when being disciplined, respectively).<sup>79</sup> It highlighted that the right of appeal to an independent appeal panel is an essential part of the exclusions process and that the new IRPs would not be able to meet this need satisfactorily as they will not be able to direct a school to readmit a permanently excluded pupil, even in cases of mistaken identity or where the exclusion is unlawful.<sup>80</sup>

The OCC also made the additional recommendation that children should be given the same rights as parents to appeal decisions affecting them, and expressed concerns that schools could find themselves involved in lengthy legal action in the absence of a proper appeal system.<sup>81</sup> Furthermore, the OCC warned that the power to detain pupils without notice was designed to cause inconvenience to both pupils and parents.<sup>82</sup> The OCC also added that the consequences of being permanently excluded are significant as many excluded pupils never re-engage with full-time education again, as evidenced by the fact that over half of young offenders in custody have been excluded from school previously.<sup>83</sup>

The Joint Committee on Human Rights (JCHR) also engaged with the DFE about the human rights implications of the proposal to replace appeal panels with IRPs deprived of the power to direct reinstatement of a permanently excluded pupil.<sup>84</sup> It referred to the DFE's position<sup>85</sup> that the right to a fair hearing under Article 6 did not apply to school exclusions due to the decision made by the ECtHR in *Ali v UK*,<sup>86</sup> that an excluded pupil had not been denied the right to education under Article 2 of Protocol 1 of the ECHR. The JCHR noted that the ECtHR did not, in its judgment, consider the applicability of Article 6 so it was not relevant to this particular issue.<sup>87</sup>

The JCHR considered in some detail the view of the Administrative Justice and Tribunals Council (the Council) which had expressed concerns that the IRP may not be sufficient to meet obligations under Article 6 and Article 13 of the ECHR.<sup>88</sup> Although it agreed with the general approach of the government to addressing discipline in schools, it expressed concern that the absence of the power to reinstate a pupil who has been permanently ex-

cluded would not provide a fair hearing or an effective remedy.<sup>89</sup> The Council recommended that all appeals against permanent exclusions should be heard initially at the FTT,<sup>90</sup> but the government rejected this option as it would have extended its jurisdiction.<sup>91</sup> Disability-related cases will be heard by the FTT, but the government rejected the option that those with SEN should have a right to appeal first to the tribunal, on the basis primarily that such appeals take too long to process. The JCHR considered the government's response to the Council's views on the matter with reference to relevant case law. The government relied on the case of *R (on the application of LG)*<sup>92</sup> in support of its position that the right of access to a court in Article 6 is not engaged in relation to the exclusion process, as exclusion is not determinative of a civil right. This was decided in February 2010 but was superseded by the ECtHR's 2010 judgment in *Oršuš v Croatia*,<sup>93</sup> which decided that Article 6 applied to an education dispute; and therefore applies in relation to exclusion cases. The JCHR asked the government if it was still of the view that Article 6 did not apply to exclusions in the light of this case, and its response was that it still was of this view as the *Oršuš* case could be distinguished on its facts on the basis that although *Oršuš* related to education and discrimination, it was about Roma children being put into separate classes from other children. It is the government's view that Article 6 does not apply to exclusions as the right to education is not a right or guarantee to be educated at a particular institution, and the domestic situation enables a permanently excluded pupil to continue to receive education.<sup>94</sup>

Despite the position expressed by the government, the JCHR concluded that whether it was considered a matter of ECHR law or common law, the right of access to an independent court or tribunal applies to perma-

ment exclusions from school.<sup>95</sup> On this basis, it proceeded to question the government on the absence of the right to an effective remedy in the new exclusions regime. Without giving IRPs full appellate jurisdiction on factual matters or the power to order reinstatement, the proposals in the Bill are incompatible with the requirements of Article 6 of ECHR.<sup>96</sup> The JCHR recommended that the Bill should be amended to remove the incompatibility.<sup>97</sup> It also recommended that the government should give further consideration to the recommendation of the Council to refer all exclusion appeals to the FTT as this will remove the incompatibility with Article 6 by providing an independent tribunal with the necessary jurisdiction to provide an effective remedy.<sup>98</sup> These recommendations were, however, rejected by the government, which argued that the changes to the appeal process in the exclusions regime were justifiable given that the option of judicial review remained available to challenge potentially unlawful decisions.<sup>99</sup>

## Conclusion

The evidence provided in this article demonstrates that there has been, and continues to be, a pattern of disproportionality in the use of exclusions, impacting adversely on certain ethnic minority groups and SEN pupils, many of whom are disabled. There needs however to be better recording of excluded pupils who have disabilities. The monitoring and research does not fully address how the exclusions system impacts on disabled pupils generally. Findings of research highlight various reasons for disproportionality from in-house factors including institutional discrimination to out of school factors. There are some examples of good practice, with efforts by some schools, local authorities and the DFE to address the

issues. The legal framework has generally provided a positive context for the achievement of equality and protection of human rights to some extent. However, it is of concern that this has not resulted in equality of outcome across the education system. Furthermore, it is of particular concern that the government has introduced amendments to the exclusions system which could, arguably, interfere with children's rights, and impact on equality. Of particular concern is the new "appeal" system which grants limited powers to the new IRPs. These reforms will need to be monitored closely. It is also important that schools and local authorities take responsibility, themselves, to comply with equality and human rights legislation. They should also monitor for any inequalities and breaches of legislation, including disproportionality and discriminatory practices, and the reasons for these. In addressing disproportionality, schools should consider whether there are any alternatives to exclusion and ensure they adopt early intervention and preventative measures. Effective implementation of the new public sector equality duty would be compatible with this approach.

With indirect discrimination now extending to disability discrimination under the Equality Act, the question of whether exclusions are a proportionate means of achieving a legitimate aim becomes even more pertinent given the numbers of exclusions which involve SEN pupils, many of whom have learning disabilities, as well as the continued over-representation of certain black and minority ethnic groups in the exclusions system. The aim of exclusions may be to punish pupils and manage poor behaviour as well as to protect the environment of the pupil population in general. Many of those involved in the system, however, including

those representing the interests and needs of parents and pupils, seriously question the effectiveness of the exclusions system in meeting its aims. Instead, there are concerns that there is a correlation between exclusions and pupils' disaffection with society generally, as evidenced by the riots in August 2011. Even if the exclusions system could be shown to be objectively justified, there is still evidence that some pupils are more at risk than others of being subject to direct discrimination.

Although the courts have been reluctant to find a breach of the right to education, as far as those pupils subjected to the exclusions system are concerned, the prevalence of informal exclusions could put schools and authorities at risk of breaching this right, if providing any alternative education on an informal basis circumvents the statutory educational system. It is important that there is greater scrutiny of these practices as well to ensure that pupils are not further disadvantaged by this process.

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1 Brenda Parkes is a freelance equality and human rights consultant and was previously a senior lawyer at the Equality and Human Rights Commission and the Commission for Racial Equality. Acknowledgement and thanks are given to Anthony Robinson who kindly read drafts of this article, gave some helpful comments and assisted with the editing. However the views expressed in this article are those of the author. Anthony Robinson is a board member of the Communities Empowerment Network and an equalities and human rights lawyer.

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# TESTIMONY

*"Last year, one woman  
- Sophia - was raped  
by three people from  
the National Security  
Services. All women now  
face this threat that the  
security organs will rape  
them. They are telling  
women: 'If you are a lady,  
a good woman from a good  
family, you should not go  
out on the streets.'"*

*Nagla Sidahmed Elsheikh Ali*



# Breaking through the Silence

## Women and the Media in Sudan: Testimony of Four Female Journalists

Freedom of expression is limited in Sudan. Independent journalists face many challenges, arising, in the main, from the restrictions placed on the media by the regime of President al Bashir. In March 2009, the Prosecutor of the International Criminal Court issued an international warrant of arrest against President al Bashir. In the immediate aftermath, three national human rights organisations were closed down and thirteen humanitarian organisations expelled from the country. In the years since the warrant, the regime's repressive tactics have intensified: the security services have instructed newspapers not to publish stories on certain topics, newspaper editions have been confiscated, journalists have been arrested and detained – in some cases for many months – and newspapers have been forcibly closed down. Both television and radio are controlled by the state leaving print and online journalism as the only vehicles for popular dissent.

In the last year, a number of independent newspapers have been shut down, including the Al Midan newspaper where 23 staff were arrested and 7 detained following closure of the newspaper in February 2011.<sup>1</sup> In September 2011, Human Rights Watch reported that over 100 political opponents of the government had been arrested, including well-known writer and activist Abdelmoniem Rahm, following clashes between Sudanese forces and armed opposition groups on the northern side of the border with newly-independent South Sudan and that the Al Jazeera newspaper was closed down.<sup>2</sup> More recently, in mid-January 2012, two newspapers – Alwan and Rai Al Shab, a newspaper affiliated with the Popular Congress Party – were shut down.<sup>3</sup>

At the same time, women in Sudan face severe discrimination, harassment and violence at the hands of both state and non-state actors. The regime's discrimination against women extends into all areas of state policy, from the school curriculum through to the criminal justice system, and creates an environment where women are exposed to violence, harassment and discrimination. Women are victims of a number of discriminatory legal provisions or provisions which are applied in a discriminatory manner. Article 149 of the Criminal Act 1991, for example, makes no distinction between rape and adultery and there is evidence that Articles 151 and 152, which prohibit acts of gross indecency and acts contrary to public morality, have been applied in a manner which targets women. The Organisation for Economic Co-operation and Development's Social Institutions & Gender Index 2009, which measures gender inequality by examining five areas of life (Family Code, Physical Integrity, Son Preference, Civil Liberties and Ownership Rights), ranked Sudan the worst of the 102 countries assessed for gender discrimination.<sup>4</sup>

Thus, the situation of female journalists – particularly those who directly challenge the regime – is extremely precarious. The high-profile arrest, detention and trial of Lubna Hussein in 2008 illustrates the multiple disadvantages facing female journalists and activists. Ms Hussein was arrested under the indecency provision in Article 152 of the Criminal Act for wearing trousers. She was sentenced to a month in prison in September 2009, after refusing to pay a fine for breaking the law, but was released the next day after the Sudan Journalists Union paid the fine on her behalf.

In the context of one of its projects in Sudan, ERT met with four female journalists and interview them. Acknowledging the risks to which these women would be exposed by speaking to us, ERT asked whether the women would like us to protect their identity through the use of pseudonyms. One by one they firmly refused this offer, stating that they wanted to speak openly about their experiences of discrimination and political repression. The four courageous women journalists who spoke with ERT are: Liemia Aljaili Abubakr, Nagla Sidahmed Elsheikh Ali, Sumaya Khalid Ibrahim Elmatbagi and Fatima Sulaiman Gazali Mohamed.

*Liemia Aljaili Abubakr* worked for the Khartoum Centre for Human Rights before it was “de-registered” and closed down. She is a prominent freelance journalist, human rights activist and consultant on journalism, media and gender issues. She contributes to various Sudanese newspapers and also blogs.



Photo credit: The Equal Rights Trust

Fatima Sulaiman Gazali Mohamed (left) and Nagla Sidahmed Elsheikh Ali (right)

***Nagla Sidahmed Elsheikh Ali*** is a social media activist and journalist, who is considered to be one of the most effective reporters using social media in Sudan in recent years. She maintains a blog and also uses YouTube and other websites to upload videos and other materials.

***Sumaya Khalid Ibrahim Elmatbagi*** is a journalist with the Al-ayam newspaper, where she works on the political desk. She is also a civil society activist, specialising in gender issues.

***Fatima Sulaiman Gazali Mohamed*** is a columnist working with the Aljareeda newspaper, where she covers both political and social issues. In May 2011, she was charged and detained by the authorities for reporting on the case of Safiya Ishaq, a youth activist who claimed in videos posted online that she was raped repeatedly by three security officers.

**Liemia Aljaili Abubakr (LAA):** In the past, the status of Sudanese women was very good. People used to look on women in a positive way. But this was in the past.

There used to be a very strong women's movement in Sudan. In the 1950s, women had the right to vote and there were rules on the representation of women in parliament. In 1972, a new law was passed which required that women were given equal pay for work of equal value.

When the current regime took over in 1989, it came with a specific ideology. In this ideology, women were viewed with great suspicion; women were targeted. This targeting was carried out through the law, such as the personal law, criminal law and the employment law. A specific dress code was imposed on women, in line with this ideology. The school curriculum was revised in a way which discriminated against women. This ideology and these policies created an environment where women experienced discrimination and violence. In addition, the conflicts and war which Sudan experienced in this period created an environment in which many violations of women's rights were carried out.

As a result of these policies and the discrimination which women have experienced, the women's movement has receded.

**Fatima Sulaiman Gazali Mohamed (FSGM):**

I think the main obstacle faced by Sudanese women is the laws which have been passed targeting women. These laws legitimise certain practices such as discrimination or even violence against women. This has created a pattern through which it becomes normal for people to discriminate against women.

The current situation faced by women, in the absence of awareness among most women, leads women to suffer more. This climate of discrimination transforms women's behaviour. The oppression of women, and discrimination against them, causes women not to challenge, or raise awareness even among women. Any woman who tries to raise awareness among other women, she is seen to be challenging the regime. I feel, as a woman, that the regime wants people to be ignorant of their rights. They want to create an environment where discrimination is normal and where violations persist. Sometimes they use the name of religion, or the name of "preserving society" to justify their practices.

These practices are carried out while there is a silence in the society. The regime has used religion, customs and traditions to justify its position. The strength of the regime, the suppression of different views and the fear which this creates, causes people to be silent. People don't challenge discrimination against women.

There are some exceptions, where people do challenge discrimination against women, and where there have been some positive results. For example, the Governor of Khartoum state wanted to pass a decree to stop women working in petrol stations and restaurants on night shifts. Thanks to a campaign by activists, this decree was stopped.

**Sumaya Khalid Ibrahim Elmatbagi (SKIE):**

I am afraid that the stereotype which has been created by the government has now altered the way women are perceived within society. People now look at women from the perspective which the government adopts. This is particularly true of the generations which have grown up under this regime. Because the younger generation has been educated in a system which promotes negative stereotypes of women in society, I am worried that this may lead to further problems for women in the future.

**LAA:** There are many women in the media in Sudan, particularly young women working as trainees. But there is a limit to how far women can progress in the media. There is only one female Editor in Chief, for example. Even those women who do get promoted, who become heads of department or heads of section, are not given the chance to express their views clearly in writing. Women journalists do not get to play a role in setting the policies of the newspapers or broadcasters. For that reason, our media exists for men.

On radio and television, which are monopolised by the government, women are treated as objects just to be seen, to present things, not to have an effective role. For that reason, we find many good women do not have important roles. But other women, the beautiful ones, are given roles in presenting or reading the news. They just want to have women's faces there on the screen. In this way, the radio and TV contribute to the stereotyping of women.

We have a network of women journalists who monitor and record discrimination and harassment against women in the media. There are examples of women who are sexually harassed in the workplace, and when they take their case to the police, they are dismissed. No-one defends them, not even the Union of Journalists. The Union of Journalists is pro-Government, so it doesn't defend its members. Women only make up 1% of the union membership.

**FSGM:** Within this environment, there are exceptional cases of women, who by the strength of their personality, manage to force the newspapers or other media institutions to let them play a role in deciding policies. I have personal experience of this. In 2006, I was in charge of the political department at one newspaper, and then at another newspaper in 2010. I used to set out the pages and make proposals to the Editor in Chief. There are examples, but it depends on the strength of personality – whether you feel strong enough to challenge them – and the type of newspaper.

Female journalists are not paid the same wages as men. As Liemia said, in 1972, a law was passed requiring equal pay for men and women, but this is not the case in some newspapers. When I was head of a department, I discovered that some of the journalists working for me were paid more than I was.



**SKIE:** Most of the newspapers do not have specific pages for women. The exception is *Al Ayam* newspaper, which has a weekly page for women. However, this page does not tackle all issues and problems facing women – it is restricted to a selection of very specific issues.

Many newspapers distort the image of women. There was one case of a woman being mistreated, and other women demonstrated about this. The newspapers called those who protested “prostitutes” and described the men who joined them as “gay” or something like that. There are some women who are challenging section 152 of the Criminal Act which says that any woman who does not dress in an appropriate way undermines society. The newspapers describe anyone who challenges this provision as being without morals and as if she is advocating a secular society.

**Nagla Sidahmed Elsheikh Ali:** I want to talk about the situation of women like me who are involved in blogging. Female bloggers receive many insults – particularly sexual insults – by email and in comments on their blogs. This shows you the mentality of men in our society, under this regime. I have personally suffered very bad insults by email, because I am well-known. Now I just upload videos, photos or stories without using my real name. Many colleagues who write online are still being insulted, people questioning their reputation, their

honour or their behaviour. This is a way for men to fight what we are saying, by using lies to damage and distort our reputation. But most of us do not care what they say. It does not deter us from what we are trying to do for disadvantaged people.

The security services also target women’s rights activists. They come to our houses and confiscate equipment like cameras, laptops and even the cables and connections. In January 2012, three women and I had our equipment confiscated. This was a message from the National Security Services for women, to send the message that we should not be involved in national protest movements. There are women who have been arrested and threatened with rape. Two activists were arrested two weeks ago, and were detained for three nights by the security organs. This was the second event in recent months. Last year, one woman – Sophia – was raped by three people from the National Security Services. All women now face this threat that the security organs will rape them. They are telling women: “If you are a lady, a good woman from a good family, you should not go out on the streets.”

I want to send a message – greetings to Sudanese women. Although I have experienced these difficulties, these problems, and regardless of the worsening situation, I decided to defend the rights of women and other disadvantaged Sudanese people.

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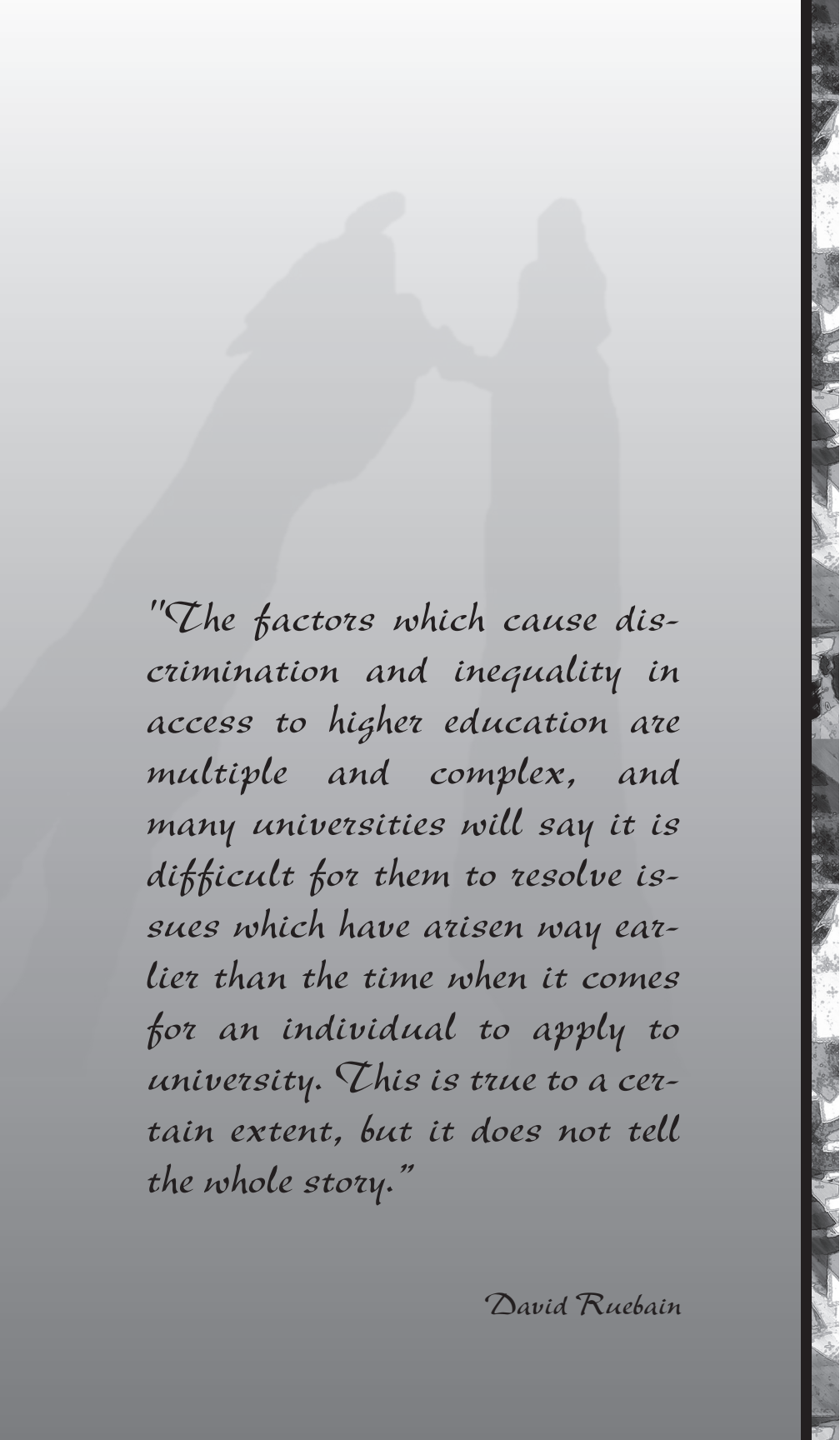
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# INTERVIEW

The background of the page features a large, light gray silhouette of two people shaking hands. The person on the left is taller and appears to be wearing a suit, while the person on the right is shorter and appears to be wearing a dress. The background is a gradient from light gray at the top to a darker gray at the bottom. On the right side of the page, there is a vertical strip with a collage of small, dark, abstract images.

*"The factors which cause discrimination and inequality in access to higher education are multiple and complex, and many universities will say it is difficult for them to resolve issues which have arisen way earlier than the time when it comes for an individual to apply to university. This is true to a certain extent, but it does not tell the whole story."*

*David Ruebain*



## Equality in Higher Education: Experts' Perspectives

*While the guarantee of access to and enjoyment of education on an equal basis with others and without discrimination is protected under various international human rights treaties, the relevant obligations assumed by states are often restricted to primary and secondary education. Therefore the sphere of higher education remains one in which efforts to achieve equality in access, results, onward opportunities, research parameters and staff promotions have lagged behind similar efforts in the spheres of primary and secondary education. The role which higher education plays, both in the lives of individual students and in society as a whole, means that the impact of any inequalities within this sector can be wide-reaching. That is not, however, to suggest that action is not being taken in order to remove such inequalities. Different approaches to the promotion of equality in higher education, including positive action, have been adopted in different jurisdictions with varying success. ERT therefore chose to interview two experts on this issue in order to explore some of the challenges and successes which they have encountered through their own work.*

*ERT spoke with David Ruebain, Chief Executive of Equality Challenge Unit, UK, and Marcelo Paixão, Professor of Federal University of Rio de Janeiro, regarding their perspectives on the issue of equality in higher education, based particularly on their own research in the UK and Brazil respectively.*

**ERT:** You are widely recognised as an expert on issues related to inequality and discrimination in higher education. Can you tell us about what led you to get involved in this area?

**David Ruebain:** It is a mixture of things really. I am disabled, and when I was a child, most disabled children were sent to “special schools” – then, effectively a euphemism for schools for children considered not to belong in regular schools. There wasn’t any particu-

lar pedagogic approach to teaching disabled children. They were just sent there because they didn’t belong in the regular school. It was not a great experience for me at all, but for complicated reasons, I also went to mainstream schools and then to university. These experiences informed my ethical and political interests. Then I decided to train as a lawyer. I was very interested in mixing my legal background with my interest in education. Before becoming a lawyer I did research in education for a while and I then qualified



as a solicitor at a time when education law was just beginning as a specialism. I was able to latch on to that development. I joined the Inner London Education Authority as a solicitor, and then eventually set up my own department in education law in a law firm, which I ran for about 13 years. So I suppose the background was a mixture of my interest in policy and practice in education as an environment which impacts on all young people in different ways.

**Marcelo Paixão:** My approach to equality in higher education comes from my special interest in race relations in Brazil. I will point at two factors. The first is the fact that I have a degree in economics with a doctorate in sociology, and I have specialised in inequality, poverty, social rights and other related issues. Naturally, the topic of race relations is a subject of particular interest within each of those matters. Currently, most of the social problems experienced in Brazil have blacks as their main victims. This is partly the prod-

uct of the model of race relations operating in the country, in which the physical appearance of each person is embedded and classified within a hierarchical system where those with lighter skin have greater access to opportunities and rights when compared to those with darker skin. This occurs within a society which is strongly unequal and asymmetric, as is the Brazilian society. Therefore, the matter of race relations is theoretically very significant, and this attracted me as a researcher and university professor.

There is also a second motivating factor that led me into this area of studies – the fact that I am also black. Naturally, I do not think that only people of darker skin can analyse this kind of topic. All who engage in the study of race relations, whatever their ethnic origin or physical appearance, are, of course, welcome to do so. But one must take into account that all analysts of racial inequality will be influenced by their own experiences of integration into society. I



do not consider myself a positivist. Thus, I believe that for science as a whole, and for social sciences in particular, it is impossible to fully dissociate the process of production of knowledge from the different interests shaped within the society.

**ERT: Please could you briefly describe the legislative framework (both international and domestic) in your countries, the UK and Brazil, which seeks to protect the rights to equality and non-discrimination in higher education? How effective do you consider this framework to be, both in relation to monitoring and protection? In your opinion, how could it be improved?**

**David Ruebain:** The legislative framework which protects the rights to equality and non-discrimination in higher education in the UK is broadly the same as that which protects those rights in other areas of public life. This is principally the Equality Act 2010<sup>1</sup> (though the legislation is different in Northern Ireland) and, to an extent, human rights legislation – particularly Article 2 to the First Protocol to the European Convention on Human Rights and Fundamental Freedoms which guarantees the right not to be denied education. However, as this is drafted as a negative right, it sets only a very low floor which offers little more than minimalist protection.

Many of the UN instruments – for example, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women – have provisions within them which impact on education. However, these are more concerned with compulsory school-based rather than tertiary education. So in terms of higher education, protection in the UK derives primarily

from the Equality Act 2010, as underpinned by European legislation.

As for whether this legal framework is effective, I think the answer is different for each of the countries of the UK. The monitoring and protection provisions mainly relate to the “public sector duty” established under the Equality Act 2010,<sup>2</sup> and the specific duties for England are *de minimis* compared to Wales and Scotland. It is hard to tell because the specific duties for England are only a few months old, but I suppose as a driver for change, I regard the “public sector duty” as very important. As the new specific duties are much less onerous than they were previously in England, my fear is that they will be less transformative in their approach. However, we just don’t know yet what the impact will be, and will have to wait and see. Equally, we will have to see whether the more thoroughgoing specific duties in Wales, and those proposed for Scotland, are in fact more effective.

As for how the framework could be improved, I was very disappointed that the government has chosen not to bring into force the socio-economic duty set out in the Equality Act 2010.<sup>3</sup> This had the potential to be a tremendous agent of change. That apart, the most important thing for driving equality forward is political will and leadership from the top. You cannot overestimate how important it is for a leader to decide that this is a key issue – it can have significant consequences for particular organisations or indeed for the whole country. When I refer to a strong commitment to transformative change, I do not only mean “not discriminating”, but more looking at historic and systemic examples of exclusion and committing to change this. I therefore think that improvement in the legal protection of the right to equality in education will require political leadership from the top

and preferably implementation of socio-economic duties. Finally, it will require a decision not to resile from existing legislation, as is threatened by the government's response to the "red tape challenge" consultation.<sup>4</sup>

**Marcelo Paixão:** In terms of its legal history, since the commencement of its Republican period (which began in 1889), according to Brazil's legal system, in theory, all are equal before the law. At least since 1891 when our first Republican Constitution entered into force – which no longer embraced the slave system which had been abolished a year earlier – people of different skin colour and origin should be treated equally before the authorities. This idea did not change throughout the twentieth century. The importance of this is reinforced if we consider the experience of countries like the U.S.A with its outdated legal formula "separate but equal," or South Africa during the Apartheid.

When referring to the lack of segregationist laws throughout the legal history of the country, I must point out that this concerns the fact of being black. Thus, officially, ever since the commencement of the Republican period, there have been no laws against blacks based solely on the colour of their skin. This does not mean, however, that the cultural events related to Afro-descendants have not been severely and repeatedly repressive.

The Criminal Code considered "samba", for example, which today is the national music of Brazil and is known throughout the world, a crime until the early 1940s. The same applied to "capoeira" (a martial art developed by Brazilian former slaves) and spiritualism, among other cultural or religious expressions related to the African traditions in the country. After the 1940s, the legal framework evolved and these kinds of cultural manifes-

tations ceased to be considered illegal, and in some cases (such as "samba" and "capoeira") they even started to be considered as defining elements of the cultural identity of the country. However, until at least the late 1980s, certain religious expressions such as "Candomblé"<sup>5</sup> were controlled by the state. Events could only take place in locations that had been registered with the police. In essence, such legislation repressed the cultural and religious expression of those of African descent, as well as their supporters, who were not only blacks.

In relation to access to higher education, the absence of segregationist legislation meant that blacks have never been legally prohibited from going to university or attending classes. In fact, Article 206 of the Federal Constitution of 1988 guarantees equality in the conditions of access in the educational system. Our problem lies not in the impeditive or segregationist legislation, as occurred in the two countries mentioned above. Rather, the presence of black students in classrooms and universities has been undermined by racist social practices, rather than by specific laws. This is one of the secrets of the Brazilian model of race relations: to segregate without segregationist laws.

In the 1950s, more than sixty years after the end of the slave system, about 70% of black people aged over 15 were illiterate. It is also notable that among the white population, the rate was also high, at around 40%. In the 1980s, when Brazil was the fastest growing capitalist economy in the world, the illiteracy rate among blacks was 40%, practically the same as the white population 30 years before!

In 1988, one hundred years after the end of the slave system, the rate of young black men between 18 and 24 who attended institu-



tions of higher education was 1.8%. Today it is near 8%. Among whites this percentage is still about three times higher.<sup>6</sup>

Therefore, this data only reveals that in Brazil it was not specific segregationist legislation that prevented blacks from attending the schools and universities. This is rather the product of a pattern of poor race relations, which has been very efficient in causing asymmetries. Segregation takes place without resort to the law, but through a continuous process of convincing those with darker skin that the most prestigious, cultural, better-paid or empowered activities are not meant for them. In fact, this is a process of persuasion by the Brazilian society for the Brazilian society. It is a model that is shared by the higher and lower classes. Therefore, according to the American sociologist Michael Hanchard, who, inspired by the conceptualisation of Antonio Gramsci, classified the current Brazilian model of race relations as forming a symbolic and ideological hegemony of whites over blacks, persuading the latter of their natural place within our social pyramid.<sup>7</sup>

That is why the Brazilian legislation concerning the universal principle of equality of all before the law – which includes access to university – fails by its formalism. Thus, if the legal principle of equality is an important value, for it to become effective, those who are different must be treated differently, otherwise the asymmetries will be perpetuated forever.

In theory, within the Brazilian legal system, everyone is equal before the law. But in practice, the mechanisms of racial discrimination continue to operate, and the legislation, or the legislator, has not been concerned with the protection of those who are historically discriminated against. Consequently, racial

inequalities have been extended indefinitely, including in relation to access to university.

**ERT: In the UK and Brazil, what are the key challenges in ensuring *equal access to higher education*? Are there any groups which are particularly disadvantaged in this regard? Do these reflect the patterns of discrimination witnessed in secondary education? What challenges, if any, are faced in effectively monitoring discrimination and inequality, and the factors which cause such discrimination and inequality, in access to higher education?**

**David Ruebain:** I think the key challenges to ensuring equal access to higher education may be about to change. We are in a period of transformation where students starting undergraduate courses in the autumn of 2012 in England will be paying significantly higher fees than their predecessors, albeit with the support of government loans. The position in Scotland, Wales and Northern Ireland is different and complicated. At this stage, we can only speculate as to what impact this will have on certain equality groups. If you are looking at socio-economic disadvantage, it can impact on anyone regardless of gender, race, age, *et cetera*, but it does disproportionately affect some groups. For example, disproportionate numbers of British Bangladeshi students are from poor backgrounds, and the same applies to disabled students as well. UK universities do broadly reflect the demographics of the population, including in relation to black and minority ethnic students, but they are not evenly represented across the different types of university (for example as between the older “Russell” group as against the newer ones). There are however disproportionately fewer men going to university; this is a relatively recent development.

The patterns of inequality in higher education are similar to those in secondary education, but not the same. There are very particular patterns of discrimination in compulsory education, for example in relation to levels of exclusion. Black British boys are more likely to be excluded from compulsory education than white boys or girls. Disabled students are also more likely to be excluded as well. Attainment is not equal in schools – people don't proportionately attain according to their representation in school. But those issues are not the same as in higher education, partly because higher education is more voluntary. If you look at attainment in compulsory education, the group that does the best is middle class Chinese heritage women, but in university, those that do best are middle class white students.

UK universities are relatively well-organised in terms of monitoring, particularly when compared to the US. In part, this is because there are fewer universities in the UK, and not as many private institutions. A lot of universities use evidence and data collection, and the Higher Education Statistics Agency – which is responsible for collecting data around a range of domains, including equality – plays an important role. For this reason, I would not say that monitoring is where the problem lies.

The factors which cause discrimination and inequality in access to higher education are multiple and complex, and many universities will say it is difficult for them to resolve issues which have arisen way earlier than the time when it comes for an individual to apply to university. This is true to a certain extent, but it does not tell the whole story. This is actually a difficult question to answer, as it really relates to discrimination and inequality in society at large. Further, higher education institutions are not homogenous. Some

universities reach out to underrepresented groups more than others, and not all make the same efforts.

**Marcelo Paixão:** The answer is far from simple. This is because, as I said before in answering your previous question, it is not just a change in the law that is needed, as there was never a legal ban on blacks attending Brazilian universities. For that reason, the right to equal access to higher education presupposes a series of measures that include the improvement of the basic education system (elementary and secondary), financial support for students from lower income backgrounds as well as specific strategies for increasing the proficiency of students of African descent in the three levels of education. In Brazil the best universities are those that are public, which are supported financially by the government and therefore provide free access to education to those who attend. Private universities, with some exceptions (especially those of religious nature), are the worst in terms of quality of education. But the irony is that within the basic education system, the reverse occurs, with the poorest and the blacks attending public schools, of a lower quality, and those with a higher income (blacks being a minority) attending private schools. This means that the state withholds the possibility of a better future life for some of the youth, but on the other hand guarantees this opportunity to the richest, when they attend its public universities.

In elementary and secondary public education, people of African descent (blacks and browns in our usual way of classification of colour or race for statistics) make up the majority of students: about 61%. In public higher education the rate drops to 38.4%. This data is in the 2009-2010 Annual Report on Racial Inequality in Brazil, edited by the Laboratory of Economic, Historical,

Social and Statistical Analysis of Race Relations (LAESER) and coordinated by myself.<sup>8</sup> I am particularly in favour of preserving the principle of free public education, including in higher education, and am frankly opposed to any proposals of privatisation. But the picture painted above is disappointing.

According to the 2009-2010 Annual Report on Racial Inequality in Brazil, about 90% of students of African descent are studying in public elementary and secondary schools. Among whites, this percentage is 80%, which means that, whereas 10% of the basic education of students of African descent are studying in a private school, the figure for whites doubles: 20%. Public schools have worse infrastructure and security standards than private schools. For example, 35% of public basic education students attended schools with weak infrastructures.<sup>9</sup> Among students attending private schools, this percentage was 3%. When analysing the safety conditions, 37% of public school students were studying in schools with little or no safety measures, whereas within those studying in private school this percentage drops to about 13%.

The problems affecting people of African descent in the education system comprise (i) worse conditions of study, (ii) socioeconomic difficulties, but also (iii) a pattern of race relations that eliminates the incentive for good performance in school. The average academic performance of blacks, when measured by tests carried out at the national level, is about 10% lower when compared to whites, and the difference is practically the same when one takes into account similar types of institutions.

This happens because teachers and other education professionals believe that those with darker skin will have less chance of success in their professional life. As a result,

these students receive lower educational investment, either financially (including state support), symbolically, or in terms of psychological and moral support, building up a social reality that Professor Eliane dos Santos Cavalleiro described as “mathematics of affection”.<sup>10</sup>

In a country like Brazil where there are so many social inequalities, many other groups beside blacks face chronic problems in terms of their access to basic or higher education. By way of example, (i) students studying in schools located in slum areas and suburbs, (ii) the descendants or children of descendants of people from the Northeast or North (when living in the richest states located in the Southeast, South or Brasilia), (iii) students of different sexual orientation from the majority, and (iv) the poor in general, also face serious problems to succeed in their studies, including in terms of access to university.

It is also notable that the sum of different variables can aggravate these conditions. Accordingly, for example, a black student who is studying in a public school located in the suburb, the poorest area of the city, will be less likely to succeed in school than a white student who faces the same conditions, even if this poor white student also has to face several obstacles due to his own socio-economic status. That is why the current affirmative action policies for the admission of black students into universities, especially the public ones, are so important.

Secondary school, on the other hand, is a separate issue. Since the 1960s, in line with the interests of the middle and upper sectors of our society, this stage of education has been shaped to prepare students for admission to university; an opportunity historically seen in our country as a privilege

of the few. In other words, secondary school offered a very good training for the university admission exams, creating huge gaps between those who could or could not pay for such preparation.

To make matters worse, Brazilian secondary schools began to suffer the consequences of events taking place at the elementary schools, where the late entry into school, the repetition of grades and school dropouts combine to ensure that only a tiny minority of students actually attend secondary school at the expected age. Not even one third of young Brazilians between 15 and 17 years are within the academic year at secondary school which is appropriate for their age. Among young black males, this percentage is just slightly more than 16%.<sup>11</sup>

On the other hand, in today's Brazil, there is a curious problem since some of the youngsters who drop out of secondary school return to school later in life. This happens because of the demands of the labour market, which offers more opportunities and better salaries to those with a certificate of secondary school completion. Therefore, in Brazil, the gross rate of schooling in secondary school (85%) ends up being far greater than the net rate. In elementary school the same occurs, however I consider this gap especially regrettable in secondary school.

The return to the education system by an older student partially mitigates the problems of dropouts in the basic education system. But the problem is that part of what should be the role of the school – training of citizens during their adolescence – loses its potential within the training scheme.

Youngsters between 15 and 17 live different life experiences that are extremely important, not only intellectually (for example, through a curiosity for things of the world),

but also affectively (in terms of moral, psychological support etc.), personally, etc. At this stage of life, there should be a special concern with the formation of one's character, the relationship with the political system, with the society, etc. Our secondary school model, in view of the above-mentioned aims, fails to fulfil this function.

Thus, as there are no effective mechanisms that allow access to university for the majority of young people, the effort to join or continue in school has ceased to make sense. This problem is bigger among young males, especially blacks.

As to the monitoring of this reality, the number of statistical tools of analysis has been growing considerably in recent years. Some of the examples given above illustrate this fact. Our problem lays not so much in the difficulty of evaluating quantitatively the obstacles of access to university for youngsters, including the issues of racial inequalities. The problem is rather how to effectively address the issues revealed by the available data. In reality, there is a lack of political will by the state, the elites and the middle classes in Brazil to face the facts. And this unwillingness stems from the fact that inequality in access to the education system is consistent with our extremely unequal society.

The fact that the educational problem is not a national issue of absolute priority in our country is explained by the same reasons which cause our social structure to continue to be so rigid in terms of the abyss that separates the living conditions of the different social classes and races. The privileged classes within society are satisfied with the way things are.

**ERT: How far does positive (or affirmative) action play a role in ensuring equality and**

**diversity in higher education in your countries? What guidelines should be in place to ensure that any such positive action policies are implemented appropriately? In particular, should admission requirements aimed at achieving equality for members of disadvantaged groups include lowering of academic criteria?**

**David Ruebain:** We do not have positive discrimination in the UK as it is unlawful save in limited circumstances. Positive action, however, is lawful. A number of universities undertake initiatives to encourage and support individuals from disadvantaged communities. There is also a degree of encouragement from government, through the work of the Office for Fair Access (OFFA). For an institution in England which wants to charge more than £6,000 per year in tuition fees, they must enter into an agreement with OFFA setting out what they will do to encourage what is known as “widening participation”, so every such university has some initiatives in this regard. Also, the higher education funding councils have money which they distribute to universities in order to support the admission and retention of students from under-represented groups. I do not however know how effective all of these provisions actually are.

In terms of lowering academic criteria, some universities use “contextual data” to inform their decisions regarding what offer to make to a student. They may, for example, factor in the nature of the school which the student has attended, or the postcode of the area in which they live. The offer may then be one grade or so lower as a result. So instead of being required to obtain the grades AAA in their A-level examinations, they may be required to obtain AAB, or ABB. The change in the offer is usually quite small. Some universities have adopted this approach, but not

all. I think this is a helpful tool to have along with others, and there is quite a lot of research around this. There is something quite evident that someone from one background who has attended one kind of school is going to have had a much stronger advantage/disadvantage than someone else. To treat all as identical is too simplistic. The problem is that deciding on the “right” offer or grades required is an art not a science. This is a controversial tool, because someone who has the higher grades but has not gained a place at university because the place has been given to someone with lower grades or via a lower offer may be aggrieved by that. But I do think that these are the tools which need to be looked at if one is serious about tackling underrepresentation. It is, however, a political hot potato.

**Marcelo Paixão:** Affirmative action to ensure access to university for blacks and people of lower income began to be adopted in the late 1990s, firstly by the State of Rio de Janeiro, on the initiative of the state government and its two public universities: State University of Rio de Janeiro and State University of Norte Fluminense. Afterwards, many institutions followed this example, always through internal decisions of the different universities involved. It is important for the reader to know that affirmative action for access to higher education in Brazil, with the exception of those implemented in the universities in the State of Rio de Janeiro, was not initiated by the Federal government or the different States’ authorities.

In 2008, the last year available when our research group conducted this research, 124 public institutions of higher education offered places for new students through quota systems implemented as part of affirmative action policies. This amounted to around 36,000 higher education places. There were

about 15 public universities that adopted an alternative system of affirmative action quotas which consisted of giving a different score for certain groups such as public school students, blacks, etc. Finally it is important to mention the University for All Program (PROUNI), a federal government program that gives scholarships for disadvantaged students in private universities. In this context, affirmative action for blacks was also implemented.

During the last two decades, there has been an increase in the number of students in the higher education system. Thus, the percentage of youngsters between 18 and 24 who attended university increased from 8.6% in 1988 to 25.5% in 2008. At first this increase in the places available was due to the growth of the private university network, but since the beginning of the Lula government, there was also a rise in the percentage of places in the public university system. Although in a proportion certainly lower than what was necessary, this natural expansion of university places contributed to the process of bringing more blacks and people of lower income to higher education institutions.

Further, affirmative action helped to increase the presence of students of African descent in public universities. In that same year, 2008, about 14,000 students of African descent enrolled in higher education public institutions through quotas. If we make a simple (and certainly inaccurate) projection, we could estimate that between 2008 and 2011, over 28,000 people of African descent have joined public institutions through the same system. And these figures do not include those who entered through a "bonus system".<sup>12</sup> As it is in the public universities that the political, economic and cultural elite is shaped, in addition to the rise in the numbers of students of African

descent in such universities, there is reason to hope that the opportunities created will sooner or later end up being reflected in other parts of social life. However, it is still too soon to analyse the effects of these policies in view of this wider picture.

Besides the issue of admission into universities, affirmative action measures highlight a well-known problem, which becomes more striking in the light of affirmative action policies. The way in which the public university system in Brazil is run tends to disadvantage the poorest students. Class schedules are often full-time, making it impossible for those who need to work to support themselves to actually attend classes. The dormitories are usually poor and insufficient in number for the level of demand. Libraries suffer from a chronic lack of resources, requiring students to spend large sums of their income on textbooks. The transport system servicing many universities is also inefficient. These problems are not new. But in the context of affirmative action, they become even more critical, since now there is an increase in people of low socio-economic status present on university campuses.

Unfortunately, the initiatives adopted to improve the system of aid for students admitted through quotas are being introduced by the universities themselves. Even today, there is no system of financial aid for poor students that is consistent and coordinated at the national level. Some initiatives have occasionally been adopted by the Federal government as well as by some state governments, however they cannot be considered as part of any policy. The problem of the poor quality of the system of financial aid for poor students can certainly be considered today the biggest obstacle in our country to the success of affirmative action policies in improving access to public universities.

**ERT: Does an analysis of the *results attained* by students in higher education institutions demonstrate any inequality in achievement levels? If so, which groups fare better and worse, and what are the key factors which you consider to impact on achievement?**

**David Ruebain:** There is evidence of inequality in the results attained by students in higher education. The Equality Challenge Unit produces annual statistical analysis for staff and students. The last set of data shows that white students generally perform better than other heritages, and that does not reflect what happens at school-leaving stage. The nature of the inequality is not the same – it changes.

Decisions regarding what to do about this are not straightforward. This is not usually about someone like a tutor or academic deliberately disadvantaging someone. It is much more subtle than that. It is not really about being marked unfairly, but tends to be more about the individual's experience of higher education. But then, of course, people come to university with a whole history of experiences, so it is not just the university experience that is relevant either. We have done some work on improving student experience and have produced a report on attainment issues for black and minority students.<sup>13</sup> But more needs to be done and it is something that we at the Equality Challenge Unit will be concentrating on.

Black Caribbean British students generally do relatively poorly, and they do worse than black African British students. But it gets more complicated than that. Bangladeshi British students do worse than Bangladeshi international students. This is in part a class issue. Bangladeshi international students will often be from middle class families,

whereas Bangladeshi British students tend to be from poor backgrounds. Chinese and Asian students quite often do well, but on average not as well as white students.

**Marcelo Paixão:** Unfortunately, in Brazil the universities that have been applying affirmative action measures have not yet adopted a policy for the dissemination of attainment indicators for students admitted through the different systems. Consequently, an analysis of this matter is hampered by a lack of standard methodology in publishing results, not to mention the cases where there is an absolute refusal to publicise this information.

Overall, studies on the performance of quota students and non-quota students show that there is not a fundamental difference between the results of the former and the latter. This suggests that those students who entered universities through affirmative action programmes are eventually managing to overcome the negative legacy of a worse basic education, and/or the perverse practice of inter-racial relationships.<sup>14</sup>

On the other hand, given that the issue of affirmative action to increase the access of blacks to universities is currently one of the most controversial points in Brazilian society, it might be the case that a significant number of the students benefiting from the quota system is aware of the challenges presented, particularly in terms of good performance in university. This may cause these students to be more engaged in their studies, demonstrating that most of the arguments against such measures were unfounded. Of course the latter reflection is a mere possibility since there is no data to support such an idea. Notwithstanding this, this hypothesis seems quite plausible.

**ERT: Given the current global economic climate, and rising unemployment**

**levels in many countries, is there any evidence that certain groups are more likely to face challenges in gaining employment on leaving higher education than others? What steps can be taken to ensure greater equality for leavers, and is this the responsibility of the higher education sector?**

**David Ruebain:** The 2011 statistical report published by The Equality Challenge Unit shows levels of unemployment after university according to each of the protected groups.<sup>15</sup> By way of example, it concluded that (i) unemployment rates were higher for male leavers (9.1%) than for female leavers (6.1%); and (ii) for UK-domicile leavers, BME leavers (12.6%), particularly Chinese (14.7%) and black (14.3%) leavers, were more likely to be assumed to be unemployed than white leavers (6.2%).

In terms of whether it is the responsibility of the higher education sector to ensure greater equality for leavers, my view is that it is in part. Many universities consider that they need to be responsible and think about the employability of their students. Many universities, for example, will build and maintain links with employers to give students opportunities. They also do this so that they can revise their curricula and develop courses which are attuned to the needs of employers. So there is, and should be, a direct relationship between universities and employers, but I do not think that they are ultimately completely responsible for employment.

**Marcelo Paixão:** Surprising as it may seem, the Brazilian economy is not following the same path as the world economy, which has been heading towards recession and unemployment. Rather, the opposite is true. The Brazilian economy has been able to maintain reasonable standards of economic growth

(projections of 3% to 4% for 2012), low levels of unemployment (around 4%, almost the natural rate), as well as the growth of the population with regular jobs (i.e. legal employment which gives the worker a series of social rights) or working as civil servants. Racial inequalities in terms of pay differentials have equally decreased in recent years. Thus, if in 1990 a white worker received about 120% more than a black worker; today this difference is about 85%.

In a few words, this phenomenon results from the new insertion of Brazil into the world economy. Our exports began to include both primary and semi-manufactured products intended for the Chinese market, which is currently our largest partner in trade terms. The policy of transferring income to the poorest segments of society (i.e. the *Bolsa Familia* programme which reaches about 13 million households), the policy to increase the minimum wage, the expansion of rural credit to household farmers through the National Program for Strengthening Household Farming (PRONAF) and the policy of expansion of the credit available to the middle and medium-low segments of society, have all helped the Brazilian economy to go in the opposite direction compared to the developed economies. The fact that we have a population of about 190 million people means that we have a huge internal market – proportionally young and with high propensity to consume – which maintains a special dynamic to our economy, even during the darkest moments of the global economic crisis that began in 2008. Finally, the financial recovery of the Brazilian state, the normalisation of the country's relationship with the international financial system, the macro-economic stability, the investments in the expansion and modernisation of national infrastructure, and the future hosting of the Football World Cup (2014) and Olympics (2016)



have brought investment from all around the world and have helped to maintain reasonable levels of growth in our economy.

On the other hand, one should refrain from too much optimism as there are some risks for the Brazilian economy that cannot be concealed. The facilitation of credit, especially for real estate, always carries the risk of creating a financial bubble. The Brazilian economy is growing, driven by its new insertion in the global economy, which leaves it vulnerable to possible future crises that may arise in other nations, particularly China. The fact that our exports now include a high percentage of natural resources means that we are unable to keep up with the most dynamic sectors of the world economy today, which are increasingly associated with creativity, high technology, computing systems, etc.

Returning to the core of the question, the current economic crisis is not affecting the Brazilian economy to a great extent, which at the moment has succeeded in ensuring economic growth, distribution of income and reduction of racial disparities in terms of labour income. Considering that we now live in a democratic system, it can be said that these present socioeconomic conditions are almost unprecedented in our country.

**ERT: In UK and Brazil, to what extent are commitments to equality and diversity taken into consideration when designing higher education curricula and research projects?**

**David Ruebain:** The answer is a bit different for undergraduate and postgraduate courses. Postgraduate courses give the student much more of a say in what they do. With taught degrees, whether undergraduate or postgraduate, it is more difficult. There is an agency called the Higher Education Academy

(HEA) which is responsible for improving teaching and learning but it is not a regulator. There is also another agency – the Quality Assurance Agency – which oversees the quality of work in higher education institutions. The HEA improves teaching and learning in a variety of ways. For example, it runs programmes to give lecturers skills in teaching. It thinks about equality considerations as well. I suspect that the answer would be mixed. Some universities, and particular departments within universities, will take equality and diversity into consideration, whilst others will think that it is not relevant.

**Marcelo Paixão:** The commitment to equality and diversity in the Brazilian higher education system appeared together with the affirmative action policies for the admission of both black and poor students through the system of quotas, as they came to be adopted in late 1990. Generally speaking, and taking into account the model of governance of our universities, it was the personal involvement of the university deans that led these measures to be approved by the governing bodies of the relevant universities. University deans have great influence over everything around the university and when they put their efforts into the adoption of these measures, they are generally successful.

On the other hand, when we analyse the content of the research and teaching at universities, we can say that, with few exceptions, there is no commitment to diversity and equality, especially ethnic or racial equality. In our curriculum, there is not a great deal of space for issues such as racial inequality. Even when we are speaking of gender equality, a topic where the adoption of positive action measures is not so controversial, we cannot say that there is a widespread concern amongst our academics to include such matters in the curriculum.

Therefore, in the law faculties, there are no courses on ethnic and racial discrimination, even if the Constitution and the Penal Code typify the crime of racism as inalienable and not subject to bail. In the faculties of social work, the topic is absent, even though those of African descent are about 65% to 70% of the population below the poverty line. In history faculties, studies on the black presence in Brazilian society are almost always limited to the period of slavery. In sociology faculties, the picture is not very different, not to mention the economics degree in which there is no tradition of studies on inequalities and discrimination. Thus, institutions such as LAESER are rare. We are today the only research department in the country, which is part of an economy faculty and is dedicated to the topic of the effects of racial discrimination on the Brazilian social structure.

In terms of research projects the scenario is not very different. Professor Carlos Hasenbalg, once commenting on the status of race relations researchers in the Brazilian academic environment, stated that they lived in a kind of “minority ghetto within the social sciences.”<sup>16</sup> And indeed, those who dare to venture into this type of research are often doomed to face “topic isolation”, not to mention personal isolation. Our system, which favours the promotion of science and technology, particularly through the National Council for Scientific and Technological Development and the Coordination for the Improvement of Higher Education Personnel, still lacks a budget line for research in the field of ethnic-racial disparities in the country. Therefore, the commitment of the national educational and higher level research institutions to racial equality and diversity is still extremely inadequate, ad hoc and fragmented.

**ERT: What benefits or challenges does the increasing number of privately run**

**education institutions present for those interested in ensuring equality and non-discrimination for students and staff?**

**David Ruebain:** This is complicated. At the moment, there are only five private British universities with degree-awarding powers. Other private institutions may teach degrees which are accredited by public institutions, so there is no straightforward answer to this question.

It is the case that the government wants to encourage the growth of private institutions, but there is a huge debate about how successful that is likely to be. A growth of private institutions will present challenges. For example, such institutions may not be subject to the public sector equality duty under the Equality Act 2010. If they are not, this would be a step back in relation to the protection of the right to equality. Also, such institutions might not be subject to other arrangements, such as data collection obligations set out by HEA. At this stage, no-one really knows how this will play out.

A good example is the proposed New College of the Humanities. This college is not going to award its own degrees, but will teach University of London degrees. The headline fees will be £18000 per year which will almost certainly have equality implications.

From my perspective, the main issue is that, for better or worse, not-for-profit institutions can make widening participation, equality and diversity part of their mission. Examples of such not-for-profit institutions in the UK are Regent’s College in London and the British School of Osteopathy. But if an institution’s prime motivator is profit, it provides a very different context. That is not to say however that such institutions will not take such issues into consideration,

because they may be persuaded by the business case for diversity.

There has been quite a lot of reporting about private higher education institutions in the United States. It seems that US private universities are often quite good at reaching out to underrepresented communities. They want to find new markets in order to exploit them, and reach out to those who might not otherwise think about attending university. Their attainment and participation rates, however, are relatively poor. More students leave part-way through the course, and are then saddled with debt without the benefit of a qualification. Similarly, in the US, there is a difference between private universities for profit, and private universities which are not for profit.

**Marcelo Paixão:** As I have mentioned above, the private system of education in our country has universities of poorer quality. This is expressed in the number of teachers with a masters or doctoral degree that work exclusively for the university, the number of scientific publications, the investment made in libraries and laboratories, among other problems. The dark side of this is that it is precisely in this kind of institution that the majority of the poor students that need to work carry out their studies. These students make a huge effort to pay their tuition fees, study, and succeed in professional life, even though they have an academic and financial disadvantage that makes the cost of this investment extremely high.

Of course, there are exceptions to this. There are some good universities in the private sector, especially those of a religious nature. But in general, the system of private higher education in Brazil has demonstrated itself to be inefficient both regarding the education of its students and its contribution to

the scientific and technological development of the country.

With systems like PROUNI and the Student Financing Fund, promoted by the Federal government, the life of the poorer students who attend private schools became a little less arduous. This is because, depending on the income of the student, the government may finance up to 100% of tuition fees. However, the downside of this measure is that this is funded through a tax exemption that the government grants to the universities that adopt this scheme. Yet it seems that these resources could certainly be better used in strengthening the public system of education.

The problem of the private education system is that, at least in Brazil, it has been very difficult to reconcile the economic interests for profit and the quality of higher education. This implies higher investment in education, lower financial return and longer maturity. These are parameters that the private sector hardly ever takes an interest in.

**ERT: To what extent do staff in higher education institutions face discrimination, for example in relation to recruitment, pay and promotion opportunities, as a result of their membership of certain groups? Please give examples.**

**David Ruebain:** If you mean by discrimination, that someone has been directly or indirectly discriminated against, there are not many reported cases. There is however research evidence on discrimination. For example, our research into the experience of lesbian, gay, bisexual and trans staff and students found that 33.8% of LGB staff reported negative treatment from other colleagues on the grounds of their sexual orientation. 49.5% of LGB students reported

negative treatment from fellow students. Our recent report into the experiences of black and minority ethnic (BME) staff evidenced experiences of BME staff being marginalised and isolated – being an “outsider” in higher education. Issues of promotions and career opportunities also come into question, such as fewer opportunities to develop research capacity and enhance promotion prospects (e.g. 40% of eligible black staff were selected for RAE 2008, as compared to 61% of all eligible staff).<sup>17</sup>

There are also certainly issues of underrepresentation in the higher education sector. The detail of that is spelt out in the Equality Challenge Unit’s statistical report for 2011.<sup>18</sup> Equal pay is an issue in higher education as it is elsewhere. By way of example, in 2011, a woman professor successfully brought an equal pay case against Royal Holloway College.<sup>19</sup> There is notable underrepresentation of women at professorial level, especially in the fields of science and technology. Similarly, there is a huge underrepresentation of black professors. A growing aspect of our work at Equality Challenge Unit is about addressing this.

**Marcelo Paixão:** The public system of higher education in Brazil is based on the principle of admission through public tender. Afterwards, the promotions are directly related to the academic qualifications (eg. Master, PhD) achieved by each member of staff. Normally, the directors of academic units are elected by a vote of teachers, students and technical and administrative staff. Thus, in every university there is little room for specific policies in terms of recruitment, pay and promotion.

When we analyse the effect of these rules on the historically discriminated groups, we are confronted with a paradox. On the one hand,

this system should be an obstacle to discriminatory practices, since it is based on merit. But on the other hand, it ends up benefitting not only those with the best academic background, but also those who have easier access to social networks.

The Brazilian higher education system has a Eurocentric perspective. The overwhelming majority of the teaching staff is made up of white people. It is rare to find people with dark skin who are working in universities and research centres as teachers and researchers. And this is not just a problem of a socio-economic nature, resulting from the fact that blacks have less education. The fact that there are relatively few people of African descent with higher education qualifications does not mean they do not exist at all or are numerically insignificant in absolute terms. The reality is that Brazilian society and its operating mode of race relations do not ensure that blacks, even those with an obvious aptitude for academic life, are stimulated to develop their talents within the higher education system.

In the world of Brazilian academia, episodes of racial discrimination against black teachers and researchers are not that rare. This discrimination can occur through conflicts with students, counsellors, committees to evaluate applications for scholarship funds for development or research, etc. Another way in which discrimination occurs is the so-called “misunderstanding”, in which a black teacher or researcher (this can also involve the students) is systematically identified as a member of the administrative or auxiliary staff by the other people.

In short, and going back to the question, I cannot recognise any action taken within the higher education system in Brazil that has sought to overcome the picture drawn above.

**ERT: How far do higher education institutions in your countries succeed in accommodating the needs of staff and students with disabilities? What impact does such success or failure have on the number of staff and students with disabilities engaged in the higher education system?**

**David Ruebain:** The answer is that the levels of success are as varied as you would expect. There are 165 universities in the UK and some do better than others. There can therefore be no single answer to this question. Part of the difficulty in understanding the picture in this regard is that, almost more than any other characteristic, disability is heterogeneous. Someone with a physical disability will have very different requirements, and is therefore likely to have a very different experience, from someone with a cognitive disability. It is necessary to break down the protected characteristic of “disability” in order to understand it fully.

There has been a massive rise in reporting of disabled students. This is overwhelmingly because of the increased identification of learning difficulties, such as dyslexia or dyspraxia. There is also a pragmatic reason for reporting disabilities of this nature, because reporting may result in specific assistance.

I suppose that there is anecdotal evidence that some universities get a reputation for doing well, and if they do badly, through word of mouth the reputation will spread. There is, however, no public table saying how well universities do in terms of accommodating students with disabilities. Some universities are physically laid out in ways which are more difficult and that might be a determinant for a mobility-impaired prospective student.

**Marcelo Paixão:** The subject of the population with “special needs” is very significant.

However, I must confess that it is not part of my studies. Therefore, in addition to recognising the validity of their demands, I can only share some thoughts that came to me throughout my life as a student and teacher. In general, there is little or no attention at all within the public school system in Brazil to the mobility of persons with physical disabilities, both in access to the classroom and to the academic space as a whole. This problem is in part related to the fact that a lot of public institutions of higher education in our country are housed in old buildings with high steps, with poor service of elevators, etc. But even the institutions housed in newer buildings rarely show concern for mobility problems.

Thus, in relation to the question about the presence of people with special needs within our higher education system, I do not know any source or database that can give me some response, which to some extent reflects how this topic is dealt with in our country.

**ERT: Have you come across examples of good practice in preventing discrimination in higher education, either in your own jurisdiction or another? What were the key features which gave rise to such good practice? How important was international and/or domestic law in promoting this practice?**

**David Ruebain:** I have many examples of good practice in the UK. A lot of the work which the Equality Challenge Unit does focuses on disseminating examples of good practice in respect of all protected characteristics. We have many examples of this, and it is part of our purpose.

One example of this is a programme which we run to advance women in senior academic positions in science, engineering and technology. The only gold award holder is The

University of York Chemistry department. They are evangelical about how they have transformed their culture and improved representation of women as a result. It is important for us to show how you can do things. The programme we run – Athena SWAN – is a culture change programme which encourages institutions to examine how and what they do, for example, in relation to maternity provision, how decisions are taken, the physical environment, everything! This is not something which you can write down on one sheet of paper in the form of guidelines.

We do not rely on international or domestic law in this programme, because in essence it is a “beyond compliance” programme. This is not so much about avoiding discrimination or harassment, *et cetera*. This is about what you can do about underrepresentation, in this case, of women. It looks at how institutions can make a difference to representation by changing their cultural, historic arrangements. The Equality Act 2010 does touch on this through the public sector duty and positive action provisions, which should serve to illuminate where the problems are. So the law can underpin such processes. But the purpose of the Athena SWAN programme is not to look at how universities and/or particular departments comply with the public sector duty, as that is only a starting point. It looks at taking this forward much further. A combination of the public sector duty and positive action is key to tackling underrepresentation.

I tend to think that Britain is a leader in the area of equality and diversity generally as well as in higher education. We certainly don't get it right all the time, but partly because of our history of colonialism, we've had to think about this for a long time. There are examples of good practice in other jurisdictions, but I am not aware of a similar agency to the Equality Challenge Unit in other countries.

**Marcelo Paixão:** In order to give an appropriate answer to your question, I need to return to something that I have been saying throughout the interview. The current model of race relations in Brazil does not expressly or explicitly discriminate against black people. Rather, this occurs through more subtle mechanisms, which are nevertheless very efficient in achieving the objective, that is, to avoid the presence of students of African descent in the higher education system.

The subtle mechanisms of discrimination operating in Brazil are stimulated by the association of each skin colour with a corresponding social position. This mechanism is present in the media, in advertising, in different social spaces (schools, universities, prisons, asylums, etc.), and also in the daily life of people who are constantly training their eyes so as to perceive and legitimise the convergence between social class and colour. Moreover, this model sanctions more open and aggressive forms of racial discrimination, which end up being experienced as normal. That is, racial inequalities are identified as something embedded in the nature of things, and it is not considered reasonable to question more open forms of racism, or why blacks have living conditions so much worse than whites.

Nowadays when one speaks about good practice in terms of an anti-discrimination legislation in Brazil, one is referring to actions which aim to increase ethnic and racial diversity in all areas of social life with special emphasis on what occurs within the university system of education. As the Brazilian racism that operates by persuasion and education of the look (a skin colour consistent with a social class), the deconstruction of racial inequalities must also operate via the alternate persuasion and education of the look. Today our society is surprised when there

are blacks in social positions of higher prestige or when they are better paid. In fact, one must criticise the historical process that was responsible for producing classes and more classes of graduates from universities consisting of predominantly male, white people. This social pathology cannot be perceived as natural and must be criticised.

From this perspective, affirmative action policies for Afro-descendants, apart from their practical results, have the merit of favouring a new pact within the Brazilian society. This pact must be based, among other parameters, on the importance of ethnic-racial diversity.

With regard to Brazilian law there is already a comprehensive legal framework to punish racist practices. Today the primary issue is how to implement the penalties. The Supreme Court is currently examining the constitutionality of affirmative actions in general, and particularly of those that are specifically directed at blacks, but there is still no final decision. This judgement is being awaited with great anxiety by the Brazilian society due to the obvious impact that the decision, whatever it is, will have.

With respect to international law, the Third World Conference Against Racism held in Durban in 2001 had a reasonable impact on Brazilian society. It was the first time that Brazilian diplomatic representatives admitted before the international community that the country harboured severe social injustices against the Brazilians of African descent. Throughout this century, new institutional spaces have been created. In 2003, the Special Secretariat for Policies to Promote Racial

Equality (SEPPPIR) was created. That same year, Law 10,639 was passed, establishing the compulsory status of studies on Africa and African descent within our education system. Currently, almost all demographic databases incorporate the variable of colour or race, an instrument of black empowerment, since it allows more accurate understanding about their standard of living and the socio-racial gaps existing in our country.

However; despite recent advances, we are still far from a framework of full recognition of the social demands of African descendants, both within the state and in many segments of the Brazilian society. The budget of SEPPPIR, besides being proportionately small, is boycotted by the Ministry of Finance and Planning. Thus, on average, just over 30% of the estimated budget is effectively applied. In fact, the issue of racial equality is almost never accepted as a priority for the current government, which sees it as a cultural, human rights, or compensatory topic; one that can be solved by government programmes to combat poverty. While acknowledging the relevance of these issues, the reality is that when they become the guiding principle of public policy, a major contribution to the struggle of the black movement is lost – one that lies in the critical perspective of the model of development of the country, which has been historically founded on Eurocentric, wealthy, politically powerful and socially prestigious elites.

As such, when critically analysing the Brazilian society in the light of the dynamics of race relations, basically what is sought is the construction of alternative models, not only of development but also for the society itself.

Interviewer on behalf of ERT:  
Libby Clarke

- 1 Equality Act 2010, sections 90-94.
- 2 Equality Act 2010, section 149: "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."
- 3 Equality Act 2010, section 1(1): "An authority to which this section applies must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage."
- 4 A public consultation run by the UK government in 2011 on all regulation relating to the conduct of business in order to remove "red tape" perceived to restrict efficiency.
- 5 Candomblé is an Afro-Brazilian religion. It was developed as a consequence of establishing the African Diaspora in Brazil during the slave period. It is a syncretic religion, mixing African animism and Catholic elements. For further information, see "Candomblé at a glance", *BBC News*, 15 September 2009.
- 6 Paixão, M., Rossetto, I., Montovanele, F. and Carvano, L. M. (org), *Relatório Anual das Desigualdades Raciais no Brasil: 2009-2010*, Garamond, 2010, pp. 227-231.
- 7 Hanchard, M., *Orfeu e Poder: Movimento Negro no Rio e São Paulo*, EdUERJ/UCAM-Centro de Estudos Afro-Asiáticos, 2001, p. 243.
- 8 See above, note 6.
- 9 *Ibid.* In this report, the authors generated an index of conditions in schools from information collected by the interviewers during visits to schools. Nine variables were considered —roofs, walls, floors, doors, windows, bathrooms, kitchens, plumbing, and electrical installations—and one composite scale was created which graded school infrastructure. To measure school safety, 16 safety variables included in the 2005 SAEB survey were selected. Among the questions asked about safety were: i) are there walls and fences surrounding the school areas? ii) Are there controls for entry and exit of students? iii) Do gates remain locked during school hours? and iv) Is there policing within the school? (Cf. Paixão, M., Carvano, L.M. and Rossetto, I., "Race and Educational Performance in Brazil", *Americas Quarterly*, Vol. 4, 2010, pp. 100-106.)
- 10 Cavalleiro, E.d.S., *Do silêncio do lar ao silêncio escolar*, Humanitas-FFLCH-USP, Contexto, 2000.
- 11 See above, note 6.
- 12 This selection system for university does not depend on quotas, but rather the grant of a bonus in the final score to candidates belonging to disadvantaged groups.
- 13 Berry, J. and Loke, G., *Improving the degree attainment of Black and minority ethnic students*, The Equality Challenge Unit and The Higher Education Academy, 2011, available at: <http://www.ecu.ac.uk/publications/files/improving-degree-attainment-bme.pdf/view>.
- 14 Further information on the impact of the quota system can be found at the following website, available at: <http://revistapesquisa.fapesp.br/?art=3502&bd=1&pg=3&lg=>. This demonstrates that there is no visible difference between the proficiency of quota and non-quota students.
- 15 Blandford, E., Brill, C., Neave, S. and Roberts Allison, A., *Equality in higher education: statistical report 2011, Part 2: students*, The Equality Challenge Unit, 2011, pp. 16-17, 44-45, 64-67 and 82-83, available at: <http://www.ecu.ac.uk/publications/files/equality-in-he-stats-11-part-2-students.pdf/view>.
- 16 Hasenbalg, C., *O negro na indústria: proletarianização tardia e desigual*, Rio Fundo Editora / ANPOCS, 1992.
- 17 See Higher Education Funding Council for England, *Selection of staff for inclusion in RAE2008*, 2009, p. 22, available at: [http://www.hefce.ac.uk/pubs/hefce/2009/09\\_34/09\\_34.pdf](http://www.hefce.ac.uk/pubs/hefce/2009/09_34/09_34.pdf). RAE stands for "Research Assessment Exercise".
- 18 Blandford, E., Brill, C., Neave, S. and Roberts Allison, A., *Equality in higher education: statistical report 2011, Part 1: Staff*, The Equality Challenge Unit, 2011, available at: <http://www.ecu.ac.uk/publications/files/equality-in-he-stats-11-part-1-staff.pdf/view>.
- 19 *Schafer v Royal Holloway and Bedford New College* (ET/2702474/09, 27 Jan 2011).



# ACTIVITIES

- **The Equal Rights Trust Advocacy**
- **Update on Current ERT Projects**
- **ERT Work Itinerary: July-December 2011**



# The Equal Rights Trust Advocacy

*In the period since the publication of ERR Volume 7 (August 2011), ERT has continued with its work to expose patterns of discrimination globally and to combat inequality and discrimination both nationally and internationally. A major component of ERT's advocacy work has been advocating for the Declaration of Principles on Equality by using the Principles as a basis for assessing legislative and judicial developments. Below is a brief summary of some of the most important ERT advocacy actions.*

## **ERT Supports Efforts to Adopt a Single Equality Act in Australia**

In July 2011, ERT's Executive Director, Dimitrina Petrova undertook a week-long advocacy trip to Australia, sponsored by the office of the Attorney-General and hosted by the Human Rights Law Centre. The visit was organised in the context of the on-going legislative initiative (the Consolidation Project) to bring together the four existing federal equality Acts (the Racial Discrimination Act 1975, the Sex Discrimination Act 1984, the Disability Discrimination Act 1992, and the Age Discrimination Act 2004) and to simplify, clarify and improve the effectiveness of legislation to address discrimination and provide equality of opportunity. During her visit, Dr Petrova gave a keynote address on recent developments in equality law at a major national conference in Melbourne and further talks at several meetings in Melbourne and Sydney. She also met with, amongst others, the Human Rights Commission, the Attorney-General's office, government officials, Supreme Court judges, and civil society organisations.

As in other jurisdictions where anti-discrimination laws governing individual grounds have been developed over an extended period, and in isolation from each other, there are significant differences in the definitions, content and coverage of protections under the existing legislation. The current initiative is aimed at reducing the complexities and inconsistencies which exist under these different laws, as well as providing an opportunity to introduce new prohibitions on discrimination on the basis of sexual orientation and gender identity.

A discussion paper published in September by the Attorney-General's office as the basis for further consultation on new legislation reflects many of the main recommendations made by ERT. In January 2012, ERT submitted a response to the consultation on the discussion paper, basing its recommendations on the 2008 Declaration of Principles on Equality to ensure that the Consolidation Project results in the most comprehensive and effective equality law reform.

## **ERT Advocacy Influences the Creation of New Human Rights Institutions in Kenya**

In late August 2011, the National Assembly of Kenya passed legislation to establish new national human rights institutions, as required by the Constitution of Kenya 2010. One of these new bodies, the National Gender and Equality Commission (NGEC) has a mandate to cover discrimination on all grounds specified in Article 27(4) of the Constitution of Kenya 2010 (i.e. "any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability,

religion, conscience, belief, culture, dress, language or birth”). The NGEC has a broad range of functions and powers related to the effective realisation of the rights to equality and non-discrimination, including promotion, monitoring, mainstreaming, policy development, investigation and the receiving of complaints.

Before the creation of the NGEC, Kenya did not have an independent national institution with a mandate focussed on prohibiting discrimination and providing for equality on all grounds. Its establishment is in part a consequence of advocacy by ERT, in partnership with the Kenya Human Rights Commission (KHRC) and the Federation of Women Lawyers (FIDA-Kenya) for legislative reform to improve protection from discrimination in Kenya.

Since 2009, ERT has been working in partnership with the KHRC and FIDA-Kenya to develop the capacity of civil society to participate in the reform towards a new anti-discrimination regime. Through a programme of research, training and support with legislative drafting and advocacy, 40 key civil society actors developed and endorsed a Legislative Map for a model equality law. The Legislative Map has been endorsed by a range of quasi-governmental commissions, political and governmental figures, practising lawyers and other civil society actors, and in mid-2011, it was developed into a draft Bill (“The Human Rights and Equality Bill 2011”) by the Kenya National Human Rights Commission and the Law Reform Commission. Since late 2010, KHRC, FIDA and other civil society actors, supported by ERT, have engaged in advocacy aimed at securing improved equality law through the adoption of legislation in line with the Legislative Map and through other legal reforms. ERT and its

partners see the establishment of the NGEC as an important step towards the realisation of their objective of comprehensive equality law for Kenya.

### **ERT Recommendations in Relation to Kenya Endorsed by Committee on the Elimination of Racial Discrimination**

At its 79th Session (8 August - 2 September 2011), the UN Committee on the Elimination of Racial Discrimination considered the state report of the Republic of Kenya. ERT submitted information to the Committee in a parallel report which highlighted two types of problem needing to be addressed: (i) gaps, inconsistencies and exceptions in the legal and policy framework; and (ii) failures of implementation and enforcement of those laws which exist. It urged the Committee to recommend that Kenya adopts comprehensive anti-discrimination legislation which prohibits, *inter alia*, all forms of racial discrimination and which: a) includes a comprehensive legal definition of discrimination, including a non-exhaustive list of prohibited grounds of discrimination; b) covers direct and indirect discrimination, multiple discrimination, discrimination by association or perception, segregation and harassment; c) creates protection against victimisation; and d) provides a basis for applying temporary special measures.

In addition, ERT also urged the Committee to recommend that Kenya:

- Review, remove or amend provisions of the National Cohesion and Integration Act which provide exceptions to the right to non-discrimination in respect of: (i) employment by non-state actors; (ii) the provision of goods and services by non-state actors; and

(iii) the administration and implementation of the immigration and nationality system;

- Investigate and take urgent steps to rectify the unfavourable treatment, in respect of conditions of acquiring citizenship documents, reportedly experienced by Kenyan Nubian and Somali populations;
- Ensure proper investigation and response to violations of the requirements of non-discrimination in the management of public property and distribution of public resources under the National Cohesion and Integration Act;
- Raise public awareness, through a programme of civic education, of the rights, obligations and the complaints mechanism available under the National Cohesion and Integration Act;
- Put in place measures to effectively prevent discrimination in access to positions of public power and in the allocation of public resources; and
- Ensure the full and effective implementation of those sections of the Constitution of Kenya 2010 which seek to address regional imbalances in income, services and resources.

The Committee incorporated many of ERT's recommendations in its Concluding Observations, including those on citizenship and public awareness-raising which were highlighted by the Committee as being of particular importance. Also, in line with ERT's submission, the Committee recommended that Kenya take action to ensure equitable racial and ethnic representation in government bodies and offices. The Committee also made strong recommendations on the implementation of constitutional provisions which seek to address ethno-regional imbalances – an important priority in view of the history of injustice in the distribution of pub-

lic resources that has disadvantaged certain ethnic communities in Kenya.

### **ERT Recommendations for Universal Periodic Review of Sierra Leone Echoed by State Delegations**

At its 18th Session (12-30 September 2011), the UN Human Rights Council adopted Working Group Reports for states which had undergone review in the 11th Session of the Universal Periodic Review (UPR). ERT provided information for the UPR of Sierra Leone in a submission which noted that, despite significant progress by Sierra Leone in recent years, discriminatory laws remain in force, there is insufficient legislation to provide comprehensive protection from discrimination, and the enforcement of existing legislation remains weak. The submission highlighted discriminatory laws and practices affecting non-African residents, women, lesbian, gay, bisexual, transgender and intersex persons, and disabled persons. ERT's submission argued that Sierra Leone should conduct a comprehensive audit of discriminatory laws and take steps to introduce comprehensive equality legislation.

A number of states made recommendations to Sierra Leone which were based on the evidence and reflected the concerns expressed in ERT's submission. Highlights included:

- Take further steps aimed at protecting and promoting the rights of marginalised and vulnerable populations (Nepal);
- Urgently address the anomaly regarding citizenship status for residents of non-African descent (Ireland);
- Implement further policies to ensure gender equality and the promotion of the rights of women throughout society (South Africa);
- Specifically prohibit, sanction and effec-

tively prevent the practice of female genital mutilation (various states);

- Introduce reforms of domestic laws and regulations aimed at the elimination of all forms of discrimination against women (Ecuador and France);
- Bring legislation into conformity with its commitment to equality and non-discrimination for all by prohibiting discrimination based on sexual orientation or gender identity (Canada); and
- Repeal provisions which may be applied to criminalise sexual activity between consenting adults (Netherlands and Norway).

### **ERT Advocates Adoption of Comprehensive Equality Law in Jordan**

In September, on invitation by the Mizan Law Centre, ERT Executive Director Dimitrina Petrova travelled to Jordan to deliver a lecture on the essential elements of national equality legislation for approximately 40 MPs, judges, governmental officials from relevant ministries, prosecutors, police, and academics in Amman. She also gave a lecture on the use of strategic litigation to promote equality to practising lawyers and NGOs.

The visit was organised as part of Mizan's campaign to promote non-discrimination and equality in Jordan, in the framework of a joint project in which ERT is a partner. The lecture on the essential elements of national equality legislation was the first meeting on equality law attended by representatives of the national authorities and was met with great interest. The lecture was followed by debate on the possibilities and challenges for the development of equality legislation in Jordan and clear expressions of interest to learn more from international good practice. The discussions were accepted with great enthusiasm by Mizan and other

NGO activists, as the most sensitive taboo issues in the Jordanian context were openly debated. These included the patrilineal transition of Jordanian nationality which is interlocked with the issue of the status of Palestinians in Jordan.

### **ERT Trains Governments, European Commission and World Bank Staff on International Trends in the Area of Equality**

In October 2011, ERT served as expert at Workshop "Towards a Coherent National Policy to Prevent and Combat Racial Discrimination and Related Intolerance: Developing and Implementing National Action Plans", organised by the United Nations Office of the High Commissioner on Human Rights, and provided training on "Effective Legislation as a Part of National Action Plans" to governmental officials from the Commonwealth of Independent States, in St Petersburg, Russia. A number of governmental representatives expressed a willingness to engage ERT's expertise in future efforts to improve their countries' equality law systems.

Also in October, ERT delivered training for approximately 35 high-ranking World Bank officials in a seminar on human rights and development organised by the World Bank's Nordic Trust Fund in Helsinki. The topic was "International Trends in the Area of Equality" and the training also focused on the relationship between the Bank's official equity framework presented in the 2006 World Bank World Development Report entitled *Equity and Development*, and the unified human rights framework on equality. It appears that as the rights-based approach to development gains ground inside the World Bank community, the rights to non-discrimination and equality will play an increasingly important role in the World Bank's lending conditionality as well as in

its own hundreds of development projects, many of which are already closely connected with equality issues.

In November, ERT served as a trainer for European Commission Delegations staff at a seminar “Human Rights and Democratisation in EU External Relations: Non-discrimination” convened in Brussels. The purpose of this training was to update relevant staff on the current status of the field of non-discrimination and equality in order to ensure that European Union support in this area is up to date with modern perspectives on equality.

In all of the above activities, ERT based its training modules on the unified human rights perspective on equality as expressed in the 2008 Declaration of Principles on Equality.

### **ERT Continues Advocacy on Equality Legislation in Moldova**

In October 2011, ERT continued its advocacy relating to the development of anti-discrimination legislation in Moldova. In response to a consultation announced by Moldova’s Minister of Justice, Mr Oleg Efrim, on 10 October 2011, ERT submitted extensive comments on the latest draft of the Law on Preventing and Combating Discrimination.

ERT has submitted comments on three previous drafts of this legislation, and was pleased to note that some of its recommendations have been incorporated into the latest draft. However, ERT continues to have significant concerns about the content of the latest draft law, and has urged the Minister of Justice to take these into account in due course. It is anticipated that the draft law will be before parliament in 2012.

### **ERT Urges Commonwealth Heads of Government to Repeal Legislation that Criminalises Same-Sex Sexual Conduct**

In advance of the Commonwealth Heads of Government meeting in October 2011, ERT called on the Commonwealth Heads of Government to take immediate steps to repeal legislation that criminalises same-sex sexual conduct. ERT urged the Commonwealth Heads of Government to: (i) establish a Ministerial Action Group to address the issue of laws criminalising same-sex sexual conduct and advise states on the legal implications of retaining such laws; and (ii) include a commitment to tackling laws criminalising same-sex sexual conduct in the final communiqué of the October 2011 meeting.

Same-sex sexual conduct is currently prohibited in 42 of the 54 countries which are members of the Commonwealth of Nations. These laws allow for the discriminatory abuse of persons on account of their sexual orientation and have a broad impact on the enjoyment of all human rights by lesbian, gay and bisexual persons. ERT’s letter pointed out that the criminalisation of same-sex sexual conduct is contrary to international law and to the Commonwealth Values and Principles. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights both prohibit discrimination on the basis of sexual orientation. The Human Rights Committee has often expressed concern about laws criminalising same-sex sexual conduct. The existence of legislation prohibiting same-sex sexual conduct in so many Commonwealth nations also clearly runs contrary to stated Commonwealth values which include equality and respect for protection and promotion of civil, political, economic, social and cultural rights for all without discrimination on any grounds.

## **ERT Urges UK Not to Repeal or Amend the Human Rights Act 1998 and Calls for UK to Join Protocol 12 ECHR**

In November 2011, ERT responded to the UK Commission on a Bill of Rights Discussion Paper entitled *Do we need a UK Bill of Rights?* The Commission was established to investigate the creation of a UK Bill of Rights and this Discussion Paper marked the beginning of the process of public consultation on this issue.

In its response, ERT endorsed the view that the UK does not need a new Bill of Rights as the Human Rights Act 1998 fulfils this function. ERT's submission reflected its view that the Human Rights Act provides an essential and non-negotiable minimum standard for the protection of human rights in the UK, both in terms of the rights specified and the mechanisms provided to make these rights effective through establishing judicial oversight and requiring public bodies to act in conformity.

ERT also urged the UK government to consider signing and ratifying Protocol 12 of European Convention on Human Rights, which provides an autonomous right to non-discrimination, and to take steps, in due course, to give effect to Protocol 12 in the domestic legal order, using the power provided under section 1(4) of the Human Rights Act.

## **ERT Calls on Tunisia to Ensure the Rights to Equality and Non-discrimination Are Guaranteed in New Constitution**

In November 2011, ERT wrote to the new Prime Minister of the Republic of Tunisia, M. Hamadi Jebali, urging him to ensure that the rights to equality and non-discrimination are placed at the heart of national transition processes. ERT's letter expressed its belief

that the current process of national transition and renewal in Tunisia offers a great opportunity to strengthen equality, one of the central values which motivated the Tunisian people's movement for change. ERT urged Tunisia to seize this opportunity by placing the rights to equality and non-discrimination at the heart of any future bill of rights envisaged in the context of constitutional reform, and by including the drafting of comprehensive equality legislation in its future legislative agenda.

ERT's letter called on members of the Constituent Assembly to ensure that constitutional protection of the rights to equality and non-discrimination reflects international law and best practice. In this respect, ERT recommended that Tunisia adopts the accepted definition of discrimination provided in international law, such that it prohibits direct and indirect discrimination, multiple discrimination, discrimination by association and perception, segregation, victimisation and harassment, and defines as discrimination the failure to make reasonable accommodations. ERT also called on the Constituent Assembly to ensure that discrimination is explicitly prohibited on all grounds recognised under international law and defined in the Declaration of Principles on Equality. In addition, ERT recommended that the government develop and adopt comprehensive legislation prohibiting discrimination and providing for measures to achieve substantive equality.

## **Resolution and Recommendation on ERT's Declaration of Principles on Equality Adopted by PACE Committee**

On 25 November 2011, the Standing Committee of the Parliamentary Assembly of the Council of Europe (PACE) adopted a Resolution and a Recommendation on "The Dec-



laration of Principles on Equality and the Activities of the Council of Europe” at its meeting in Edinburgh, UK, welcoming and endorsing the Declaration of Principles on Equality (the Declaration). The Resolution, for the adoption of which a simple majority was necessary, and the Recommendation, which required a qualified majority of two thirds, were voted on during the session of the Standing Committee under the UK Chairmanship of the Council of Europe in Edinburgh. The Standing Committee acts on behalf of PACE when the latter is not in session, and its Resolutions and Recommendations have identical legal status with those of the full assembly.

In the Resolution, PACE welcomes the Declaration and “calls on member states to take into account the principles contained in the Declaration when adopting equality and non-discrimination legislation and policies”. In the Recommendation, PACE recommends that the Committee of Ministers, the highest executive authority of the Council of Europe:

- Enhance efforts aimed at speeding up ratification of Protocol No. 12 to the European Convention on Human Rights (ETS No. 5) by the members states which have not yet done so;
- Disseminate information on good practices in the implementation of policies aimed at combating discrimination and inequalities;
- Ensure that the Declaration is taken into account in the work of the different Council of Europe bodies and expert groups dealing with the issues of equality and non-discrimination; and
- Promote the Declaration in its dealings with external actors, and in particular with policymakers from the Council of Europe member states.

The Recommendation also called on the Committee of Ministers to increase cooperation with the European Union on the consolidation of standards on non-discrimination and equality and cooperate with international organisations with a view to “achieving coherent interpretations of the principles of equality and non-discrimination and the implementation of common policies in the field of combating discrimination and inequalities”.

### **ERT Makes Stakeholder Submission for the Universal Periodic Review of India, Indonesia and the United Kingdom**

In November 2011, ERT made Stakeholder Submissions for the Universal Periodic Review (UPR) of India, Indonesia and the United Kingdom, all of which will be under review for the second time at the 13<sup>th</sup> Session of the UPR held under the auspices of the UN Human Rights Council in May and June 2012.

ERT’s submission on India highlighted various problems of discrimination and inequality in the country, including the existence of laws which discriminate on various grounds, inadequate legal protection for some categories of persons, insufficient legal protection from discrimination in different areas of public and private life and the inadequate enforcement of existing legal provisions. The submission recommended that the government of India undertakes a comprehensive review of domestic legislation to identify discriminatory laws and take immediate steps to amend or repeal such laws to ensure compliance with its international obligations. It also recommended that the government should take steps to develop and adopt comprehensive equality legislation and policies, providing protection from discrimination on all relevant grounds and in all areas of life governed by law. Finally, it recommended the establishment of a national institution

to ensure effective implementation and enforcement of the law and develop guidance for good practice in the area of equality.

ERT's submission on Indonesia focussed on discrimination and discriminatory violence against religious minority communities, noting the strong connection between the continued existence of laws which restrict religious freedom and discriminate against religious minorities, and the rising influence of extremist factions which promote and engage in discrimination and violence against religious minorities. The recommendations made in the submission included: (i) to immediately repeal laws which discriminate on grounds of religion or belief; (ii) to take steps to effectively prevent incitement to discrimination or violence; to review police procedure and publish guidance to ensure that the police response to violence against religious minorities is adequate; and (iii) to take steps to ensure the better enforcement of existing legislation providing protection from discrimination on grounds of religion or belief.

ERT's submission on the United Kingdom focused on the most significant concerns and challenges with regard to the human rights of stateless persons. The submission discussed three areas of concern: (i) the lack of a statelessness determination procedure in the UK; (ii) immigration detention practices which do not take into consideration the unique context of statelessness; and (iii) other human rights concerns, including enjoyment of socio-economic rights by stateless persons. The submission concluded that failures in each of these areas amount to violations of the UK's international human rights obligations as well as its obligations under the 1954 Convention Relating to the Status of Stateless Persons (1954 Convention). The

submission made a number of recommendations, including that the UK: (a) puts in place an effective, accessible and fair statelessness identification procedures, drawing from the ERT Guidelines on the Identification and Detention of Stateless Persons and the expertise of the UNHCR; (b) implements a maximum time limit for immigration detention of no more than six months and does not subject stateless persons to immigration detention for purposes of removal; (c) imposes an "alternatives to detention" regime, to ensure that detention is not arbitrary, and is only pursued as a necessary final resort that is proportionate to the administrative objective at hand; and (iv) respects, protects and fulfils the human rights of stateless persons subject to its jurisdiction, including specifically ensuring equal access to work, health-care and education.

### **ERT Submits a Contribution to the List of Issues on Turkey's Compliance with the International Covenant on Civil and Political Rights**

In December 2011, ERT submitted a contribution to the List of Issues regarding Turkey's compliance with the International Covenant on Civil and Political Rights, in advance of the 104<sup>th</sup> Session of the Human Rights Committee. The submission motivated and then formulated questions to the Turkish government to be asked by the Human Rights Committee, including:

- What actions are being taken by the state party towards the introduction of comprehensive equality and anti-discrimination legislation, as recommended by treaty bodies?
- Will such legislation contain legal definitions of key concepts including direct and indirect discrimination, multiple discrimi-

nation, discrimination by association or perception, segregation and harassment conforming to current international norms of best practice?

- Is Turkey considering any steps in defining positive (affirmative) action, consistent with international human rights instruments?
- What measures is the state party undertaking to ensure consistency of protection across all grounds of discrimination?
- Is Turkey taking or envisaging any legislative or policy action to address the widespread discrimination suffered by members of sexual and gender minorities on grounds of sexual orientation and gender identity?

### **ERT Submits a Parallel Report to the Committee on the Elimination of Discrimination Against Women on the State Report of Jordan**

In January 2012, ERT submitted a parallel report to the United Nations Committee on the Elimination of Discrimination Against Women commenting on the report by the Hashemite Kingdom of Jordan under Article 18 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

The submission focused on Jordan's compliance with Article 2 of CEDAW and expressed ERT's concern that the Constitution of Jordan does not include sex or gender as a prohibited ground of discrimination. Failure to expressly prohibit discrimination on the basis of gender amounts to a significant failure to fulfil the obligation under Article 2(a) of CEDAW, which requires states to "embody the principle of the equality of men and women in their national constitutions". ERT also expressed its concern over the lack of protec-

tion in the Constitution of Jordan against discrimination on other grounds which are particularly important to eliminating all forms of discrimination against women, including "pregnancy or maternity" and "civil, family and carer status".

The submission noted that the absence of "sex" and "gender" from Article 6 of the Constitution of Jordan is further compounded by the lack of either comprehensive or specific anti-discrimination law prohibiting discrimination against women in the public and private spheres, in violation of Jordan's obligations under Article 2(b) of CEDAW to "adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women".

### **ERT Makes Submission to the UN Special Rapporteur on the Human Rights of Migrants on the Immigration Detention of Stateless Persons**

In late January 2012, ERT wrote to the UN Special Rapporteur on the Human Rights of Migrants on the question of immigration detention of stateless persons. ERT welcomed the Special Rapporteur's decision to focus his first report on the immigration detention of migrants and offered information on the immigration detention of stateless persons. In its submission, ERT explained how the factual circumstances facing stateless persons make them particularly vulnerable to arbitrary immigration detention, and provided the Special Rapporteur with a number of ERT publications on the detention of stateless persons to inform his investigation.

ERT's submission pointed to the fact that the immigration laws, policies and practices of most states do not sufficiently take into

account the unique characteristics that set stateless persons apart from other migrants. The submission argued that the failure to recognise the particular circumstances of statelessness has created a protection gap; this is most evident in the context of immigration detention for the purpose of removal.

ERT recommended the use of its Guidelines on the Detention of Stateless Persons for the purpose of informing states of their international legal obligations pertaining to the protection of stateless persons from arbitrary detention, and providing guidance on how these obligations can be realised.

# Update on Current ERT Projects

## **Greater Human Rights Protection for Stateless Persons in Detention**

The purpose of this project, which started in 2008, is to contribute to strengthening the protection of the equal rights of stateless persons, particularly in the context of immigration, security and criminal detention.

ERT has continued its advocacy through participation in working groups and discussion forums relating to the issue of statelessness. In July 2011, ERT attended the first meetings of both the UK Working Group on Statelessness and the European Network on Statelessness (ENS). ERT continued to be an active member of the UK Detention Forum, attending Detention Forum meetings and in September 2011, signing a joint letter to the Home Affairs Select Committee on unlawful immigration detention in the UK. A previous joint letter submitted in April 2011 to the Joint Committee on Human Rights, requested the Committee to revisit its 2007 report on Detention. This letter has been responded to and the Committee has stated that this is one of the possible inquiries being considered for early 2012. In November 2011, ERT made a stakeholder submission for the Universal Periodic Review of the UK, which focused on the most significant concerns and challenges with regard to the human rights of stateless persons. In December 2011, ERT attended a two day meeting of ENS, at which various decisions were taken with regard to the ENS focus, strategy and planned activities over the next two years; and a UNHCR/All Party Parliamentary Human Rights Group panel discussion on statelessness. ERT continued to act as an advisor to Asylum Aid and

UNHCR in the delivery of their statelessness mapping project. ERT provided feedback on the final draft of the Asylum Aid and UNHCR report – *Mapping Statelessness in the United Kingdom* – which was subsequently launched in November 2011.

ERT commenced its programme of training for UK-based NGOs on statelessness in the UK with a workshop at the Barrow Cadbury Trust in London on 6 January 2012. ERT, Asylum Aid and Detention Action were the workshop implementers, and the participants were members of the UK Detention Forum and other London based NGOs and legal practitioners.

Following the publication of ERT's Draft Guidelines on the Detention of Stateless Persons (the Guidelines) and accompanying Commentary in Volume 7 of this journal, a consultation process took place in which the 7000 plus recipients of the journal and over 100 experts in the complementary fields of human rights, equality, immigration, detention, refugees and statelessness were asked to provide their review and feedback. Additionally, the Guidelines were disseminated through four specialist networks on refugees and asylum and detention, and through this process, the Guidelines have reached more than 500 additional experts. The Guidelines were widely acknowledged and welcomed as a timely and positive development, which could have a significant impact on existing law and policy. A further draft of the Guidelines was then prepared, taking into account the feedback received during the consultation process, including from the UNHCR. This draft was circulated amongst a smaller group

of experts and a roundtable discussion was held on 14 December. The Guidelines have now been finalised and will be published in the coming months.

The outcomes and impact of this project so far include: (1) integrating statelessness as a key issue of the international movement to end arbitrary detention – ERT has worked in close partnership with the International Detention Coalition, UNHCR, OHCHR and other key players to highlight statelessness as an important issue which must be addressed by immigration detention regimes; (2) developing standards relating to the identification and detention of stateless persons through ERT's Guidelines on the Detention of Stateless Persons; (3) changing attitudes of civil society towards statelessness through trainings, networking and capacity building, including through ERT's UK training workshops, the establishment of the ENS and ERT's active participation in key NGO networks including the Asia Pacific Refugee Rights network, the International Detention Coalition and the UK Detention Forum; (4) filling a documentation and knowledge gap on statelessness – ERT's report *Unravelling Anomaly* has been widely acknowledged as a key text on statelessness which has filled a research gap and serves as a useful resource to academics, activists and policy makers. The focus on detention and the highlighting of the connection between statelessness and lengthy immigration detention has resulted in many organisations addressing immigration detention from a statelessness perspective; and (5) promoting statelessness as a human rights issue – ERT continues to raise human rights concerns with regard to the treatment of stateless persons at different international forums, including most recently, at the Universal Periodic Review of the United Kingdom.

## **The Unified Perspective on Equality and LGBT Rights**

In September 2009, ERT launched a project aimed at showing how the unified approach to equality can enhance LGBT rights. One aspect of this project is to explore the possibility for promoting LGBT equality in countries with Islam. The work under this project will produce two published outputs: an article in a forthcoming book focusing on the use of equality and non-discrimination law in advancing LGBT rights in countries of the Commonwealth, with a special reference to the decriminalisation of same sex conduct; and a study on LGBT equality in countries with Islam, including secular states. The editorial process for both publications is currently underway. A second draft of a paper on LGBT rights and Islam is undergoing consultations.

The expected outcomes of this project include: (1) better understanding among civil society and other actors of the potential of using equality law principles and concepts in efforts to decriminalise same sex sexual conduct; (2) better understanding of the strategic choices for enhancing LGBT equality in countries with Islam; and (3) improved dialogue between LGBT groups, faith-based actors and civil society, particularly human rights organisations.

## **Developing Resources and Civil Society Capacities for Preventing Torture and Cruel, Inhuman and Degrading Treatment of Persons with Disabilities: India and Nigeria**

This project commenced in November 2010 with partner organisations in India (Human Rights Law Network – HRLN) and Nigeria (Legal Defence and Assistance Project – LEDAP). Its overall objective is to reduce the incidence of torture and ill-treatment of persons with disabilities.

The project envisages publication of two resource packs on disability and torture (one covering each of India and Nigeria), which will describe patterns of torture and ill-treatment of people with disabilities in India and Nigeria identified in the course of field research, present legal research and analysis bringing together relevant international, regional and domestic law and jurisprudence on disability and torture, and make recommendations for change to address the problems identified in the baseline report carried out in the first half of 2011. National consultants carried out field research in India and Nigeria between June 2011 and January 2012. Work has commenced on the drafting of the resource packs to be published in October 2012.



Lagos training December 2011

Photo credit: The Equal Rights Trust



Lagos training December 2011

Photo credit: The Equal Rights Trust



Oliver Lewis, Delhi training, November 2011

In November and December 2011, the first round of capacity-building training workshops for civil society activists and lawyers took place in Delhi and Lagos respectively. The workshop programmes were similar in both countries, and addressed: (i) international and comparative laws and standards which prohibit the discriminatory torture and other forms of ill-treatment of persons with disabilities; (ii) the provisions in national legislation and jurisprudence on, or related to, the protection of persons with disabilities from discriminatory torture and other forms of ill-treatment; (iii) the different tools, including strategic litigation and advocacy, which can be used to improve the content and implementation of the domestic protection of persons with disabilities from discriminatory torture and other forms of ill-treatment, having regard to both international and domestic legal obliga-



ERT Project coordinator Libby Clarke (in back, second from left) with colleagues at the Lagos training, December 2011

Photo credits: The Equal Rights Trust





Resident of Leprosy Colony visited by ERT in Delhi, November 2011

tions; and (iv) the potential for, and benefits of, collaboration with other organisations to further the aims and objectives of the project. The workshops were well-received by all participants who are now fully engaged in the project's objectives and keen to work closely with ERT, HRLN and LEDAP, especially in relation to identifying strategic litigation cases, supporting research and participating in advocacy actions over the forthcoming months. Further workshops for the same group of participants will take place in November 2012.

During their visits to India and Nigeria respectively, the project manager and the senior project advisors visited CSOs working in the field of disability rights and also institutions, including a leper colony in Delhi and a home for children with disabilities in Lagos. This enabled the project team to witness

first-hand the issues which have been raised in the reports and testimonies provided by the national consultants.

A further aspect of the project is to support strategic litigation concerning the ill-treatment of persons with disability. HRLN and LEDAP have started to identify potential cases in accordance with the case selection criteria devised in line with the project's objectives. In India, HRLN has lodged four cases in relation to which ERT is preparing legal briefs. The first relates to the appalling conditions in the Asha Kiran home, the only institution housing children and adults with physical and psycho-social disabilities in Delhi. The failure of the government to provide food, water, clothing, basic hygiene, and necessary medical care to residents in Asha Kiran has not only amounted to inhuman and degrading treatment, but

has also resulted in numerous deaths over several years, reaching a climax in February 2010 when 26 children died within a span of two months. The second case relates to the licensing of psychiatric hospitals in Karnataka and the failure to ensure adequate standards of care. The inadequate facilities include an absence of qualified psychiatrists and unhygienic conditions which have led to deaths in the facility documented in a Karnataka State Human Rights Commission Report and local media reports. The third case involves the tying and beating leading to death of a man perceived to have psycho-social disability, by the Railway Po-

lice at a train station. The fourth case is a public interest litigation in which HRLN is challenging guidelines published on mental health in the Delhi jails. The guidelines are considered to be inadequate to protect persons with disabilities from discriminatory ill-treatment in prison settings. LEDAP and ERT are currently in the process of analysing potential cases in Nigeria against the project's case selection criteria.

ERT has also identified key advocacy priorities in both India and Nigeria which will be acted on during 2012. In India, a new Disability Bill, drafted by a civil society coalition, is currently before the government for consideration. This draft bill aims to improve upon the current Persons with Disabilities Act 2005 which does little to implement India's obligations under the Convention on the Rights of Persons with Disabilities (CRPD). ERT will work closely with HRLN, which has been actively involved in the drafting of the bill, to advocate for its adoption and implementation. In Nigeria, a disability bill which would effectively enact many of Nigeria's obligations under the CRPD and has been passed by the legislature, still awaits the President's signature. ERT wrote to Nigeria's President in the first half of 2011 to urge him to sign the bill into law, but this step has yet to be taken. ERT plans to engage in further advocacy alongside LEDAP and other disability rights organisations in Nigeria to encourage the President to enact this bill.

The main outcome achieved under this project during its first



Krassimir Kanev conducting training in Lagos, December 2011

Photo credit: The Equal Rights Trust

year was that the two workshops provided increased knowledge and skills to 35 participants in India and 40 participants in Nigeria which is key to the success of the project activities and the achievement of the project objectives. All participants in the two training workshops reported that they were valuable and they will now be fully engaged in the planning and implementation of project activities during the second year of the project. ERT hopes to achieve further outcomes and impact during 2012 through the publication of the Resource Packs, the ongoing legislative advocacy and the development of strategic litigation cases.

### **Strengthening Human Rights Protection of the Rohingya**

In March 2011, ERT began to implement this 30-month project, the overall objective of which is to strengthen human rights protection for the Rohingya. Since August 2011, the project team has carried out preparations and subsequently begun to implement the research phase of this project. Scoping visits were carried out by the ERT project team to Bangladesh (24-29 July), Malaysia (19-24 September), Thailand (24-30 September) and Singapore (30 September-2 October). The outcome of the scoping visits is that strong foundations have been laid for cooperative and collaborative approaches between many types of in-country actors during the research phase of the project.

An Advisory Group meeting was held in London in November 2011. This was followed by a Management Committee meeting, which looked forwards to the management structures and procedures that should be in place for the coming research phase. A research workshop was held on 13-14 January 2012 at Mahidol University in Bangkok, Thailand. It brought together a team of ten participants

from six countries to collectively finalise the research plan and approach across all project countries.

### **Applying Equality and Non-discrimination Law to Advance Socio-Economic Rights**

This thematic project started on 1 July 2011 and will contribute to building strategies of better enforcement of economic and social rights through drawing and communicating lessons from a global review of jurisprudence and policies which have used equality and non-discrimination law to advance the realisation of social and economic rights. The planning process for the project is complete, with the establishment of an Advisory Committee comprising Daniel M. Brinks, Brun-Otto Bryde, Sandra Fredman, Bob Hepple, Sandra Liebenberg, Kate O'Regan, Denise Réaume, and Kamala Sankaran; and the drafting of a concept note which proposes a skeleton argument for the content of the final report and a process for production of the report. ERT has begun to carry out an initial review of relevant case law, with cases analysed and categorised according to the report's skeleton argument.

The envisaged main output of this project is a report containing practical advice as to how equality arguments can be used to advance the implementation of economic and social rights and a compendium of case law examples of where this has been done successfully. The report will serve as a resource for human rights activists working to promote economic and social rights. It will provide additional and/or alternative arguments on which human rights activists can rely in seeking to further the enjoyment of economic and social rights in the courts. In doing so, the report will enhance the ability of such activists to achieve the notoriously

difficult objective of advancing economic and social rights.

### **Promoting Better Implementation of Equality and Non-discrimination Law in India**

This project started in May 2009 and most activities including research and capacity building events were concluded in the second half of 2011. It was implemented in partnership with the Human Rights Law Network (HRLN) with the objective of developing the capacity of Indian NGOs, lawyers and judiciary to implement equality and non-discrimination law through promotion of national, regional and international standards and best practice.

In July-September 2011, ERT project officer supported by HRLN and ERT colleagues and volunteers from University College London drafted a report on equality and non-discrimination law in India which will be published during 2012. The report will be distributed within India, to human rights activists, lawyers and members of the judiciary, and it is hoped that it will be a valuable resource both for future advocacy efforts and for those representing clients in cases involving issues relating to equality and non-discrimination. The report will also serve as a resource for those individuals who attended a training workshop in December 2009 and a judicial colloquium in January 2011 in their ongoing work in the field of equality and non-discrimination.

The outcomes of the project so far include: (1) an increased capacity on modern equality law among civil society organisations, lawyers and judges, achieved through training of NGOs and lawyers (Mumbai, 2009) and a judicial colloquium for judges of the Supreme and High courts of India (Delhi, 2011); and

(2) a tangible impact on the capacity of Indian lawyers and civil society organisations to litigate equality cases in India.

### **Kenya 1: Empowering Disadvantaged Groups through Combating Discrimination and Promoting Equality**

In July 2009, ERT started work on this project with the purpose to enable Kenyan civil society organisations to be key players in building a national anti-discrimination regime. The project activities were implemented by September 2011. ERT worked with two local partner organisations – the Federation of Women Lawyers (FIDA-Kenya) and the Kenya Human Rights Commission (KHRC), on a range of activities, with a view to promoting the adoption of comprehensive anti-discrimination legislation, including the development of a draft comprehensive law and the adoption of a joint advocacy strategy. Since October 2010, ERT and its partner organisations have engaged in sustained advocacy to build support for the adoption of a new equality bill. Efforts centred on the opportunity provided by the passage of the new Constitution, which requires the government to introduce legislation to establish a new Kenya National Human Rights and Equality Commission. ERT and its partners took the approach of arguing that this legislation must contain the substantive provisions for equality law included in the Legislative Map, a document of principle agreed among Kenyan civil society organisations, based on the Declaration of Principles on Equality.

ERT continued to support its partners in their advocacy efforts during 2011, in the context of a rapidly evolving debate about the establishment of a new institutional regime to govern human rights and equality issues. In August 2011, ERT met with partners and other key players, notably Com-

missioner Lawrence Mute of the Kenyan National Human Rights Commission, to discuss prospects and advocacy strategies related to equality in the forthcoming years. In late August 2011, the Kenyan Parliament passed three Bills establishing: (i) the National Gender and Equality Commission; (ii) the Kenya National Commission on Human Rights; and (iii) the Commission on Administrative Justice. Powers related to equality and non-discrimination with respect to gender, including investigative powers, are given to the National Gender and Equality Commission, with the Kenya National Commission on Human Rights holding the same powers in relation to all other human rights issues. Following the passage of this legislation, ERT analysed the Acts highlighting that they lack definitions of discrimination. This means there is a need for further advocacy for the adoption of a comprehensive anti-discrimination bill which would provide definitions of direct and indirect discrimination, grounds, scope, affirmative action, exceptions, remedies, etc.

On 8 September 2011, ERT hosted a successful event aimed at encouraging equality lawyers in the UK to support ERT's work and publicising the project's approach and impact. Following the event, ERT has established the Equality Lawyers Network of lawyers interested in undertaking work in support of ERT projects. The Network currently has 22 barristers as members.

The project sought to produce four outputs: 1) a draft comprehensive anti-discrimination law (CADL) developed by key CSOs; 2) a joint lobbying strategy for the adoption of CADL; 3) enhanced capacity of CSOs to formulate and act on positions on equality issues; 4) increased awareness of the right to non-discrimination as a basic human right. While legislation reflecting

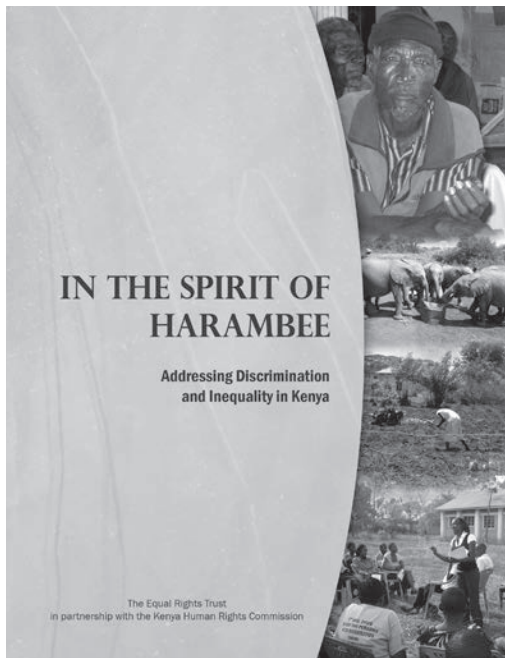
the Legislative Map developed by ERT and its partners was not adopted during the project lifetime, the foundations for such a development have been laid. The establishment of the National Gender and Equality Commission provides a good basis from which to advocate for substantive legislation on equality, while the impact of the partner's advocacy both upon civil society and on commissioners means they are well situated to be effective in this advocacy in the future. The Statement of Principles for Equality Law, Legislative Map and draft bill have been complemented by the ERT report on equality in Kenya, entitled *In the Spirit of Harambee* and published by ERT in February 2012 (see below). It re-affirmed the need for comprehensive equality legislation and catalysed further advocacy. Outside of the project itself, ERT's work on this project has provided a platform for its long-term engagement on equality issues in Kenya, which is evidenced by the three additional projects underway there, and the positive relationships which ERT has with both its immediate partners and a wider community of interested parties. The project has also allowed ERT to develop its unique rights-based approach to development, which stresses the importance of effective legal protection from discrimination in ensuring effective, sustainable poverty alleviation.

## **Kenya 2: Embedding Equality under Kenya's New Constitution**

This project, undertaken in partnership with the Kenya Human Rights Commission (KHRC), commenced in September 2010 and came to an end at the end of October 2011. The project involved four activities, each aimed at strengthening the implementation of the right to non-discrimination under the 2010 Constitution of Kenya: (1) Publication

of a country report on equality in Kenya; (2) Delivery of four training workshops; (3) Lodging of six strategic litigation cases; and (4) A public awareness campaign.

The country report on equality in Kenya, which was researched and drafted throughout the project period, was published in February 2012 under the title *In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya*. The 320-page report, which is the result of ERT's three year long partnership with KHRC, is the first ever comprehensive account of discrimination and inequalities on all grounds and in all areas of life in Kenya. The report brings together – for the first time – evidence of the lived experience of discrimination and inequality in Kenya on a wide range of different grounds, including ethnicity, sex, disability and sexual orientation, with an analysis of the adequacy of the laws, policies and institutions established to address these issues.



The report concludes that while Kenya has made great progress in recent years, discrimination exists across a range of grounds and areas of life, and major substantive inequalities remain. It recommends concrete steps related to stronger participation in international human rights instruments; repeal and amendment of discriminatory laws; action to effectively prohibit discrimination by state actors; and the adoption of measures to address substantive inequalities. Most importantly, the report argues that if Kenya is to give effect to the aspirations of its new Constitution, it must adopt comprehensive equality legislation providing protection from discrimination on all grounds and in all areas of life regulated by law.

On 4-7 October 2011, training was delivered by ERT to three groups: (i) commissioners from statutory and constitutional commissions; (ii) practicing lawyers; and (iii) government officials from across a number of departments. The training was successful with partners receiving positive feedback from all participating groups.

In addition, the project has identified six cases for strategic litigation. Of these, two cases concern the right to reasonable accommodation of persons with physical disabilities, an undeveloped concept in Kenyan law; two rely on the right to non-discrimination on grounds of pregnancy, a new ground established under the 2010 Constitution of Kenya; one concerns protection from discrimination on grounds of albinism, a ground which is not explicitly listed under the Constitution, but which it is argued falls within the scope of the open-ended list of grounds; and one concerns denial of access to education on grounds of socio-economic status. A dedicated fund has been established to support each case and make a contribution to lawyers' and court fees. Three

UK equality lawyers from the Equality Lawyers Network have prepared detailed briefs for use by lawyers in two cases each and each one has agreed to maintain an on-going role, *pro bono*, in advising the lawyers as these cases proceed.

In mid-October 2011, ERT's partner KHRC completed the activities required in respect of a "Know Your Rights" public awareness-raising campaign. Following analysis of key audiences, KHRC concluded that the campaign should target people between the ages of 18 and 30, as this group was both receptive to the campaign's messages and under-informed about their Constitutional rights. On 24 October 2011, KHRC convened a public forum attended by over 700 law students from 12 Universities. KHRC also produced a range of promotional materials, including hats, bags, t-shirts, etc., which were distributed at the event and will be used in future campaigns.

An independent evaluation of the project concluded that, despite many of the project's outcomes being necessarily long-term, immediate improvements could be identified as a result of the project activities. In the long term, it is expected that the country report will make a substantial contribution to the on-going debate about the need for comprehensive equality law in Kenya, that the strategic litigation cases will both raise awareness of the right to non-discrimination provided under the Constitution and strengthen its interpretation, and that the training workshops will lead to improved decision-making by those responsible for policy-making and implementation. Furthermore, the project has made a positive contribution to the overall aim of increasing support for the introduction of comprehensive equality law in Kenya.

### **Kenya 3: Promoting LGBTI Rights in Kenya in a Unified Equality Framework**

In October 2010, ERT launched a third project in Kenya whose purpose was to utilise the unitary framework on equality in promoting LGBTI rights. It was completed in the autumn of 2011, together with two project partners, Gay and Lesbian Coalition of Kenya (GALCK) and Kenyan Human Rights Commission (KHRC).

The project co-funded ERT's work on the comprehensive report on equality in Kenya published in February 2012 (see above). It also produced a practical guide for NGOs and lawyers on legal protection against discrimination of LGBT and other vulnerable groups in Kenya; and a feasibility study on the strategies of promoting equality inclusive of sexual orientation and gender identity. In August 2011, ERT conducted a week-long study tour in Kenya to develop the feasibility study under this project, as well as to gather further first-hand testimony for the report on equality in Kenya.

As the outputs of this project largely exceed the planned ones, so did the outcomes and impact. The report on equality in Kenya which was not envisaged as a separate output under this project but the production of which was made possible by the clustering and mutual amplification of activities undertaken by ERT and its partners under other projects in Kenya, will be useful not only to NGOs and lawyers but to a range of domestic actors, including but not limited to community leaders, statutory bodies, the judiciary, civil servants and legal scholars, as well as individuals who have been discriminated against. By identifying gaps, weaknesses and inconsistencies in existing legal protection and highlighting the impact of these deficiencies on vulnerable groups,

especially LGBTI groups, the report builds a case for legal and policy reform and provides these actors with the evidence they need. In addition, the report provides a strong foundation for other types of equality-related work, including development of training modules, policy positions, strategic litigation and international level advocacy. The added value of the report consists in framing a new debate on equality in Kenya and helping to constitute equality as a field of study and policy making, bringing together discourses of human rights, discrimination law and social justice.

Instead of the originally planned narrower feasibility study aimed primarily to test the idea of creating a hub of equality activism on Nairobi, the actual output is a more substantial needs-assessment study looking at strategies for strengthening LGBTI equality in Kenya and the region. The target audience of the study is primarily funders interested in promoting equality in Kenya, inclusive of sexual orientation and gender identity. The study made use of individual interviews and focus group discussions, according to a questionnaire in a one-hour version for individuals and a two-hour version for focus groups. Respondents enlisted with the help of partner NGOs included approximately 20 prominent individuals who are opinion-makers in Kenya and six focus groups of between ten and twenty persons each, representing different stakeholders (persons with disabilities, gays, lesbians, trans persons, persons living with HIV/AIDS, and sex workers).

The project's overall impact includes creating preconditions for better protection from discrimination of the legal rights of LGBTI and other vulnerable groups. While this one year project is only a preparatory stage for further work, it has contributed and will through its outputs continue to contribute

to: (1) stronger, more confident and better included constellations of LGBTI activists; (2) improved understanding among the LGBTI and other civil society groups of equality as a right and of the link between the different strands of equality and equality of sexuality; (3) increased accountability of the Kenyan government with a view to its obligation to promote equality and protect against discrimination, including on grounds of sexual orientation and gender identity; (4) better enforcement of existing equality law and policies, including in respect to LGBTI persons; (5) development of comprehensive national equality legislation and policies giving effect to the universal right to equality.

#### **Kenya 4: Improving Access to Justice for Victims of Gender Discrimination**

This project, which commenced on 1 April 2011, has as its purpose to enable Kenyan women to secure legal remedies and enhanced protection from discrimination by adding an equality component to free community based legal services. The project is implemented with a partner organisation, the Federation of Women Lawyers Kenya (FIDA-Kenya) and its planned duration is four-and-a-half years. It focuses on building legal service capabilities of community-based organisations (CBOs) throughout Kenya.

In early July 2011, the Handbook for use by participating CBOs was completed. The Handbook provides information on Kenyan law as well as on how to set up, provide and administer community based legal services in discrimination matters under the project. On 18-22 July 2011, ERT provided training on equality and anti-discrimination law, and on establishing and providing community based legal services in discrimination matters to 10 CBOs and 10 lawyers. All participants in the training reported that



it was valuable. They are now using the skills developed to provide better advice to women who have suffered discrimination at the community level. This has involved raising awareness in the target communities of the rights and duties arising under the Constitution of Kenya, Employment Act and other legislation providing a right to non-discrimination and disseminating information on the legal services available through the CBOs. In addition, CBOs began providing advice on discrimination issues to women in their communities. In October and November 2011, FIDA undertook visits to five of the ten participating CBOs to provide advice, collect monitoring data and assess organisational development needs.

In August 2011, three ERT staff received training on monitoring and evaluation. Following this training, ERT prepared and submitted a monitoring and evaluation plan to the donor (Comic Relief). As part of this project, ERT's project officer has also started work on an Open University course on "Capacities for Managing Development". It is hoped that this learning will contribute to ERT's on-going work in developing its own unique rights-based approach to development.

Through the delivery of legal advice and legal services to Kenyan women and girls who have been victims of discrimination the project aims to increase access to justice for all women, and, to increase the material enjoyment of particular rights, such as the rights to education and employment. This project has already had impact, as evidenced by initial reports submitted by FIDA and participating CBOs which indicate that the training, guidance and materials provided under the project have been used to raise awareness and sensitise communities to their rights and duties under the Constitution of Kenya, Employment Act

and other legislation providing a right to non-discrimination.

### **Malaysia: Empowering Civil Society to Combat Discrimination through Collective Advocacy and Litigation**

Launched in March 2010, this project had the general objective of strengthening the role of Malaysian civil society in implementing equality and anti-discrimination provisions enshrined in the Federal Constitution, in line with international law. ERT had overall responsibility for the implementation of the project and worked with a Malaysian partner, the Kuala Lumpur-based NGO Tenaganita.

An advanced draft of the report on equality and non-discrimination law in Malaysia was finalised in the second half of 2011. ERT carried out desk research to identify patterns of inequality, analysing statistics provided by UN bodies and state agencies, NGO reports, academic articles and press reports. This research was supplemented by field research and testimony. Research was also carried out into the Malaysian legal system and relevant law was analysed against the requirements of international law. Malaysian legal experts were recruited during August 2011 to review a draft of the report and their feedback was incorporated prior to circulation of the resulting draft to members of the Equality Forum established under the project, for discussion at their sixth meeting in August 2011. A preview of the report was then published based on the comments received during consultation with the Equality Forum.

On 30 November 2011, a stakeholder roundtable meeting took place in Kuala Lumpur to discuss the preview of the country report on equality and non-discrimination in Malaysia and particularly its recommendations.

Participants included key stakeholders from government ministries, parliament, the judiciary and civil society. The meeting was well-attended and interesting discussions took place, particularly in relation to (i) the relationship between religion and equality; (ii) attitudes towards LGBTIQ rights in Malaysia; and (iii) the advantages and disadvantages of a unified approach to equality. It is hoped that with the publication of the final report on inequality and discrimination in Malaysia in 2012, further action will be taken by members of the Equality Forum in order to implement its recommendations.

Under the project, ERT and Tenaganita have provided research support in relation to two equality cases – the first of which is a judicial review of the Shari’ah law prohibition of cross-dressing, and the second – a constitutional challenge against the dismissal of a temporary teacher on the ground of her pregnancy. Leave was granted in the transgender judicial review case on 4 November 2011, and the full hearing is expected to take place in April 2012. ERT is providing a legal research brief to the representatives of the applicants setting out international and comparative law in support of the case.

The outcomes and impacts of this project include (i) the establishment of a Malaysian Equality Forum which provides an institutional framework for civil society dialogue on equality and discrimination issues in Malaysia; and (ii) the increased understanding of 35 workshop participants of both international and domestic equality and non-discrimination law, and an increased capacity to develop advocacy strategies through which their improved knowledge can be used to seek improvements in domestic protections of the rights to equality and non-discrimination for all vulnerable groups within Malaysian society.

### **Moldova: Strengthening Legal Protection from and Raising Awareness of Discriminatory Ill-Treatment in the Republic of Moldova, Including Transnistria**

This project, in which ERT is a partner to a Moldovan NGO – Promo-Lex – has two general objectives: (1) to contribute to strengthening the legal protection from discriminatory ill-treatment; and (2) to raise awareness of stakeholders on discriminatory ill-treatment. ERT has been responsible for certain aspects of the project related to building the capacity of local stakeholders on equality law issues.

One aspect of this project involves Promo-Lex and ERT working together in support of selected strategic litigation cases. Two of the project’s cases relating to domestic violence have been taken to the European Court of Human Rights and were communicated during March 2011: *Eremia & Others v Moldova* (Application No. 3564/11) and *Mudric v Moldova* (Application No. 74839/10). In June 2011, ERT submitted requests for permission to intervene in both cases. In September 2011, permission was granted. ERT instructed two barristers to draft submissions in these cases focussing the implications of Article 14 for the state’s positive obligations under Article 3 of the European Convention on Human Rights, when dealing with domestic violence. The amicus briefs were submitted to the Court in late October 2011.

In October 2011, ERT made further submissions to the Ministry of Justice of Moldova regarding the Draft Law on Preventing and Combating Discrimination which will be considered by the government during 2012. While the submission praised the Ministry of Justice for accepting several of ERT’s previous comments, submitted in March 2011, it also noted remaining deficiencies in the

draft, including: (i) the lack of protection from discrimination by perception and multiple discrimination; (ii) the failure to include certain grounds as protected (e.g. descent, pregnancy, maternity, family or carer status, birth, national origin, association with a national minority, gender identity and genetic or other predisposition toward illness); (iii) the exclusion of “relationships of marriage and adoption regulated by the legislation in force” and “religious denominations and their component parts in aspects concerning their religious beliefs” from the prohibition of discrimination; (iv) the legal uncertainty caused by the inadequate drafting in relation to “Grave Forms of Discrimination”; and (v) the absence of a provision which sets out an obligation to provide reasonable accommodation. ERT is awaiting publication of the final version of the law in order to assess the extent to which its comments have been incorporated.

A bilingual (Romanian-English) report on discriminatory ill-treatment in Moldova, to which ERT has contributed, was published by Promo-Lex in early 2012. The report analyses the main patterns of discriminatory ill-treatment prevailing in Moldova and the relevant law, and illustrates the main issues with testimony of specific cases.

The impact of this project is that through the training workshop delivered by ERT in August 2010 and the series of four public lectures in Chisinau which ERT has participated in, over 70 legal practitioners, judges and civil society representatives have been introduced to the unitary framework on equality and its relationship to discriminatory ill-treatment in Moldova. It is anticipated that further impact and outcomes will be seen through: (1) the judgments issued by the European Court of Human Rights in the cases of *Eremia v Moldova* and *Mudric v Moldova*;

(2) the use of the report on discriminatory ill-treatment by civil society activists and legal practitioners to strengthen equality law arguments when representing victims of discriminatory ill-treatment; and (3) improved drafting and content in the future Law on Preventing and Combating Discrimination.

### **Solomon Islands: Empowering Disadvantaged Groups through Human Rights and Equality Training**

ERT is a partner to this project whose main implementer is the Honiara office of the Secretariat of the Pacific Community. The specific objective of the project is to build the capacity of Solomon Islands civil society organisations to provide basic and wide-reaching training on human rights and equality with a view to building and strengthening the national human rights regime.

Following the two-week training provided by ERT to Solomon Islands organisations in March 2011, the participants in the training programme have continued to carry out field work in their respective regions of the Solomon Islands and gathered information for future use in human rights advocacy, reporting and litigation. This project concluded in September 2011 and will be followed by a new project, due to commence in 2012, which will build on the work under the first project through advocacy and the publication of a country report.

The outcomes of the project are: (i) ten civil society members trained as provincial focal points, empowered to document discrimination; (ii) recording of human rights violations has been done in 10 provinces and Honiara; (iii) human rights violations documented by the project have been transcribed and will form the basis of national level discussions and possible submissions

to Law Reform Commission, Constitutional Reform Commission and Ministry of Women, Youth, Children and Family Affairs; 24 individual interviews of victims have been carried out, documenting cases of abuse in the following areas: sexual violence, physical violence, emotional violence, abuse of adopted child, and negligence resulting in violation of the rights of the child (access to health care and education).

The project impact includes: (1) an increase in awareness of basic rights among the most vulnerable groups in 10 Provinces; this is reflected in reports by the focal points where people who receive information on human rights are saying that they are grateful that they are aware of their rights; women especially are starting to ask for participation in decision making in their communities through the feedback they gave to focal points; (2) moving communities with human rights violations from acceptance to action, by linking them to active civil society groups where present, and by encouraging the growth and strengthening of existing civil society such as church leaders, village leaders and church women, men and youth groups to be aware of human rights and to speak out against violations in their own villages, by gaining support of village leaders; and (3) increased capacity of CSOs to tackle gender-based discrimination.

### **Sudan 1: Empowering Civil Society in Sudan to Combat Discrimination**

This project, which started on 4 October 2010, is aimed at developing civil society capacity through training, elaboration of a country report on discrimination, and establishment of a civil society coalition to undertake advocacy. It is being implemented by ERT in partnership with the Sudanese Organisation for Research and

Development (SORD). The project is being implemented in the context of a rapidly-changing and difficult political and security environment, which is affecting the ability of SORD to operate freely, and has necessitated a number of changes to the delivery of project activities.

Work on a report on discrimination and inequality in Sudan is underway. In July 2011, field research for the report began in five provinces of Sudan. In October 2011, ERT convened and delivered an intensive train-the-trainer workshop for a small group of senior Sudanese human rights activists. The training provided an introduction to the basic concepts of equality law, discussion of



Trainer Sarah Kinjanyui teaching equality concepts to Sudanese activists, October 2011

Photo credit: The Equal Rights Trust

these concepts and their application, and discussion of training techniques in order that participants could provide training to other members of the target group inside Sudan. The training was well-received and positively evaluated by the participants. A select number of the participants then delivered training in two further workshops, in Khartoum and Kassala, for 25-30 persons each, in January-February 2012.



Trainer Margarita Ilieva  
talking to Sudanese activists, October 2011

Photo credit: The Equal Rights Trust

The key impact and outcome of this project achieved so far is that the training was well-received and positively evaluated by those participating in it. The training had an important multiplier effect, with each participant effectively capacitated to deliver training to other civil society actors.

## Sudan 2: Equality and Freedom of Opinion, Expression and Association

ERT launched this project in October 2010, with the objective of enhancing the ability of Sudanese human rights defenders and journalists to use equality and human rights law concepts in their work, and to be aware about the need to balance freedom of expression with the right to non-discrimination, including in the form of freedom from hate speech. ERT works with anonymous Sudanese consultants operating from outside and inside Sudan. With support from the project, journalists are continuing to write for Sudanese and international media on human rights issues. The journalists have launched campaigns and published statements on a number of topics, including one condemning the closure of a Sudanese Newspaper *Aljareeda* by the security organs in late September 2011.

In early 2012, ERT and its local partners convened two two-day training workshops for 25 Sudanese journalists and human rights defenders. The first workshop examined the role of journalists in reporting on human rights abuses, with a particular reference to the rights to freedom of expression and non-discrimination. In addition, the workshop examined the responsibilities of journalists to respect the right to non-discrimination in their work, including through balanced reporting and refraining from harmful speech. The second workshop focussed on journalistic ethics and techniques and included modules on reporting from conflict zones, ethics in journalism and the use of digital and social media in human rights journalism and advocacy.

Between July 2011 and February 2012, ERT and its local partners undertook a number of other activities to support the journalists and their network, including support to individual journalists, publicising the closure



Nagla Sidahmed Elsheikh Ali, a Sudanese journalist participating in ERT project activity, January 2012

Photo credit: The Equal Rights Trust

of newspapers and detention of journalists, and work to establish a website.

This project has had a significant impact in two important areas: (1) Through providing practical and technical support to journalists involved in covering human rights issues, ERT has made a contribution to sustaining independent journalism in Sudan; (2) Through providing training on reporting from a rights-based perspective, with a particular focus on the right to non-discrimination and harmful speech, ERT has had an important impact on the Sudanese media, helping to ensure more balanced, effective and informed human rights reporting in future.

### **Guyana 1: Empowering Civil Society to Challenge Homophobic Laws and Discrimination against LGBTI Persons**

This project started in October 2010. Its objective is to build the capacity of civil society

to challenge discrimination against LGBTI persons, by both increasing the technical skills and capacity of LGBTI organisations and by fostering improved cooperation between LGBTI organisations and other human rights NGOs. ERT's project partner is the Society against Sexual Orientation Discrimination (SASOD) based in Georgetown.

Recent work has focussed on the preparation of a report on discrimination in Guyana. In August, ERT and SASOD undertook field research and collected testimony from victims of discrimination on different grounds in different regions of the country. Since November 2011, ERT and SASOD have also carried out further desk-based research on patterns of discrimination and inequality and completed a thorough review of the legal and policy framework on equality in Guyana.

Two training workshops on human rights, equality and the protection of LGBTI per-

sons were delivered by ERT in August 2011. The workshops built on a training provided previously (in May 2011) by ERT and focussed on ensuring that participants had a strong understanding of the key concepts of equality law, the relevant provisions in the Guyanese Constitution and legislation, and techniques for documenting and publicising incidents of discrimination.

The Guyana Equality Forum established by ERT's partner SASOD in the first half of 2011 continued to develop and agreed its mandate and principles of operation. In the project period, two further meetings of the Forum were held. The partners intend to maintain and further develop the Forum in the context of their second project together (see below).

### **Guyana 2: Empowering Civil Society to Address Societal Prejudice and Undertake Advocacy on Discrimination against LGBT Persons**

This second project on Guyana started on 18 October 2011, overlapping with the last phase of the first Guyana project (see above). It is implemented again in partnership with SASOD. The two projects are closely interconnected: the second, focusing on media, political and international advocacy, builds on the first, which focussed on the development of basic capacities and tools for advocacy.

This project's objective is to further develop the capacity of the organisations which together form the Guyana Equality Forum, supporting them to undertake advocacy and awareness-raising in pursuit of legal and policy reforms on equality, with a particular focus on tackling discrimination against LGBTI persons. The project aims to enable these organisations to address two obstacles to successful advocacy on these issues:

(1) Societal prejudice and stigma against LGBTI persons; and (2) Lack of commitment to reform from government and political leaders. The project will do this through supporting the participating organisations to develop and implement an integrated advocacy and awareness-raising campaign operating at the community, national and international levels.

Since the start of the project, ERT and SASOD, in a challenging post-electoral context defined by political struggle around and after the November 2011 election, have made efforts to maintain focus on the need for decriminalisation of same-sex conduct between men and of cross-dressing, and for legal protection from discrimination on grounds of sexual orientation and gender identity. Commitments made by the Guyanese authorities to consult on these issues have been made, following criticism at the Universal Periodic Review of Guyana in 2010. SASOD and ERT have been asked to provide evidence to the Office of the President on discrimination against LGBTI persons and the need for legislative reform.

### **Discrimination and Torture in Nigeria and Thailand**

This project, which started in the autumn of 2010, has as its objective to provide practical and legal assistance to victims of discriminatory torture in Nigeria and Thailand. Since the start of the project, ERT and its partner in Nigeria, the Legal Defence and Assistance Project (LEDAP), have delivered direct legal assistance to 29 victims of torture arising from discrimination. Where necessary, LEDAP has arranged for the provision of medical, psychological and social support to those victims receiving legal support.

Under this project, ERT has supported several cases in Thailand, through a partnership with the Thai Committee for Refugees Foundation, which exists to promote and protect the human rights of refugees, asylum seekers and stateless persons in Thailand and in the ASEAN region. The project has provided five individuals who have been held in immigration detention amounting to cruel, inhuman, or degrading treatment or punishment with legal assistance.

Through providing support to 29 individual torture victims and enabling them to pursue legal claims for torture against the Nigerian authorities, and providing similar support for 5 victims in Thailand, this project has secured redress for the individual victims, and will contribute to efforts to reduce impunity for torture in the target countries, and strengthen the capacity of the project partners in this regard.

### **Indonesia: Empowering Civil Society to Use Non-discrimination Law to Combat Religious Discrimination and Promote Religious Freedom**

The overall objective of this project, which started on 1 November 2010, is to empower civil society in Indonesia to use non-discrimination law in combating religious discrimination and promoting religious freedom. ERT works with two Indonesian partners – Indonesian Legal Aid Foundation (YLBHI) and Institute for Policy Research and Advocacy (ELSAM).

Recent work has focussed on the production of a report on discrimination in Indonesia. Field research started in August 2011 and has been supervised by ERT's partner YLBHI. The second project partner, ELSAM has been responsible for undertak-

ing further desk research and preparing a first draft of the report. It also liaised with YLBHI to ensure that field research was properly directed.

As a result of the project activities, Indonesian NGOs that participated in a training workshop delivered by ERT and its partners in June 2011 have an increased capacity to identify and document cases of discrimination. The work undertaken by these organisations is improving the documentation of religious discrimination in Indonesia.

### **Belarus: Empowering Civil Society in Belarus to Combat Discrimination and Promote Equality**

This project started in December 2010. Its objectives are to improve knowledge of discrimination law among NGOs in Belarus, to enable them to monitor and report on discrimination and to bring discrimination cases to courts and to create a coalition of NGOs with a joint advocacy platform on issues of discrimination. ERT works with an informal partner based in Minsk – the Belarus Helsinki Committee (BHC).

Following training of Belarusian human rights CSOs provided by ERT in June 2011 on basic concepts and overarching principles of equality law and their application in the Belarusian context, ERT and its partner, the BHC, have engaged in monitoring discrimination on the grounds of gender, sexual orientation, disability, ethnicity, political opinion, and religion in different regions of Belarus. Research findings are being used by the partners to provide evidence for a planned comprehensive report on discrimination in Belarus. The report will be launched at a roundtable event in



Minsk, and widely disseminated both within the country and internationally to form the basis of an advocacy campaign aimed at advocating for the adoption of comprehensive anti-discrimination legalisation in line with international norms.

The partners are simultaneously identifying potential litigation cases which can be supported under the project. It is envisaged that these cases can be brought under the Belarusian Constitution, with ERT providing international expertise and a limited financial contribution towards the legal teams' costs.

### **Jordan: Addressing Discrimination and Violence against Women in Jordan**

The objective of this project, which started in January 2011, is to contribute to the protection of women from all forms of discrimination in Jordan at the societal and legal level. ERT is implementing this project in Jordan as a partner to Mizan, an Amman-based organisation which is one of the most prominent and active human rights and legal defence NGOs in the Middle East.

In September 2011, ERT delivered a lecture on the essential elements of national equality legislation to an audience consisting of key Jordanian law-makers, government ministers, judges and prosecutors as well as NGO representatives, generating and propelling a growing interest in developing equality legislation in Jordan. The discussion which followed focussed on the prospects of incorporating lessons from other jurisdiction in Jordan through law reform in the area of equality, and on issues of gender discrimination related to obtaining citizenship, whose high sensitivity is due to the way in which a reform would affect the very substantial Palestinian population in Jordan.

ERT also met with partners and consultants in Amman to review progress on a study on gender equality in Jordan. Also, legal issues and cases in which ERT input is requested have been identified. These include issues of "protective detention" of women to rescue them from threatened or real domestic violence, a measure which is itself an abuse of women; passing on of nationality from mothers to their children; and domestic violence, among others.

In January 2012, ERT submitted a parallel report to the United Nations Committee on the Elimination of Discrimination Against Women in which it set out concerns regarding Jordan's implementation of Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, according to which Jordan is obligated to protect the right of women to non-discrimination. It particularly noted the failure of the Constitution of Jordan to include "gender" as a prohibited ground of discrimination.

The intended impact of the project is to enhance the capacity of Jordanian non-state actors to advocate for a national gender equality regime to better protect women's rights, including the adoption or modification of domestic laws in line with international standards and their effective implementation.

### **Croatia: Empowering Civil Society through Training and Establishing a Croatian Equality Forum**

Work on this project began in May 2011. The project envisages the provision of training on equality and non-discrimination law, production of a toolkit on equality and non-discrimination law for Croatian CSOs and legal professionals, and the establishment of a Croatian Equality Forum bringing together

a minimum of 30 civil society organisations working on issues related to equality and non-discrimination law.

ERT visited Croatia in August to undertake planning discussions with the project partners, the Croatian Law Center (CLC) and the Association for Protection of Human Rights and Citizens' Freedoms (HOMO). The partners have produced a baseline study, which provides an analysis of Croatia's legal protections against discrimination, discriminatory laws, and civil society capacity.

A first training workshop under this project took place in Pula on 2-4 March 2012. Trainees from ERT, the Equality and Diversity Forum (EDF, UK), the Croatian Law Center, the Croatian Ombudsman and the Croatian Supreme Court presented interactive workshops covering topics including Croatian and European equality law and practice; the role of jurisprudence in fighting discrimination; substantive, procedural and criminal law perspectives on non-discrimination; coalition building and joint advocacy; advocacy and awareness-raising campaigns and strategic litigation. Participants came from across Croatia and included human rights activists, civil society representatives and practising lawyers.

### **Azerbaijan: Developing Civil Society Capacity for Preventing Discriminatory Torture and Ill-treatment**

This project began on 29 November 2011. Over the course of 18 months, this project will seek to (1) increase the capacity of civil society organisations (CSOs) and other professionals to understand and apply anti-discrimination and human rights law in challenging discriminatory torture and ill-treatment; (2) create an institutional frame-

work for civil society dialogue and advocacy on issues relating to discriminatory torture and ill-treatment through establishing a CSO Forum; and (3) increase awareness and understanding among CSOs and other key stakeholders of the link between discrimination and the occurrence of torture and ill-treatment in Azerbaijan. The project will consist of training workshops in three cities in Azerbaijan (Baku, Ganja and Kurdemir), the publication of a report on discriminatory torture and ill-treatment in Azerbaijan, the establishment of a CSO Forum, and an advocacy campaign.

ERT visited Azerbaijan in December to undertake planning discussions with the project partner, Women's Organization Tomris, which is based in Ganja. In addition, meetings were held with a group of CSOs and individuals for a scoping discussion on discriminatory practices in the Azerbaijani context. ERT and Tomris are currently working on a baseline study which will guide the planning of the project activities and contacting local CSOs who will form the core of the CSO Forum.

### **Bosnia and Herzegovina: Developing Civil Society Capacity to Combat Discrimination and Inequality in Bosnia and Herzegovina**

This 18 month project began on 14 December 2011. ERT visited Bosnia and Herzegovina in January 2012 to work with the local partner organisations, Helsinki Committee for Human Rights in Bosnia and Herzegovina (HCRC) based in Sarajevo, and Center for Informative and Legal Aid (CIPP) based in Zvornik.

This project will seek to (1) increase the capacity of Bosnian human rights defenders to identify and challenge cases of dis-

crimination and inequality; (2) increase the availability of information and evidence on discrimination and inequality and increase understanding of the relevant issues; (3) increase cooperation between Bosnian CSOs in challenging discrimination and inequality; and (4) raise the awareness of civil society and other key stakeholders of the widespread existence of discrimination and inequality in Bosnia and Herzegovina and the duty of Bosnia and Herzegovina to investigate and bring an end to such practices; leading to (5) the better implementation of anti-discrimination legislation. The project will consist of training workshops on anti-discrimination law and policy and anti-discrimination litigation in the two entities of Bosnia and Herzegovina, the establishment of a forum of organisations to combat discrimination, the publication of a comprehensive report on discrimination in Bosnia

and Herzegovina, direct legal assistance to victims of discrimination through legal advice, strategic litigation and an advocacy campaign. ERT, HCHR and CIPP are currently working on a baseline study which will guide the planning of the project activities and contacting local CSOs who will form the core of the CSO Forum.

### **Turkey: Empowering Civil Society to Challenge Discrimination against LGBTI Persons in the Aegean and Marmara Regions of Turkey**

This 18-month project began on 1 January 2012. The project seeks to address the lack of capacity among local level CSOs in two of Turkey's regions to challenge discrimination against LGBTI persons and advocate for improved implementation of legal protection from discrimination, including on grounds



Nicola Simpson (ERT, first on the right) with Turkish colleagues Erdem Gursu and Damla Gülmez in Izmir, February 2012

Photo credit: The Equal Rights Trust

of sexual orientation and gender identity, through (1) improving documentation of all types of discrimination, including against LGBTI persons from a unified perspective on equality in the form of a published report; (2) increasing knowledge of anti-discrimination law and concepts among CSOs; (3) increasing experience of documenting cases of discrimination among CSOs in the target regions; and (4) increasing cooperation between CSOs in the target regions through the creation of a Regional Equality Forum.

ERT visited Turkey in February 2012 to undertake planning discussions with the project partner, Siyah Pembe Üçgen (SPU), which is based in Izmir. ERT and SPU are currently working on a baseline study which will guide the planning of the project activities. The latter will include training seminars on discrimination law and policy in regional centres, the establishment of a Regional Equality Forum and the publication of a report on discrimination in the Aegean and Marmara regions of Turkey.

# ERT Work Itinerary: July – December 2011

**July 7, 2011:** Attended EU meeting for implementers of projects in Belarus, in Brussels.

**July 6-8, 2011:** Delivered a public lecture on the discriminatory ill-treatment of persons with disabilities to Moldovan students and lawyers at a meeting organised by partner organisation Promo-Lex, in Chişinău.

**July 18-22, 2011:** Delivered training on key concepts in equality law and the provision of legal advice in discrimination matters to community-based organisations and lawyers from across Kenya, in Nairobi.

**July 26, 2011:** Gave a keynote lecture “International Trends and Best Practice Models of Promoting Equality”, at conference “Reforming Australia’s Equality Laws”, organised by the Human Rights Law Centre, in Melbourne, Australia.

**July 22-30, 2011:** Conducted a week-long visit, on invitation of the Human Rights Law Centre and the Attorney General, to share expertise with numerous stakeholders on best practices in developing equality legislation, and to address conferences and meetings in the context of the Australian Consolidation Project aimed at upgrading equality legislation, in Melbourne and Sydney, Australia.

**July 23-30, 2011:** Conducted a research scoping visit, in Bangladesh.

**August 5-14, 2011:** Conducted a week-long feasibility study on funder strategies of supporting the development of equality, inclusive of sexual orientation and gender identity, in Kenya.

**August 24, 2011:** Held project development meeting with Croatian partners (The Croatian Law Centre and “HOMO” Association for Protection of Human Rights and Citizen’s Freedoms) to plan a joint project entitled “Empowering civil society through training and establishing a Croatian Equality Forum”, in Zagreb.

**September 8, 2011:** Held panel discussion entitled *Equality Law, Equality Lawyers and International Cooperation on Equality* on ERT’s project and advocacy work which led to the establishment of the Equality Lawyers Network, in London.

**September 14, 2011:** Presented the draft Guidelines on the Detention of Stateless Persons at a meeting of the UK Detention Forum, in London.

**September 20, 2011:** Provided training on “Essential Elements of National Equality Legislation and Good Practices in Promoting Equality” to 30 Jordanian parliamentarians, government officials, members of the judiciary, prosecutors and NGOs, hosted by Mizan Legal Centre, in Amman.

**September 19-30, 2011:** Conducted a research scoping visit, in Malaysia and Thailand.

**September 29-30, 2011:** Served as expert at Workshop “Towards a Coherent National Policy to Prevent and Combat Racial Discrimination and Related Intolerance: Developing and Implementing National Action Plans”, organised by the UN OHCHR, and provided training on “Effective Legislation as a Part of National Action Plans” to governmental officials from the Commonwealth of Independent States, in St Petersburg, Russia.

**October 6, 2011:** Served as expert for World Bank staff at Workshop on Human Rights and Development organised by the World Bank Nordic Trust Fund and the Ministry of Foreign Affairs of Finland, and conducted training on non-discrimination and equality, in Helsinki.

**October 3-7, 2011:** Delivered training on key concepts in equality law and the equality provisions of the Kenyan Constitution to lawyers, commissioners and civil servants, in Mombasa, Kenya.

**October 25, 2011:** Participated in *Good Pitch Europe*, an event which brings together filmmakers with NGOs, foundations, philanthropists, brands and media around leading social issues, in London.

**October, 2011:** Delivered train-the-trainer training on equality and non-discrimination law to civil society activists from Sudan.

**November 21, 2011:** Served as a trainer for European Commission staff at seminar “Human Rights and Democratisation in EU External Relations: Non-discrimination”, in Brussels.

**November 23-28, 2011:** Carried out field research and delivered a two-day workshop on the discriminatory torture and ill-treatment of persons with disabilities to lawyers and civil society activists, in Lagos, Nigeria.

**December 5, 2011:** Held panel discussion with barristers at Cloisters Chambers on the engagement of barristers in the Equality Lawyers Network, in London.

**December 9, 2011:** Held meetings with project partner organisation, Women’s Organization Tomris, and other civil society stakeholders, in planning a joint project entitled “Developing civil society capacity for preventing discriminatory torture and ill-treatment”, in Ganja, Azerbaijan.

**December 5-10, 2011:** Carried out field research and delivered a two-day workshop on the discriminatory torture and ill-treatment of persons with disabilities to lawyers and civil society activists, in Delhi.

**December 12-13, 2011:** Participated in a two-day meeting to set up the European Network on Statelessness, in London.

**December 14, 2011:** Hosted a roundtable discussion on the draft Guidelines for the Detention of Stateless Persons, in London.

**December 14, 2011:** Participated in a parliamentary event on statelessness at the Houses of Parliament, in London.

# Note to Contributors

The Equal Rights Trust invites original unpublished articles for the future issues of *The Equal Rights Review*. We welcome contributions on all aspects of equality law, policy or practice. We encourage articles that examine equality in respect to cross-cutting issues. We also encourage articles that examine equality law policy or practice from international, regional and national perspectives. Authors are particularly welcome to submit articles on the basis of their original current or past research in any discipline related to equality.

## Peer Review Process

Each article will be peer reviewed prior to being accepted for publication. We aim to carry out the peer review process and return comments to authors as quickly as possible.

## Further Information and Where to Submit

Articles must be submitted by email attachment in a Microsoft Word file to: [info@equalrightstrust.org](mailto:info@equalrightstrust.org)

For further information regarding submissions, please email: [nicola.simpson@equalrightstrust.org](mailto:nicola.simpson@equalrightstrust.org)

## Submission Guidelines

- Articles should be original, unpublished work.
- Articles must be written in United Kingdom English.
- Articles must contain footnote or endnote referencing.
- Articles should be between 5,000 and 10,000 words in length.
- Articles must adhere to the **ERT style guide**, which is available at: <http://www.equalrightstrust.org/ertdocumentbank/ERR%20STYLE%20GUIDE.pdf>







# The Equal Rights Trust

The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice.

Established as an advocacy organisation, resource centre and think tank, ERT focuses on the complex relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

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