

Gender Mainstreaming & 'Equality Proofing' in British Law-Making: A Comment on the Impact of the Equality Act 2010

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Abstract

The central purpose of this article is to demonstrate that 'gender mainstreaming' and 'equality proofing' procedures in British law-making are in a state of flux. It reflects on two recent developments that are likely to have a significant impact on how gender equality concerns are taken into account in law-making: the introduction of the single public sector equality duty in the Equality Act 2010 and the announcement in late 2012 by David Cameron that public authorities are no longer required to carry out 'equality impact assessments'. Although both of these developments threaten to undermine the fundamental purpose of gender mainstreaming, a widely-endorsed equality strategy that requires all law and policy to be evaluated through a gendered lens, they also send conflicting messages to public authorities. Whereas the new public sector equality duty requires law-makers to be more aware of diversity and to take more equality concerns into account in law and policy making, the axing of equality impact assessments reflects the view that such practices are overly bureaucratic and a waste of valuable resources. This paradox exacerbates the lack of clarity that currently defines 'equality proofing' in British law-making and raises new and serious questions about the responsiveness of future laws to the needs and interests of diverse social groups.

1. Introduction

In April 2011, the Equality Act 2010 came into force across Great Britain,¹ replacing specific public sector equality duties relating to gender, disability and race with a single public sector equality duty.² This new 'general' duty requires *inter alia* that public authorities 'have due regard' to the elimination of discrimination, harassment and victimisation³ directed at individuals with a 'protected characteristic'⁴ and further that

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¹ With limited exceptions, the Act does not apply to Northern Ireland. See Equality Act 2010, s 217.

² <<http://www.scotland.gov.uk/Topics/People/Equality/18500/GenderEqualityIssues>> accessed 23 May 2013; Equality Act 2010, s 149.

³ Equality Act 2010, s 149 (1) (a).

⁴ Section 149 (7) of the Equality Act 2010 lists the 'protected characteristics'. These are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

such authorities 'advance equality of opportunity' and 'foster good relations' '(...) between persons who share a relevant protected characteristic and persons who do not share it.'⁵ Approximately eighteen months after the Equality Act came into force, David Cameron announced that 'equality impact assessments' (EIAs), a tool used to evaluate the impact of policy and legislation on protected groups, were to be axed.⁶ This announcement appeared to send the message that the evaluation of legislation and policy against a standard of equality is unnecessary 'red tape'⁷ rather than a necessary and prudent measure to ensure that British laws do not have a disparate impact on society's most vulnerable groups. With respect to gender equality, Cameron's announcement is in direct conflict with the concept of gender mainstreaming ('GM') which demands that '(...) *any* planned action, including legislation, policies or programmes, in *any* area and at *all* levels'⁸ be evaluated for their potential gendered impact.

This article analyses the above two developments in light of the UK's ostensible commitment to gender mainstreaming, paying specific attention to how and why gender equality concerns are currently taken into account in the law-making process. In order to comment upon the possible consequences of removing EIAs (themselves a tool of gender mainstreaming), it is necessary to first examine the arguments justifying their existence. After providing an overview of the concept of gender mainstreaming, part two of this article outlines the arguments in favour of gender mainstreaming in general and gender equality proofing specifically. The following part then draws attention to concerns that have been expressed with respect to the implementation of gender mainstreaming, questioning whether the axing of EIAs will in fact make a material difference in terms of achieving gender equality.

The final part of this article reflects on the meaning and potential impact of the new public sector equality duty. It will be argued that although the new law means that gender is no longer singled out as requiring specific attention in policy formation and legislative drafting, the new duty signals a movement towards 'diversity' or 'equality' mainstreaming that has been recently popularised and promoted in both mainstreaming and feminist literature. In short, the disappearance of the gender equality duty from Britain's equality law framework is not necessarily problematic from the perspective of those most concerned with the advancement of gender equality. The adoption of a single equality duty does, however, raise a wealth of new concerns that, coupled with the abolition of EIAs, cloak the future of equality proofing in British law-making in a cloud of uncertainty.

⁵ Equality Act 2010, s 149 (1) (b) & (c).

⁶ H Mulholland, 'David Cameron axes equality assessments in war on 'red tape' *The Guardian* (London 19 Nov 2012) <<http://www.theguardian.com/politics/2012/nov/19/cameron-axe-equality-assessments>> accessed 23 May 2013.

⁷ *ibid.*

⁸ This is part of the commonly-referred to definition of gender mainstreaming, coined by the UN Economic and Social Council in 1997. See United Nations, *Report of the Economic and Social Council for 1997* (New York: General Assembly, A/53/3) available at <<http://www.un.org/documents/ga/docs/52/plenary/a52-3.htm>> accessed 23 May 2013.

2. *The Argument for Mainstreaming Gender Equality in British Law & Policy-Making*

A. Gender Mainstreaming in England, Wales & Scotland

To many, the notion that all law and policy should be evaluated for its gendered impact might sound at once controversial, overtly feminist, radical and impractical. However, since gender mainstreaming was formally adopted in 1995 at the UN World Conference on Women in Beijing,⁹ and by the EU in the Treaty of Amsterdam,¹⁰ this idea has been officially embraced and promoted on both an international and domestic level. The Council of Europe have offered the following justificatory rationale for the universal adoption of GM:¹¹

Gender mainstreaming is essential for a properly functioning democracy. It puts people at the heart of policy making; leads to better informed policy-making and therefore enhanced government; makes full use of all human resources and acknowledges the shared responsibilities of women and men in all spheres of social ordering; makes gender visible at all levels of society; and takes account of diversity between women and men and between women and women, men and men.

Significantly, both the Scottish and UK Parliaments have endorsed GM as a 'gender equality strategy',¹² with the Scottish Executive describing equality mainstreaming as '(...) the systematic integration of an equality perspective into the everyday work of government, involving policy makers across all government departments, as well as equality specialists and external partners.'¹³ It is important to note here that although the Scotland Act reserves the power to legislate on equal opportunities to the UK Parliament, the Scottish Executive still has the power to 'encourage equal opportunities' and impose specific duties on Scottish public

⁹ O Hankivsky, 'Gender vs. Diversity Mainstreaming: A Preliminary Examination of the Role and Transformative Potential of Feminist Theory' (2005) 38:4 *Canadian Journal of Political Science* 977, 978.

¹⁰ The Treaty of Amsterdam 1997, Articles 2 & 3. Kantola points out that the Council of Europe's 2008 definition of gender mainstreaming has been influential in the European context. See J Kantola, *Gender and the European Union* (Palgrave 2010) 127. The Council of Europe defines GM as '(...) the (re)organization, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies and all levels and at all stages, by the actors normally involved in policy making.' Cited in Kantola, 127.

¹¹ Council of Europe, cited in C Chinkin, *Gender Mainstreaming in Legal & Constitutional Affairs: A Reference Manual for Governments and Other Stakeholders* (Commonwealth Secretariat 2001) 14.

¹² Equal opportunities and positive action are generally recognized as the two other 'equality' strategies. See R Bendl & A Schmit, 'Gender Mainstreaming: An Assessment of Its Conceptual Value for Gender Equality' (2013) 20:4 *Gender, Work & Organisation* 364, 364.

¹³ <<http://www.scotland.gov.uk/Topics/People/Equality/18507/executivemainstreaming>> accessed Aug 2 2013.

authorities.¹⁴ There are therefore some key differences in the mainstreaming duties imposed on public bodies in Scotland and the rest of the UK. Indeed, some have suggested that '(...) the commitment to mainstreaming (...) appears to be a stronger force for change in the newly devolved administrations of Scotland and Wales' due to the heavy involvement of women's groups in the devolution process. As McKay et al explain:¹⁵

The absence of a stated political commitment to gender in election manifestos suggests that the promotion of gender balance and gender mainstreaming in Scotland can be directly attributed to the lobbying and participants of women's groups throughout the process towards devolution.

Despite some differences in how gender mainstreaming is conceived and implemented, however, the fact that the fundamental equality law framework is governed by Westminster means that legislative change also applies in the devolved administrations of the UK.

B. The Logic Underlying the Gender Equality Duty

The foundational idea of gender mainstreaming is that state policies and laws affect women and men differently¹⁶ and thus have the potential to reproduce and perpetuate existing patterns of gender inequality. The widespread and systematic evaluation of law and policy (both international and domestic) for its potential differential impact on men and women is the core aim of GM. This aspiration is strikingly wide, but also 'radical'¹⁷ for, as Zalewski has noted:¹⁸

(...) the generic demand [of GM] is nothing short of wholesale transformation of the institutions and processes of government in regard to gender, with the intention that this impacts on, works with, and changes the wider society and polity.

¹⁴ <<http://www.scotland.gov.uk/Topics/People/Equality/18507/govtresponsibility>> accessed Aug 2 2013. The Equality Act makes provision for specific duties to be laid down by Scottish Ministers through the adoption of regulations. The Equality Act 2010 (Specific Duties) (Scotland) Regulations came into force in May 2012. The regulations are available online:

<www.legislation.gov.uk/sdsi/2012/9780111016718/contents> accessed Aug 2 2013.

¹⁵ A McKay, R Fitzgerald, A O'Hagan & M. Gillespie, 'Scotland: Using Political change to advance gender concerns' in D Budlender & G Hewitt (eds), 'Gender Budgets Make More Cents: Country Studies and Good Practice' (Commonwealth Secretariat 2002).

¹⁶ Hankivsky (n 9) 977.

¹⁷ M Zalewski, 'I don't even know what gender is': a discussion of the connections between gender, gender mainstreaming and feminist theory' (2010) 36 *Review of International Studies* 3, 7.

¹⁸ *ibid.*

GM has been described '(...) as the most "modern" approach to gender equality'¹⁹ insofar as it moves beyond a focus on individual rights²⁰ towards an approach that challenges '(...) those systems, processes and norms that generate inequalities'.²¹ Gender mainstreaming might also be understood as 'modern' insofar as it attempts to shift the conceptual focus away from 'women's' interests towards more 'generic' gender issues. Otherwise put, GM is not 'supposed' to be a strategy only for women, despite the fact that the concept has strong connections with the feminist movement.²² Rather, GM was conceived as a strategy to ensure that the needs and interests of women *and* men are evaluated and responded to in law and policy making. Indeed, some have argued that the focus on 'gender' rather than 'women' is a key advantage of GM;²³ that the fact that mainstreaming is not explicitly 'feminist' helps to '(...) win broader audiences for gender issues'.²⁴

Other commentators have highlighted that, in reality, gender mainstreaming is often treated as if it *is* really about women or, to put it another way, '(...) that gender mainstreaming may not necessarily be gender-focused at all.'²⁵ In the UK context, this is exemplified by the fact that the UK's first response to the advent of GM was for the Ministers of Women to set up a Women's Unit within the Department of Work and Pensions.²⁶ This is likely explained by the fact that women are still framed as the 'problem holders' in gender inequality discourse.²⁷ Nevertheless, it is the introduction of the Gender Equality Duty (the 'GED') in 2006 that still stands out as the UK government's most obvious and concerted effort to mainstream gender.²⁸ Indeed, at the time of its introduction, the GED was heralded as the most significant legislative development in the area of gender equality since the Sex Discrimination Act.²⁹ Acknowledging the failure of an 'individual rights' approach, the GED placed the onus on public authorities to integrate gender considerations into their everyday work,

¹⁹ M Daly, 'Gender Mainstreaming in Theory and Practice' (2005) 12:3 *Social Politics: International Studies in Gender, State & Society* 433, 433.

²⁰ Bendl & Schmit (n 12) 364.

²¹ *ibid.*

²² As Hankivsky has noted, '[f]eminist theories about engagement with the state and normative arguments regarding women's oppression, subordination and inequality constitute the foundation on which GM is constructed'. Hankivsky (n 9) 983.

²³ E Woodward, 'European Gender Mainstreaming: Promises and Pitfalls of Transformative Policy' cited in Hankivsky (n 9) 984.

²⁴ Hankivsky (n 9) 984.

²⁵ Daly (n 19) 441. See also Zalewski (n 17) 6, noting that gender mainstreaming has been accused of ignoring men and masculinity.

²⁶ J Veitch, 'Looking at gender mainstreaming in the UK government' (2006) 7:4 *International Feminist Journal of Politics* 600, 600. Harriet Harman and Joan Ruddock were the Ministers for Women in 1997.

²⁷ E Lombardo & P Meier, 'Gender Mainstreaming in the EU: Incorporating a Feminist Reading?' (2006) 13: 2 *European Journal of Women's Studies* 151, 157.

²⁸ The GED was introduced by the Equality Act 2006, which amended the Sex Discrimination Act 1975.

²⁹ See Equality & Human Rights Commission (Scotland), *Gender Equality Duty Code of Practice: Scotland 2* available at <www.equalityhumanrights.com/.../scottish_ged_code_of_practice.doc> accessed Aug 4 2013. See also Zalewski (n 17) 17.

requiring them to publish gender equality schemes and, importantly, '[t]o assess the impact of its current and proposed policies and practices on gender equality, and to have due regard to the results of those impact assessments'.³⁰ The duty applied '(...) to policy-making, service provision, employment matters, and in relation to enforcement or any statutory discretion and decision making.'³¹ It is therefore clear that the full and proper implementation of the GED demanded that gender equality concerns be paid 'due regard' in the formulation and drafting of law and policy. A key question, of course, is how to measure the gender equality impact of proposed legal and policy changes. What exactly is involved in equality proofing and what are some of the limits and failures of mainstreaming gender in law-making?

3. Mainstreaming Gender: How it Works in Practice

The integration of gender equality considerations can occur at various stages in the law-making process and via a variety of mainstreaming 'tools', which include equality proofing procedures and gender-based analysis.³² Equality impact assessments form an important part of the wider process of equality proofing, however it is important to note that they were not legally required under the gender equality duty, nor are they currently required under the public sector equality duty.³³ On the other hand, they are carried out by public authorities as a matter of good practice and serve as *proof* that public authorities have fulfilled their legal duty to pay 'due regard' to the elimination of discrimination and the promotion of equality.³⁴ Their purpose is to '(...) expose the 'gap' between the assumptions on which policy has been based and the reality',³⁵ rather than to ensure blanket gender neutrality or '(...) that all decisions are "good for women"'.³⁶ The following passage, taken from a Scottish Executive report that compared equality proofing procedures in different jurisdictions, contains a useful

³⁰ Equality & Human Rights Commission (Scotland) (n 29) 6-7.

³¹ *ibid* 6.

³² F Mackay & K Bilton, *Equality Proofing Procedures in Drafting Legislation: International Comparisons* (Scottish Executive Central Research Unit 2001). At 6, the report explains that these terms are often used interchangeably, however notes that it is more accurate to think of equality proofing '(...) as the formal framework within which impact assessment takes place.'

³³ This matter was discussed in the case of *R (Brown) v Secretary of State for Work and Pensions and another (Equality and Human Rights Commission intervening)* [2008] EWHC 3158 (Admin), cited in D Pyper, 'The public sector equality duty and equality impact assessments' (Briefing Paper, House of Commons Library, 21 March 2013) 7 available at <www.parliament.uk/briefing-papers/SN06591> accessed Aug 6 2013.

³⁴ *ibid*. At 17, Pyper notes that '(...) although the law does not require public authorities to carry out EIAs, the courts place significant weight on the existence of some form of documentary evidence of compliance with the PSED when determining judicial review cases.'

³⁵ Mackay & Bilton, *Equality Proofing Procedures in Drafting Legislation* (n 32) 5.

³⁶ *ibid*.

summary of the types of issues that mainstreaming tools can expose in law and policy formation.³⁷

(...) flaws have been exposed in proposed policies and legislation. For example, gender impact assessments carried out at policy review stage in the Netherlands showed that a plan to restructure secondary school education which the designers believed to be 'gender neutral' would in fact reinforce gender segregation within the educational system. Similarly, when an analysis of a proposed reform of the electoral system was conducted, it showed that it would actually reduce the number of elected women politicians. In health care, a strategy which had been proposed to improve services for those suffering from chronic illnesses had taken as its reference point the needs and lives of young men, whereas in fact, most of the chronically sick are older women.

The report also found that the effectiveness of GM was maximised if equality proofing and/or gender-based analysis were conducted at various stages, including policy formation, legislative drafting and scrutiny of the Bill.³⁸ At the same time, however, the report suggests that the likelihood of integration is increased if proofing takes place in the early stages of policy formation and is followed by '(...) an ongoing series of checks and interventions.'³⁹ It is perhaps unsurprising that the reality falls short of this ideal. Due to limited resources and time constraints, screening methods are commonly used to prioritise what 'needs' to be equality proofed. Although it does not appear that any 'official' screening methods exist in Britain, it seems likely that a degree of filtering occurred/occurs⁴⁰ through the requirement that public authorities pay 'due regard' to the promotion of equality and the potential for discrimination. The Scottish Code of Practice for the GED explained that 'due regard' comprises the elements of 'proportionality' and 'relevance', stating that '[i]n practice, this principle will mean public authorities should prioritise action to address the most significant gender inequalities within their remit.'⁴¹ The Equality Act 2010 does not remove the uncertainty surrounding what constitutes 'due regard' and concern has recently been expressed

³⁷ *ibid.* The report also contains examples of the types of questions that may be asked in the process of assessing whether a particular law or policy has relevance to gender. One such example (outlined on pgs. 8-9) is the Dutch analytical tool SMART (Simple Method to Assess the Relevance of policies to gender) which is comprised of two questions: '1. Is the policy proposal directed at one or more target groups? Will it affect the daily life of part(s) of the population? 2. Are there differences between women and men in the field of the policy proposal (in respect of rights, resources, representation, values and norms related to gender?'

³⁸ Equality proofing can be conducted by a variety of public servants, including '(...) policy makers, equality experts within departments, specialist equality units, Bill teams including instructing officers and drafters, statutory equality agencies, parliamentary committees and external experts.' *ibid* 6.

³⁹ *ibid* 7.

⁴⁰ As noted above, the new legislation relating to the public sector duty also uses the term 'due regard.'

⁴¹ Equality & Human Rights Commission (Scotland) (n 29) 16.

over the vague and non-specific nature of the term.⁴² Although some guidance can be found in case law,⁴³ to date there is no official code or guidance providing clear instructions to public authorities on this issue, meaning that those subject to the public sector duty, as well as the courts, have a degree of discretion as to what is prioritised.

While prioritisation is certainly understandable, there is a risk that the fundamental purpose of mainstreaming is undermined through screening or filtering processes. As MacKay and Bilton note, screening means that legislation or policy that appears 'gender neutral' or does not have *obvious* implications for gender equality will be screened out, despite the fact that it might have considerable gendered implications.⁴⁴ This goes against the very ethos of gender 'mainstreaming'. The all-embracing demands of GM might also mean that mainstreaming tools such as equality proofing are employed in a routine, essentially meaningless fashion, with those responsible for proofing adopting a 'tick-box' mentality. Finally, it is worth bearing in mind that all UK legislation must, at a minimum, comply with anti-discrimination, equality and human rights legislation, a fact that might lead some law-makers to conclude that sufficient equality proofing has already occurred, or will occur in the future, thereby deterring further analysis. All of the above factors cast doubt over the true value of equality proofing.

Difficulties relating to the systematic implementation of equality proofing mirror the broader difficulties with GM that are well-reported in mainstreaming literature. In her analysis of an EU-funded research project (EQUAPOL) that examined how gender is being mainstreamed in eight European countries,⁴⁵ Daly reported enormous disparity and fragmentation in approaches to mainstreaming, concluding that the '(...) "common core" to gender mainstreaming in action across countries (...) lies in the tendency to apply the approach in a technocratic way and to be non-systemic in compass.'⁴⁶ Other mainstreaming commentators paint a similar picture with respect to difficulties with implementation. While Hankivsky claims that 'GM's promise (...) has not been realized in any jurisdiction or in any area of public policy',⁴⁷ Squires has endorsed the view that '(...) many countries and organizations adopt mainstreaming in name only'.⁴⁸ Recently,

⁴² In a recent lecture, Justice Sales said the following: 'The statute does not give us much information about that [what is 'due regard'], other than again in very general terms in section 149(3). The practical effect of the combination of a very wide range of application for the duty across all public functions and a very abstract formulation of what has to be done means that the burden of spelling out the practical content of the duty devolves to the courts.' Cited in Pyper (n 33) 7.

⁴³ *ibid.* See, e.g., *R (Brown) v Secretary of State for Work and Pensions and another* (n 33).

⁴⁴ Mackay & Bilton, *Equality Proofing Procedures in Drafting Legislation* (n 32) 8.

⁴⁵ Daly (n 19) 434. The countries were Belgium, France, Greece, Ireland, Lithuania, Spain, Sweden and the United Kingdom.

⁴⁶ *ibid* 433.

⁴⁷ Hankivsky (n 9) 981.

⁴⁸ J Squires, *The New Politics of Gender Equality* (Palgrave 2007) 73. Here, Squires concludes: 'The inconsistent and unenthusiastic application of mainstreaming may be symptomatic of its derivation in institutions beyond the nation-state, meaning that the strategy lacks the necessary internal advocates, fails to mesh with existing policy priorities or institutional structures, or becomes interpreted in ways which resonate with national priorities, norms and structures, but which limit its envisaged potential.'

there have even been signs of a movement away from GM in the EU, leading some to declare a state of 'crisis'.⁴⁹ With this in mind, David Cameron's view that EIAs - which as noted above form part of the proofing procedure encouraged by mainstreaming - are nothing more than 'bureaucratic rubbish'⁵⁰ does not seem quite so extreme. As with mainstreaming generally, there is no available evidence to support the view that impact assessments *alone* will deliver practical improvement to the lives of those with protected characteristics. The research conclusions of MacKay and Bilton support this view:⁵¹

Whilst formal requirements to include statements about gender or other equality impact assessments in Memoranda for Cabinet are seen as desirable, they are not seen as sufficient to ensure effective integration of such considerations in legislative proposals. If these requirements are not backed up by mainstreaming systems, training, resources, good working relationships and political will they are seen as symbolic rather than resulting in changes outcomes.

Nevertheless, it is suggested here that the outright axing of equality impact assessments is overly hasty, out of step with the approach taken in other EU and Commonwealth countries and sends the wrong message about the government's commitment to equality. After all, it seems clear that the difficulties with EIAs pertain to their implementation and effectiveness, as opposed to the reasoning and values underpinning their existence. The decision to outright abandon impact assessments, rather than to dedicate more energy and resources into creating a culture in which mainstreaming is valued and supported, has therefore been criticised. Former shadow equalities minister, Yvette Cooper, raised concerns about axing impact assessments at a time when '(...) women are being hit much harder than men with low-income working families and disabled families losing out badly',⁵² accusing the prime minister of removing '(...) any requirement for the public sector to even think about equality' and of having a 'personal blind spot on women.'⁵³ Even if there is not yet available evidence pointing to a direct correlation between impact assessments and measurable equality outcomes, it is argued here that EIAs (and equality proofing generally) are part and parcel of fair, transparent and responsible law-making procedures that define a democratic state. Even if a degree of bureaucracy is involved, this is preferable to placing the burden on already over-worked public servants to judge when equality concerns are relevant and worthy of further analysis.

Although lack of political will may go some way to explaining the lack of effectiveness with respect to equality proofing procedures in Britain, it is important not to lose sight of the fact that the failure of mainstreaming is a universal problem, even in countries such as Canada and Sweden where there is strong political support and

⁴⁹ Bendl & Schmit (n 12) 364.

⁵⁰ Mulholland (n 6).

⁵¹ MacKay & Bilton, *Equality Proofing Procedures in Drafting Legislation* (n 32) 41.

⁵² Mulholland (n 6).

⁵³ *ibid.*

clear proofing guidelines and procedures in everyday use.⁵⁴ The fact that there is still ambiguity as to exactly what GM entails has prompted deep reflection on the exact meaning of the terms 'gender', 'mainstreaming' and 'equality', as well as on the theoretical underpinnings of GM. Implementation issues have also triggered debate about how to 'reinvigorate' GM, with many arguing for a more diversity-focused concept of mainstreaming. As noted earlier in this article, the new public sector equality duty in the Equality Act 2010 more closely conforms to a diversity model of mainstreaming than the previous individual equality duties. The remainder of this article assesses the significance of this change, again using insights from mainstreaming literature.

4. Diversity Mainstreaming & The Equality Act 2010

A. The Shift Towards 'Diversity' or 'Equality' Mainstreaming

Although the former specific public sector equality duties relating to gender, race and disability were presented as powerful, revolutionary, tools at the time of their introduction, they were promptly criticised on grounds of inadequacy. From a conceptual standpoint, the principal critique was that these distinct duties reflected a narrow understanding of inequality, one that required individuals to identify with only one homogenous group in order to pursue a case of discrimination, even if those individuals had experienced discrimination on multiple levels.⁵⁵ For example, a black disabled woman would have had to *choose* the ground on which she wanted to pursue a claim, when in reality the discrimination might have been triggered by the intersection of her different disadvantages.⁵⁶ As Bagilhole explains in some detail, UK statistics show that social inequality is experienced in complex ways. For example, while disabled men and women experience higher levels of unemployment compared to those who are not disabled, disabled women are less likely to be employed than disabled men.⁵⁷ The fact that Muslim women suffer high levels of economic disadvantage compared with both women and men in different religious groups⁵⁸ also serves as evidence of '(...) diverse and intersectional (in)equality between differentiations and communities, and polarization within each.'⁵⁹

Numerous mainstreaming commentators have therefore drawn attention to the difficulties with equality strategies that '(...) look at gender equality in isolation from

⁵⁴ See generally MacKay & Bilton, *Equality Proofing Procedures in Drafting Legislation* (n 32).

⁵⁵ B Bagilhole, 'Equal Opportunities and Diversity Policies' (2010) 27 *Canadian Journal of Administrative Sciences* 263, 263.

⁵⁶ *ibid.*

⁵⁷ *ibid* 265.

⁵⁸ *ibid.*

⁵⁹ *ibid.*

other forms of equality',⁶⁰ calling for equality strategies that are responsive to diverse forms of inequality, both between and apart from men and women. Hankivsky has presented a strong case for reconceptualising GM to be more diversity-focused, arguing that '(...) GM invokes a liberal concept of an abstract woman'⁶¹ that '(...) tends to concentrate on differences between men and women, treating each gender as a unitary, one dimensional category of analysis'⁶² in a way that nourishes '(...) fairly crude distinctions between women and men.'⁶³ As with GM theory as a whole, these claims draw heavily on the work of some feminist writers who have taken opposition to the notion that all women share the same 'voice', needs, problems and experiences,⁶⁴ and have popularised the term 'intersectionality'.⁶⁵

Since the mid-2000s, therefore, calls to recognise and respond to plural, intersecting forms of inequality have gained in frequency and encouraged a widespread shift towards what is commonly termed 'diversity' or 'equality' mainstreaming. As Bacchi and Eveline note, the language of diversity has been embraced by the EU, as well as by legal international organisations, including the United Nations and the World Bank.⁶⁶ The introduction of the unitary public sector equality duty in the Equality Act 2010 is the legal manifestation of this shift in Scotland and England and Wales. However it was the establishment of the Equality and Human Rights Commission (EHRC) three years prior to this Act that clearly marked the adoption of a 'single equality approach' in Britain.⁶⁷ While it is almost impossible to criticise the reasoning behind the extension of equality protection to other disadvantaged groups, praise for Britain's new single equality approach has not been universal. This article now highlights several unintended consequences that have the potential to undermine the transformative potential of the new equality approach embodied in the public sector equality duty.

⁶⁰ J Squires, 'Is Mainstreaming Transformative? Theorizing Mainstreaming in the Context of Diversity and Deliberation' (2005) 12:3 *Social Politics* 366, 367.

⁶¹ Hankivsky (n 9) 986.

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ See, e.g., JG Greenberg, 'Introduction to Postmodern Legal Feminism' in MJ Frug, *Postmodern Legal Feminism* (Routledge 1992) x. As Greenburg notes here, such concerns about the meaning and scope of the term 'women' remind us that '(...) generalized perspectives are necessarily partial' and that defining '(...) one particular group of women as representing the "essence" of women does violence to and constrains the lives of women who differ.'

⁶⁵ The work of Crenshaw was groundbreaking with respect to intersectionality. See, e.g., K Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour,' (1991) 43:6 *Stan.L.Rev.* 1241.

⁶⁶ C Bacchi & J Eveline, 'Gender Mainstreaming or Diversity Mainstreaming? The Politics of "Doing"' (2009) 17:1 *Nordic Journal of Feminist and Gender Research* 2, 6.

⁶⁷ E McLaughlin, 'From Negative to Positive Equality Duties: The Development and Constitutionalisation of Equality Provisions in the UK' (2007) 6:1 *Social Policy & Society* 111, 111.

B. The Public Sector Equality Duty: Too Much, Too Early?

In presenting her case for 'diversity' mainstreaming, Hankivsky makes the following claim:⁶⁸

(...) diversity mainstreaming allows for a more complex and dynamic understanding of equality and social justice, because the contours and compound effects of discrimination that women experience can be captured and the invisibility or marginalization of difference is no longer an option.

Hankivsky is thus of the view that 'diversity' mainstreaming creates an environment that is *more* responsive to *more* women's needs. There is a strong argument, however, that the opposite is true in practice; that the requirement that public authorities evaluate the equality impact of law and policy on numerous grounds may lead to gender equality 'losing out' in the 'milieu of diversity.'⁶⁹ Several mainstreaming commentators have voiced concern along these lines. In their analysis of the reform of European employment strategy, for example, Fagan, Grimshaw and Rubery argue that gender mainstreaming and gender equality objectives have been 'subordinated' following the removal of gender equality guidelines.⁷⁰ Although the new public sector equality duty does not remove the duty on public authorities to take gender issues into account,⁷¹ it is possible to argue that the new duty obscures gender considerations to a certain extent and removes them from the forefront of the mind of law and policy makers. This is not to argue that gender is somehow more important or more worthy of attention than other protected characteristics, but simply that the generic equality analysis approach, encouraged by the Equality Act 2010, carries the risk of '[d]ilution and blandness'.⁷²

There are other potential downfalls associated with the UK's new approach to equality. Verloo has helpfully identified three basic difficulties relating to the EU's movement towards a multiple inequalities approach that are also relevant to immediate discussion: '(...) the assumed similarity of inequalities, the need for structural approaches and the political competition between inequalities'.⁷³ The first concern stems from the way that single equality instruments (e.g. the Equality Act 2010) list inequalities together in a way that suggests that all forms of inequality are alike and 'necessitate similar policies.'⁷⁴ The listing approach in the UK thus has the potential to

⁶⁸ Hankivsky (n 9) 994.

⁶⁹ Bagilhole (n 55) 265.

⁷⁰ C Fagan, D Grimshaw & J Rubery, 'The subordination of the gender equality objective: The National Reform Programmes and 'making work pay' policies' (2006) 37:6 *Industrial Relations Journal* 571.

⁷¹ Although interestingly the term 'gender' is replaced with 'sex' in the new Equality Act 2010.

⁷² F Mackay & K Bilton, 'Learning from experience: Lessons in mainstreaming equal Opportunities' (University of Edinburgh, Governance of Scotland Forum 2003) 152

<<http://www.scotland.gov.uk/Publications/2003/05/17105/21749>> accessed June 14 2013.

⁷³ M Verloo, 'Multiple Inequalities, Intersectionality and the European Union' (2006) 13 *European Journal of Women's Studies* 211, 214.

⁷⁴ *ibid.*

obscure key differences with respect to inequality on grounds of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation and indeed the cultural and spatial variation in how these inequalities are experienced.

The second concern identified by Verloo is that single equality instruments perpetuate an individualistic approach that is insufficient to deal effectively with structural disadvantage. To tie this to the discussion about the public sector equality duty, this means that the legal change represented in the Equality Act is not enough: that it must be accompanied by '(...) strategies at the level of structures and institutions'.⁷⁵ In other words, the shift to 'equality' or 'diversity' mainstreaming has to occur in practice at an institutional level as well as in theory. Verloo emphasises that the adoption of 'equality' or 'diversity' cannot simply involve adapting current tools of gender mainstreaming. Rather,⁷⁶

[if] intersectionality is at work in strategies against inequalities, then new and more comprehensive analytical methods are needed and methods of education, training and consultation will have to be rethought.

Although the new EHRC in Britain '(...) requires an approach that acknowledges diversity and intersectionality'⁷⁷ more research is required to determine whether this approach is being applied in practice. However, the fact that current EHRC guidelines for public authorities⁷⁸ do not even make reference to the term 'intersectionality' does little to instil confidence that this is the case. In sum, given the theoretical complexity and contestation surrounding concepts of intersectionality, difference and diversity⁷⁹ it is possible to argue that the attempt to 'blend' equality analysis has happened too quickly, without full appreciation of what these terms mean in theory or practice; the differences between forms of inequality; how they intersect with one another; and what tools are required to ensure that these diverse and intersecting equality concerns are effectively and sophisticatedly integrated into law and policy making. Competition between different forms of inequality is the third potential downfall to a single equality duty that lists multiple protected characteristics. In essence, the concern here is that some equality issues will be paid more attention than others, creating something that resembles a 'hierarchy of inequalities'. This competition, according to Verloo, is '(...) fuelled by the specific nature of current policies' and the political environment at a particular point in time. Gender or disability concerns, for example, could slip down

⁷⁵ *ibid* 215.

⁷⁶ *ibid* 222.

⁷⁷ Bagillhole (n 55) 264.

⁷⁸ Various guidelines are available of the EHRC website:

<<http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/guidance-on-the-equality-duty/>> accessed May 29 2013.

⁷⁹ See, e.g., Bacci & Eveline (n 66) 6-8 for an explanation of how the concept of diversity is contested & Verloo (n 73) for an in-depth discussion of intersectionality theory.

the 'hierarchy' during a moment of heightened political awareness about racial inequality, and thus be less likely to be integrated into law and policy.

5. Conclusion

One of the principal aims of the Equality Act 2010 was to 'harmonise' and 'simplify'⁸⁰ Britain's equality law framework through the creation of a single equality duty covering eight protected characteristics. While the extension of equality protection is welcome and in line with developments elsewhere, this article set out to demonstrate that the background and conceptual underpinning to this fundamental change is far from simple. The new public sector duty not only replaces concerns about inadequate protection with concerns about dilution, vagueness, competition and the adequate recognition of intersectionality, but requires law and policy makers to broaden their equality-sensitive gaze at a time when public resources are incredibly stretched. From the perspective of those concerned with the advancement of gender equality in law and policy making, there is a real risk that gender concerns will be overshadowed or deprioritised and that the ethos of gender mainstreaming will be simultaneously undermined.

To be clear, the movement towards a more 'diversity' or 'equality' focused conception of mainstreaming conception is a step in the right direction. There are few feminists or gender mainstreaming commentators who would deny this, particularly given that 'diversity' or 'equality' mainstreaming is, at least in theory, capable of responding to the needs of *more* women. The point to emphasise, however, is that this new form of mainstreaming will only live up to its conceptual expectations if those responsible for its implementation have a robust understanding of intersectionality, awareness of potential unintended consequences and access to the proper assessment tools. Unfortunately, any hope that this will occur is dampened by the message coming from the top that equality impact assessment is readily dispensable.

⁸⁰ <<http://www.equalityhumanrights.com/legal-and-policy/equality-act/what-is-the-equality-act/>> accessed Aug 5 2013.