

**Wanted – an equality revolution:  
Overcoming systemic discrimination  
against women and young people**

**Churchill Fellowship 2000 Report**

The measure of a true democracy is one which cherishes all its citizens equally, creates space for all viewpoints, and places the vulnerable and minorities at its centre and not at its margins. It is a society in which inclusion is the central principle, backed up by adherence to a high standard of human rights and equity. Its confidence is expressed in its ability to accommodate difference and promote pluralism, to reach out across boundaries into mutual sharing, and to play a part in shaping economic and social development in an interdependent world.

Bronagh Hinds (1997) *Is Democracy a Myth?*

Speech delivered at the Common Good Series, Northern Ireland

Who should be required to bear the burden of complaint proceedings that may have broader social implications? Who should be responsible for pursuing systemic or indirect discrimination, or for taking on the repeat offender, challenging a hostile work environment or questioning the culture of a male-dominated industry?

Sue Walpole, Australian Sex Discrimination Commissioner

*Sex Discrimination – the Road Ahead*

Paper for the 1995 Women and Labour Conference

## Contents

- 5 Acknowledgments**
- 6 Executive summary**
- 10 Introduction**
- 12 Method and program**

### **What is systemic discrimination?**

#### **Strategies for overcoming systemic discrimination**

- 12** Enforcing international human rights conventions, treaties and
- 18** legislation
- 20** - National human rights institutions
  
- 23** Monitoring conventions and treaty obligations
- 24** - Genuine participation by marginalised groups in monitoring
- 25** processes
- 25** - A right to judicial review
- 28** - Tripartite monitoring
- 28** - Voluntary compliance assessment
- 28** - Building human rights into regular inspections
- 30** - Cyclical monitoring of countries by United nations committees
  
- 33** Complaint processes – individual and group
- 33** - The impact of individual complaints on systemic discrimination
- 34** - Broadening the impact of individual complaint processes
- 34** Case study 1 – Pay curve modelling in the Netherlands
- 35** Case study 2 – Using ‘open hearings’ during individual complaint investigations
- 37** Case study 3 – Incorporating administrative law principles into complaint processes
- 38** - The impact of group complaints on systemic discrimination
- 38** Class actions in Dutch law
- 39** Group complaints under labour law
- 40** United Nations 1503 complaint processes
- 40** Conciliation and mediation in individual and group complaint processes
  
- 41** Investigation and inquiry powers

- 45** - Case study – Inquiry into institutional racism in the United Kingdom
- 49** Pay equity
  - Case study – NSW pay equity inquiry
- 51** Gender mainstreaming
- 57** Women’s budgets
- 62** Gaining an equal share of power and decision-making positions
- 64** Participation
- 68** Human rights education and awareness raising
- 72** Self-determination
- 76** Emerging themes and conclusions
- 82** Appendices
  - Participating organisations
  - Recommended actions

## **Acknowledgments**

The overseas study tour was made possible by the Winston Churchill Trust, Australia who funded the fellowship and the Department for Women (NSW) who granted me leave to complete the study tour.

There are two people in particular who made the final study itinerary possible. Firstly David Robinson, with the Australian Human Rights and Equal Opportunity Commission, via discussions that ranged over a number of months, shaping the project framework. Mr John Pace, former UN Research and Right to Development Branch Head, who made it possible for me to spend a month with the United Nations in Geneva.

The staff of the United Nations Information Service in Sydney were very supportive and put me in touch with Mr Pace.

Thank you to the professionals from the Australian Human Rights and Equal Opportunity Commission, the Anti-Discrimination Board (NSW) and the National Children and Youth Law Centre for preparatory interviews.

The generosity of overseas participants, who made time to be interviewed and willingly shared their insights (in English!), impressed me greatly. I consider myself very fortunate to have met such inspirational and dedicated human rights activists.

I'd like to express particular gratitude to Ms Stephanie Grant (Branch Head) and Mr Osamu Shiraishi with the United Nations Research and Right to Development Branch in the Office of the High Commissioner for Human Rights who helped make my one month research placement so successful.

Thank you to Philippa Hall, Fiona Manning, Anne Melano, Vera Zaccari and Gerard Sullivan, for comments on the final draft.

I'd like to acknowledge and thank Moya Dodd for her encouragement, understanding and patience from the beginning right through to the end.

## Executive Summary

### **Project description**

Overcoming systemic discrimination was the focus of this Churchill Fellowship carried out in July and August 2000. The motivation for this fellowship comes from my experiences as a teacher, education consultant, community liaison officer and feminist activist which have given me insight into women and young people's experiences of systemic discrimination.

This report is based on series of interviews, both in Australia and overseas. To identify key questions and specific issues, I had discussions with a number of Australian human rights professionals and advocates. This helped the grounds for 35 interviews with human rights workers in Western Europe, Scandinavia and Indonesia.

This report offers an overview of and commentary about the strategies used by the agencies to overcome systemic discrimination. The report ends with some proposals for furthering discussion of systemic discrimination in Australia and action to help progress the agenda, particularly for women and young people.

### **Project highlights**

Having the opportunity to:

- Develop a well-informed international overview of strategies for addressing systemic discrimination.
- Gain first hand knowledge of the issues facing human rights professionals, advocates and academics working to overcome systemic discrimination.
- Speak with Northern Ireland women instrumental in achieving, implementing and maintaining the Good Friday Peace Agreement.
- Discuss the outcomes of the Lawrence Inquiry into institutional racism with Pam Smith and Barbara Cohen of the United Kingdom Commission for Racial Equality. The common themes of the Lawrence Inquiry and the topic of this overseas study tour confirm the importance of further research on systemic discrimination.
- Gather insights of progressive children's rights advocates about how to overcome the barriers to children and youth rights.
- A one-month research placement with the United Nations Office of the High Commissioner for Human Rights in Geneva. The placement with the Research and Right to Development Branch enabled me to interview United Nations staff, international experts and observe various United Nations committees in session. The guidance of Stephanie Grant, Branch Head, was invaluable for effectively navigating United Nations structures and processes in the short time available.
- Be better positioned to make a contribution to non-discrimination and human rights work in Australia.

## Recommendations

- A widely supported definition of systemic discrimination is required to help make such discrimination visible and create a point of reference for future discussions.

In this report systemic discrimination is defined as the discriminatory culture and structures of political, economic, social or cultural systems which produce less favourable treatment of marginalised groups. The discriminatory culture is entrenched and permeates many, if not all, levels of the system's structure.

- There is widespread support from participants in this study for work on developing a model of systemic discrimination.
- Institutions with a monitoring responsibility are encouraged to include explicit analysis of structural and cultural discrimination in monitoring reports. This would provide more detailed evidence of systemic discrimination to assist modelling of systemic discrimination.
- To increase the net gain of monitoring processes, human rights institutions are encouraged to publish case studies on monitoring, particularly when there are breakthroughs or failures, as such situations offer valuable tuition. Documentation can give human rights professionals and activists in other jurisdictions leverage for change.
- Osler and Morrison's structural analysis of systemic racial discrimination in schools can be referred to as a basis for modelling systemic discrimination. It also offers instruction on indicators of systemic discrimination.
- Further research is required on ways of modifying individual complaint processes to increase the impact on systemic discrimination.
- The case studies about innovations in individual complaints in this report, for example 'open hearings' and pay curve modeling, offer information about the differences between systemic discrimination as distinct from direct and indirect discrimination.
- Information about group complaint methods employed by human rights institutions should be made available and discussed to encourage uptake in other jurisdictions.
- Under-utilisation of existing group complaint processes should be examined and addressed, for example the representative complaint powers in the New South Wales *Anti-Discrimination Act (1977)*.

- Investigation and inquiry processes have the potential to impact on systemic discrimination if:
  - findings are reported in terms of the structural and cultural dimensions of discrimination to be addressed, and
  - precipitators and indicators of systemic discrimination are identified during an investigative process or as part of a meta-analysis of a number of investigations conducted by an agency.
- The Lawrence Inquiry is a landmark investigation of systemic discrimination. The circumstances, process, findings and outcomes warrant further analysis and monitoring, which should be published widely.
- The landmark NSW Industrial Relations Commission equal remuneration principle is transferable to overseas jurisdictions. It warrants international consideration and wide discussion.
- Documenting the outcomes of gender analysis and gender mainstreaming work, rather than describing the process, is necessary to progress these strategies.
- Developing methods for measuring the outcomes of participation is an area yet to be worked out. Given the emphasis on participation in recent conventions, legislation and approaches, it is an area warranting research.
- The Northern Ireland human rights curriculum development project is a valuable case study of school based education which should be analysed and widely reported on.
- While there is an argument that self-determination is a different discourse to systemic discrimination, it offers a conceptual framework that future models of systemic discrimination can be compared against.
- An area of analysis yet to be fully explored is which incentives facilitate organisational change and how to structure such incentives into individual complaint and investigation judgments.
- Simple narratives are required to expose the ‘paradox of equality’ and the continuing failure to deliver substantive equality to women, children and young people.

### **Disseminating findings and taking action in Australia**

The Fellowship findings will be shared by:

- Discussing the report and recommendations with appropriate human rights institutions such as the Human Rights and Equal Opportunity Commission, National Children’s and Youth Law Centre, Anti-Discrimination Board of NSW,

Office of the Director of Equal Opportunity in Public Employment and the Commission for Children and Young People (NSW).

- Making the report available to women's non-government organisations and youth rights agencies.
- Publishing this report on the Women's Electoral Lobby website ([www.wel.org.au](http://www.wel.org.au)).
- Sending a copy of the report to participating agencies with an encouragement to document their work and findings on systemic discrimination.
- Encouraging participating agencies and other relevant Australian agencies to build analysis of systemic discrimination (structural and cultural discrimination) into their complaint, monitoring, inquiry, consultation or education processes.
- Encourage modelling of systemic discrimination by an Australian agency.
- Encouraging an appropriate agency to liaise with the Ulster People's College in Belfast about progress and outcomes from the *DemocraShe* program on women's political education.
- Use structural discrimination as an analytical tool in my policy/research and lobbying work.

### **Fellow contact details**

Sandy Killick

Policy Officer, Department for Women (NSW)

Business phone 02 9287 1963 (outside Australia 61.2.9287 1963)

Mobile 0409 204 100 (outside Australia 61.409 204 100)

Email: [sandyshores@bigpond.com](mailto:sandyshores@bigpond.com)

## Introduction

*Equality, which is the cornerstone of democratic nations, successful organisations and a basic human right, are time and space dependent phenomena.<sup>1</sup>*

Women, children and young people are treated as 'minority groups' even though in population terms they are 'majority' groups. Two factors in particular create the minority status of these groups. Firstly the social construction of 'women', 'young people' and 'children'. Secondly, the limited political, social, economic and cultural power built into the social constructions imposed on women and youth. The consequence for members of these groups is limited participation in social and political decision-making affecting them, unequal access to resources and constant undervaluing of their contributions. While there has been some shift in the perception of women and youth, the shift has not delivered substantive equality.

Over time, the discriminatory treatment of these groups is normalised and perpetuated through our key social, cultural, political and economic systems. Unless these norms are challenged, women and young people will continue to experience discrimination in the various systems they rely upon. For example, sex-based discrimination in the legal system<sup>2</sup>, economic discrimination via the male and female earnings pay gap, and education systems that do not provide equitable outcomes for indigenous, disabled or homosexual/lesbian youth.<sup>3</sup> In each situation, women or young people have to navigate inequitable power relationships built into the systems.

With time, the sexist and ageist social norms can be challenged. The United Nations convention and treaty system, based on human rights and equality, offers an alternate set of norms. The norms initially are legal norms, created through the international and domestic legal and legislative frameworks. Ideally over time the legal norms will replace discriminatory social norms or at least modify/restrict discriminatory behaviours.

The norms underpinning the convention and treaty structure are:

- non-discrimination – in principle and practice;
- true participation – United Declaration of Human Rights Article 8[2] provides 'States should encourage popular participation in all spheres

---

<sup>1</sup> Horelli, L (2001) *How to mainstream gender equality – Experiences from the Finnish context*. Helsinki University of Technology, Centre for Urban and Regional Studies, [www.eurofem.net/info/wales.html](http://www.eurofem.net/info/wales.html)

<sup>2</sup> Department for Women (1996) *Heroines of fortitude – The experiences of women in court as victims of sexual assault*. Report from the 'Gender bias and the law' project, Sydney.

<sup>3</sup> Flynn, C (1994) *Rights into reality - Report on national consultations with young people and children's and youth advocates*, National Children's and Youth Law Centre, University of New South Wales, Sydney.

as an important factor on development and in the full realisation of all human rights'; and

- effective remedies for breaches of human rights granted by the constitution or law, delivered by competent national tribunals, and
- adequate progress – steps towards realising rights promoted through relevant institutions must be taken within a reasonably short time after a covenant's entry into force.<sup>4</sup>

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) are the two conventions of greatest relevance to this study. Having ratified both conventions, the Australian federal government is obliged to establish the legal and social norms outlined above in both public and private life to ensure substantive civil, political, economic, social and cultural equality for women, children and young people.

Alongside the norms and structures flowing from the convention/treaty system, community based advocacy, lobbying and grass roots campaigns also help to highlight discrimination and point out how society is failing to accommodate difference and promote pluralism, thereby failing to involve all people in economic and social development.

Complaint systems have been established in response to recognition of discrimination. These systems, however, are complicated and expensive. The complaint system places the onus on the individual to make a complaint, even though he or she is in the least powerful position in the relationship. The focus on individuals at all stages of the complaint process, including the recommendations/penalties, fails to take into account the group nature of discrimination, for example pregnant women, Aboriginal youth, people with disabilities. A complaint system based on individual cases also fails to deal with system wide discrimination. At worst, the system of remedies perpetuates the bias experienced by women, young people and children.

This purpose of this Churchill Fellowship is to question which strategies are the most appropriate for dealing with systemic discrimination. The aims of the fellowship are to:

- a) increase recognition of and discussion about systemic discrimination, as distinct from direct and indirect discrimination;
- b) identify strategies that are making having an impact on systemic discrimination and examine why they are effective;
- c) disseminate relevant and innovative examples of work by Australian and overseas human rights professionals and advocates; as well as
- d) make some suggestions about possible ways forward in Australia.

---

<sup>4</sup> Bailey, P (1990) *Human rights: Australia in an international context*, Butterworth Publishing, Sydney.

The conclusions and recommendations made throughout the report are written for an Australian context, however, they may have some application in other jurisdictions.

### **Method & Program**

To identify issues facing human rights professionals in Australia, a series of interviews were conducted with state and national organisations as well as advocates and experts in the field.

The interviews produced a set of key questions for use during the overseas study:

- What is the status of women/young people in this country?
- How is the concept of women/young people constructed in this society?
- What strategies do you recommend for addressing systemic discrimination against women and children?
- Which incentives work? What evidence do you have of incentives?
- Do you/your agency use explicit or implicit human rights language when dealing with institutions?
- What approaches are used to promote and increase the legitimacy of women's /children's rights?
- Do group remedies exist? If so, how do they work? How effective are they?
- Is the Human Rights and Equal Opportunity Commission's 'open inquiry' method of any interest to overseas agencies? Is it transferable?
- Would further examination of the concept of systemic discrimination be useful? Would it assist your work to define or model the concept?

Australian contacts were asked to recommend agencies and contacts in Western Europe, Scandinavia and Indonesia were visited during the study. These locations were chosen for various reasons:

- because of recent human rights developments;
- long standing human rights structures; and
- differences in their cultural construction of women and young people.

Once interviews were arranged, interview questions being forwarded in advance. Interviews were taped and transcribed. This report is based on the interview transcripts as well as further reading and analysis. Overseas participants were asked to comment on the text of the report before public release.

Appendix 1 contains a list of Australian and overseas participants to the study.

### **What is systemic discrimination?**

*The concept of systemic discrimination is perhaps as hard to define as such discrimination is to identify. It is not identical in concept to direct discrimination. [Indirect] discrimination... involves requirements which do*

*not, on their face, discriminate on a prohibited ground, but which affect a group identifiable on a prohibited ground in a way such to have a discriminatory effect on that group. While [indirect] ...discrimination may be quite subtle in its operation, often the effect is fairly obvious. Most people today, for example recognise that minimum height requirements discriminate against women... the concept of systemic discrimination, on the other hand, emphasises the most subtle forms of discrimination... it recognises that long standing social and cultural mores carry within them value assumptions that contribute to discrimination in ways that are substantially or entirely hidden and unconscious. Thus, the historical experience that has tended to undervalue the work of women may be perpetuated through assumptions that certain types of work historically performed by women are inherently less valuable than certain types of work historically performed by men.*<sup>5</sup>

*Systemic discrimination is complex and entrenched by nature because it is:*

*... based on assumptions and stereotypes about the appropriate role of women in society and the maintenance of an ideology of subordination. It is pervasive and it is harmful because it reflects attitudes and prejudices towards women as a group and which cannot be addressed solely through individual anti-discrimination remedies.*<sup>6</sup>

Hunter<sup>7</sup> describes systemic discrimination as 'a complex of directly and/or indirectly discriminatory (or subordinating) practices which operates to produce...disadvantage for a particular group'. The practices are absorbed into social structures, for example in systems such as the judicial and political systems, or key institutions such as schools or universities<sup>8</sup>, which entrenches them and makes them widespread.

In my opinion, however, these definitions do not capture the essence of systemic discrimination. The definitions above fail to give us a way to tackle it in the way definitions of 'direct' and 'indirect' discrimination have impacted on social consciousness and behaviours. There is as yet a widely accepted and widely used definition of systemic discrimination. The absence of a clear reference point arguably reduces our ability to analyse and address systemic discrimination.

One of the aims of this Churchill Fellowship is to raise for discussion the concept of 'systemic discrimination', exploring the language and concepts used by people

---

<sup>5</sup> *Public Service Alliance of Canada and Canadian Human Rights Commission v Canada (Treasury Board)* (1991) 15(5) Canadian Human Rights Reporter D/341, D/349.

<sup>6</sup> Ministry for the Status and Advancement of Women New South Wales (1994), Submission 350 to the Commonwealth Law Reform Commission Inquiry *Equality before the law: Justice for women*, Report number 69, Part 1, Sydney.

<sup>7</sup> Hunter, R (199), *Indirect Discrimination in the Workplace*, p 13.

<sup>8</sup> Commonwealth Law Reform Commission (1994), *Equality before the law: Justice for women*, Report number 69, Part 1, p 47, Sydney.

working on eliminating systemic discrimination in various countries. Each interview started with a discussion of the term 'systemic discrimination'. In most cases synonymous terms such as 'structural discrimination' or 'institutional discrimination' were preferred and used during the interview.

The term systemic discrimination resonated most strongly in two interviews. First with Wendy Foulger, United Kingdom Equal Opportunity Commission, particularly in the context of the Commission's pay equity work. Foulger felt the term was widely used during the seventies and had become outdated, but this should not be taken as a sign of irrelevance.

In Foulger's opinion, systemic discrimination is a combination of the processes and culture of a system. It is distinct from direct and indirect discrimination:

*I think there are still rules and regulations to look at, but to know what you are looking at when you look at them (is important)... because...just to pick up your point about the legislation, this isn't a direct and indirect particular argument because it is equal pay which doesn't fall readily into those two definitions.*

The second interview was with Pam Smith and Barbara Cohen at the Commission for Racial Equality in Britain. Systemic discrimination is a particularly relevant issue for the Commission following the Lawrence Inquiry into institutionalised racism in the police force.

An important outcome of the Lawrence inquiry is a definition of institutional discrimination:

*Those established laws, customs and practices that systematically reflect and produce racial inequalities in society. If racist consequences accrue to institutional laws, customs or practices, the institution is racist whether or not the individuals maintaining those practices have racial intentions.<sup>9</sup>*

Cohen and Smith emphasised the value and power of defining institutionalised racism, which they considered to be synonymous with systemic discrimination.

*... after this definition of institutionalised racism was published, most organisations in the public sector were prepared to put their hand up to say it was an issue that they need to consider.*

*Certainly in my work going out talking to people, I can say if there is institutionalised racism, you are not doing the job you should be doing. It is quite good leverage to say you can't allow this to continue, for example if you are meant to be providing education and there is institutionalised racism, then you aren't doing the best job.<sup>10</sup>*

---

<sup>9</sup> Commission for Racial Equality (1998) *Evidence to the Lawrence Inquiry (Part 2)*, London.

<sup>10</sup> Cohen, B (July 2000) Interview, Commission for Racial Equality, London.

In this report systemic discrimination is defined as the discriminatory culture and structures of political, economic, social or cultural systems resulting in less favourable treatment of marginalised groups. The discriminatory culture is entrenched and permeates many, if not all, levels of the system's structure.

At one level, consequences of systemic discrimination for marginalised groups in a system include being unable to access resources/services and limited participation in decision making and agenda setting. The most significant consequence of systemic discrimination, however, is the failure of systems to deliver substantive equality to women, children and young people.

'System' is used in this discussion to mean both macro and micro social structures and organisations. For example, macro level systems include education, industrial relations and judicial systems. At micro level it can mean individual organisations within a system, for example, government schools or particular arms or agencies within the industrial relations sector. Most people experience government and non-government institutions as 'systems', requiring them to enter, pass through and exit at centrally determined points.

The term 'system' in fact is best defined by the context the discrimination occurs in. For example, gay and lesbian students may experience homophobia at a school level. System in this case is the individual school and any macro level policy impacting on the school's ability to address the homophobic treatment of students. In the case of pay equity and women workers, the 'system' is the wage-fixing system that perpetuates an undervaluing of women's work producing lower rates of pay across 'feminised' sectors such as teaching, nursing and child-care.

Systemic discrimination is persistent, withstanding attempts to be regulated. For example, the pay gap between men and women in Australia persists after years of equal pay legislation. It also withstands changes of membership within a system, as the prevailing culture is greater than the influence of those who recognise the presence of discrimination and seek to reform it.

A key limitation of anti-discrimination practice is the tendency to conceptualise discrimination as acts between individuals. As Guest points out:

*Individual acts of discrimination are a subset of [a] much broader and elusive systemic backdrop.<sup>11</sup>*

---

<sup>11</sup> Guest, K (1998-99) *The elusive promise of equality: Analysing the limits of the Sex Discrimination Act 1984*, Canberra, Parliamentary Research Library research paper 16, p 7.

Reducing discrimination to an interpersonal level without any recognition of the relationship between the individual and social, political, economic and cultural systems:

*...shapes your tactics. People are not as comfortable directly looking at it as a system that is ensconced and one which, as long as you build on top of the current rules of that institution, it will never be an institution that represents or serves or incorporates a truly diverse constituency.*<sup>12</sup>

It is necessary to find strategies to deal with acts of discrimination not targeted or carried out by a specific person. For example, the cultural effects of discriminatory advertising are not satisfactorily dealt with via the self regulating system operating in Australia. Complaints of sexist advertising rarely lead to the ad being withdrawn, unless a third party, such as the agency contracting the billboard space, decides to have the ad removed.

While indirect discrimination is an attempt to go beyond interpersonal discrimination, it however cannot address sexist advertising. It cannot explain or address an indigenous incarceration rate of 19% in Australian prisons, 15 times the non-indigenous rate.<sup>13</sup> Nor can it account for the gendered labour market patterns seen in just about every country of the world. Indirect discrimination legislation does not have the scope to look at discrimination as 'a system that is ensconced'.

Institutionalised and prejudicial assumptions about the roles of women and young people in our society cannot be addressed by relying on individual complaints nor indirect discrimination measures because of the tension between the 'traditional legal liberalism' underpinning anti-discrimination legislation and the 'group based, systemic reasons for discrimination.'<sup>14</sup>

Affirmative action measures such as equal employment opportunity have created pockets of change but have not greatly altered the distribution of power nor have they significantly changed the prejudicial construction of women. The male norm continues to dominate, particularly in financial, business, economic and political systems. As McDougall pointed out above, the challenge is how to change the rules or foundations of an institution to make it more inclusive. A key question underlying many of the interviews is why group level mechanisms, such as group

---

<sup>12</sup> Gay MacDougall (August 2000) Interview, Geneva. Ms MacDougall was speaking in her capacity as member expert of the United Nations Committee for the Elimination of Racial Discrimination.

<sup>13</sup> Grattan, M (2001) *Aborigines put behind bars at a rate outstripping the rest 15-fold*, Sydney Morning Herald, January 18<sup>th</sup>. Based on an Australian Bureau of Statistics report which shows that indigenous prisoners were 19 per cent of the Australian prisoner population on September 1<sup>st</sup>, 2001. The highest number of indigenous prisoners was 1,134 in NSW. The Northern Territory had the highest proportion of indigenous prisoners - 62 per cent. The highest ratios of indigenous to non-indigenous rates of imprisonment were in Western Australia and South Australia, which had respectively 18 and 16 times the non-indigenous rates.

<sup>14</sup> Guest, K (1998-99) *The elusive promise of equality: Analysing the limits of the Sex Discrimination Act 1984*, Canberra, Parliamentary Research Library research paper 16, p 11.

complaints and open inquiries, are not more widely available and used more extensively where they do exist.

Each interview ended with discussion of whether it would be useful to the participant's work to have a definition or model of systemic discrimination. The majority of interviewees readily agreed it would be useful to have a definition, for a variety of reasons. For example, Rayner<sup>15</sup> supported exploring the concept of systemic discrimination because:

*I'm only [sic] interested in it ...because all of the littler stories add up to a bucket of evidence that some people are excluded as a matter of practice from our sphere of moral equality and that is what you have to do something about. That is the major purpose of the complaint process, which overall does not work well for individuals. They suffer too much to bring a case and often if they do resolve it, it is unsatisfactory and if they can't, the prize is often not worth the winning because of the damage they do on the meantime...*

*I don't think you would have seen any change at all, such as work place change or the way we design our public spaces or indeed the way we structure policy making if you didn't have the evidence of complaints of sex discrimination. ...You need some body at a credible level that can see the big picture and point out what this means as well as the willingness of decision-makers to listen. That is the big thing – the willingness of decision-makers to listen that I get cross about. Compassion doesn't work - it has to be a sense of obligation. That comes in Europe because you have to do something for economic reasons... Some bright spark, way back-when, said you only get a sound economy is if you have human rights protection and recognition, so you must listen to that as well.*

For Birgitta Aleskog<sup>16</sup> in Sweden, moving to definitions and models of systemic discrimination is a logical phase in progressing work on non-discrimination and equity professionals. For Aleskog, structural discrimination is a stage beyond direct and indirect discrimination:

*Yes – we need to do it and we are doing it! (Defining systemic discrimination is) important because the male norm is prevailing, it is invisible in many cases and of course it is important to find ways to increase knowledge about it and also to make it visible. Of course it is the basis for change. You start at the surface with direct discrimination, the easy thing to see and (then) you go to indirect discrimination. (Then) you have to really show what it is about and look at the structures.*

---

<sup>15</sup> Rayner, M (July 2000) Interview, Greater London Authority Office for the Children's Commissioner, London.

<sup>16</sup> Aleskog, B (July 2000) Interview, Ministry of Industry, Employment & Communications, Stockholm.

Gay McDougall, expert to the United Nations Committee for the Elimination of Race Discrimination, agrees that defining systemic discrimination would help to make it visible:

*I think there is some utility (in defining it). Institutional racism is real, at least for people that experience it and may not be real for people that don't. Even people that would recognise interpersonal racism (immediately) ...cannot see a system that is constructed in way to benefit some people and be a disability for others. So I think the more we work to define that and give it more of a sense of visibility to the people that aren't experiencing it, the better.<sup>17</sup>*

Others such as Ana Angarita in the United Nations Office of the High Commissioner for human rights and Jane Hodges with the International Labour Organisation are uncertain about introducing a new term and supporting concepts. Hodges argues it takes time for people to get used to complex discrimination concepts. Angarita believes terms can be diminished if people think a term represents a particular campaign, fashion or moment in time.

If we continue, however, to rely principally on direct and indirect discrimination strategies with some limited support for affirmative action programs, it will be a long time before all members of marginalised groups realise their human rights. Different mechanisms are required to address systemic discrimination.

### Key messages

- Systemic discrimination is defined in this report as the discriminatory culture and structures of political, economic, social or cultural systems resulting in less favourable treatment of marginalised groups. The discriminatory culture is entrenched and permeates many, if not all, levels of a system's structure.
- The discriminatory assumptions which fuel and arise from systemic discrimination are reinforced daily, becoming social norms over time. The norms and the prejudicial behaviours that signify them block the delivery of substantive equality to marginalised groups.
- Direct and indirect discrimination measures address individual acts but make little impact on systemic discrimination.
- A widely supported definition of systemic discrimination would help make such discrimination visible by creating a point of reference.

## **Strategies to overcome systemic discrimination**

### *Enforcing international human rights conventions, treaties and legislation*

A constant theme in nearly every interview is the need for a strong legal framework to promote and protect the human rights of women and children. International conventions and treaties institutionalise human rights and, should

---

<sup>17</sup> McDougall, G (August 2000) Interview, United Nations Committee for the Elimination of Racial Discrimination, Geneva.

these rights be infringed, provide legal remedies and redress via domestic law initially, and then through other international avenues such as optional protocols. Domestic legal structures also protect human rights from challenges during periods of changing political and social will, although these structures can be abolished unless entrenched constitutionally.

#### Impact on systemic discrimination?

Conventions and treaties require expression through domestic structures. Once a country ratifies a convention, the government is required to make adequate progress towards realising the relevant rights within a reasonably short time. For example, the Australian *Sex Discrimination Act (1984)* and the *Affirmative Action (Equal Employment for Women) Act 1986* are two of the major legislative structures designed to meet the government's commitments under the United Nations Convention on the Elimination of Discrimination against Women.

Ideally, existing domestic law will be harmonised with newly introduced conventions, for example the redrafting of the Children (*Care and Protection*) Act (1998) in New South Wales and federally the *Family Law Act (1975)* to comply with the Convention on the Rights of the Child. In particular, the participation principle, one of the controversial principles of the Convention on the Rights of the Child, is emphasised in the child welfare decision-making processes contained in the Acts.

The introduction of the Convention on the Rights of the Child in 1989 shows how the human rights system can impact on prevailing cultural constructions. The convention advocates a:

*...very dynamic vision of the child where they are not just objects of protection but subjects of law, having rights to participate in all aspects of their daily life, especially decision making, depending on their maturity and capacity.*

*If you look at (society) through a human rights perspective you have the feeling that before the convention existed children were non-existent except when we talked about a few protection issues. Especially in the area of civil rights they were non-existent, but suddenly on their 18<sup>th</sup> birthday they are entitled to many rights. Now we have the Convention on the Rights of the Child, which recognises very strongly the status of the child as an actor of his/her own rights, depending of course on maturity and capacity.<sup>18</sup>*

Paolo David, Secretary of the United Nations Committee on the Rights of the Child, believes that the convention's introduction has helped to progress problems previously deadlocked, denied or ignored because of cultural

---

<sup>18</sup> David, P (August 2000) Interview - United Nations Office of the High Commissioner for Human Rights, Geneva. Mr David is secretary to the Committee for the Rights of the Child.

intransigence. Issues such as sexual exploitation, juvenile justice practices and child labour are now on the agenda of the international community and many nation states. Some of the more difficult ones, such as a child's right to choose their own religion or to access health care without parental consent, will take longer to be debated. Country reports to the Committee on the Rights of the Child provide evidence that the convention has been a catalyst for cultural change in some countries.

David describes the Convention on the Rights of the Child as a 'drastic evolution' rather than a revolution that unnerves people. It will take time to sink into cultural thinking, policy and practice. There is little jurisprudence at national levels, a limited amount of research on children's rights and the Committee has not as yet drafted or adopted any general comments to guide practitioners.<sup>19</sup>

A constant theme raised by interviewees is the need for greater use of international and domestic human rights law to entrench a rights based system, to broaden its impact and make it more robust. Three ways of using legal structures was emphasised and each of these strategies is discussed in the following sections:

- making complaints,
- monitoring convention obligations, and
- actively using conventions and treaties to guide decision making on domestic issues.

Rayner<sup>20</sup> points out it is naïve to think 'that the good will of the common law is sufficient to promote and protect human rights', citing the introduction of the UK *Human Rights Act (1999)* in the absence of a national human rights institution as a case in point. Laws alone will have little if any impact on systemic discrimination. Statutory 'umbrella' organisations, such as the recently established Northern Ireland Human Rights Commission and the Indonesian National Commission on Human Rights, are necessary to monitor laws, offer public education and actively seek to promote and strengthen human rights through legislative law reform and inquiries.

#### National human rights institutions

The role of national human rights institutions is outlined by the Paris Principles, developed by member states during the 1980s, and endorsed by the United Nations Commission of Human Rights resolution 1992/54 and General Assembly resolution 48/134 in 1993.

The role of national human rights institutions is to:

- a) submit recommendations, proposals and reports on human rights to their Governments;

---

<sup>19</sup> David, P (August 2000) Interview - United Nations Office of the High Commissioner for Human Rights, Geneva.

<sup>20</sup> Rayner, M (July 2000) Interview, Greater London Authority Office for the Children's Commissioner, London

- b) promote conformity of national laws with international human rights standards;
- c) encourage ratification and implementation of international standards;
- d) contribute to reporting procedures required under international standards;
- e) increase public awareness of and implement education for human rights; and
- f) cooperate with international and other national human rights institutions.

Principles (a) to (d) are designed to produce structural outcomes while (e) and (f) target cultural outcomes. The range of principles show that systemic discrimination is tackled by multiple strategies, a particular combination suiting a given social and political context.

To support human rights institutions, the United Nations High Commissioner for Human Rights appointed Brian Burdekin, former Australian Human Rights Commissioner as a special advisor on national human rights institutions. Burdekin heads a small, dynamic team of staff that works with regional groups and individual countries to ensure institutions are robust and suited to the context in which they must operate.

A case study is useful to illustrate how human rights institutions may impact on systemic discrimination. In 1999 the Indonesian government established by presidential decree the National Commission on Violence against Women. The Commission was established in response to the mass rapes of Indo-Chinese women in 1998. The role of the agency, however, goes beyond investigations of the mass rapes and includes addressing all forms of systemic, sex-based violence against women.

A significant feature of the National Commission on Violence against Women is the appointment of independent commissioners via a process free of government direction, unlike the Indonesian National Commission on Human Rights set up in 1993.<sup>21</sup> There are about twenty commissioners drawn mostly from civil society – academics, human rights and feminist activists, lawyers, police and medical representatives, theologians from different religions. The Commission therefore represents a diverse cross section of the community.

The independence of the process for appointing a group of commissioners, representing a broad range of interests, is specifically a strategy for overcoming systemic discrimination. There are three advantages in this – separation from government, messages from the Commission about changes to systems affecting women are seen to carry broad community support and the commissioners also have a wide reach into the community to help change

---

<sup>21</sup> The three strategic areas of work for the Commission in it's first year are: policy change, mapping violence against women to produce an advocacy resource and survivor support systems.

attitudes and practices.<sup>22</sup> The independence of the appointment process helps to avoid replication of entrenched discriminatory relationships.

The broad network the Commissioners bring with them is intended to assist group participation in commission processes, an alternative pathway to participation in individual complaint systems in the long term.

Another way national human rights institutions are working to overcome systemic discrimination is by entering discussions on good governance. In 1999 the Indonesian National Commission on Human Rights worked collaboratively with the New Zealand Official Development Assistance group to hold a national workshop on 'Human rights, good governance and civil society'.<sup>23</sup> The workshop brought together government, civil society and the business sector to discuss strategies, roles and responsibilities for promoting and upholding human rights.

Without democratic governance, national human rights institutions will find realising their charter difficult:

*This is important because national human rights institutions are designed to work with already established core democratic bodies such as independent courts and judiciary, properly run legislative bodies and non-government organisations. The context in which a national human rights institution is placed is therefore an important consideration. Human rights bodies are not designed to be substitutes for these democratic bodies.*<sup>24</sup>

Citizenship is a contentious aspect of governance and democracy when citizenship is used to limit marginalised groups access to public resources. For example, in Indonesia children born out of wedlock are not recognised by the state and therefore cannot access state education and health services. Refugees and immigrants with resident status pending or with qualified residency, such as permanent resident status, do not have the same rights as people holding citizenship. In these circumstances democratic structures and citizenship concepts are used to recognise the rights of some and deny the rights of others. The Convention on the Rights of the Child challenges the limitations of citizenship by requiring nation states to provide for children living within their borders, regardless of their citizenship status.

Autonomous human rights agencies are critical watch-dogs and intervenors in systemic discrimination, providing necessary pools of complaint and investigation data, which in turn can demonstrate systemic discrimination.

---

<sup>22</sup> Chandrakirana, K (September 2000) Interview, Executive Officer, National Commission on Violence against Women, Jakarta

<sup>23</sup> National Commission on Human Rights (2000) *Human rights: Good governance and civil society*, National Commission on Human Rights Publishing, Central Jakarta.

<sup>24</sup> O'Sullivan, M (2000) 'National human rights institutions – Effectively protecting human rights?' in *Alternative Law Journal*, Vol 25 (5) p 237.

## Key messages

- Conventions and treaties are minimum equality standards.
- Conventions and treaties need to be translated into domestic legislation and monitored by independent national human rights institutions to have effect.
- Domestic legislation should be harmonised to fit with nation states' convention and treaty obligations.
- Domestic non-discrimination legislation protects minimum human rights standards when there are changes of political will against a rights framework.
- Autonomous national human rights institutions are essential for implementing and monitoring the legislation. They are also a forum for civil society to communicate experiences of discrimination and have a role in overcoming it.
- Human rights professionals and advocates promote a 'use or lose it' case – a greater use of international and domestic human rights law helps to raise awareness of the system and entrench rights in legal decisions.

## *Monitoring convention and treaty obligations*

Discrimination legislation generally includes a clause specifying which agency is responsible for administering the legislation and the types of monitoring powers they have.

Human rights institutions at times will state a case for introducing new monitoring duties. For example the Equal Opportunity Commission in the United Kingdom argues in favour of the introduction of statutory monitoring via amendments to the existing Equal Pay and Sex Discrimination Acts.<sup>25</sup> In this situation, employers (with the exception of private households) would have a statutory requirement to monitor the workforce patterns of gender, job title or grade, and rates of pay on at least an annual basis. Information collected as a result of the monitoring would then be made available to employees, employee representatives and the Equal Opportunity Commission on request.

## Impact on systemic discrimination

Monitoring statutory duties makes three important contributions to overcoming systemic discrimination:

1. shifting the responsibility for acting on discrimination from the individual to the organisation;
2. triggering regular reviews within organisations, generating reports about equality outcomes, providing impetus for change; and
3. giving leverage to relevant human rights institutions and advocates to raise equality and non-discrimination issues with organisations or sectors.

A number of factors, however, determine the degree to which monitoring impacts on systemic discrimination, including:

- the public standing of the monitoring agency;

---

<sup>25</sup> Equal Opportunity Commission (1998) *Equality in the 21<sup>st</sup> Century: A new sex equality law for Britain*. Submission to UK Government, Manchester.

- each agency's attitude towards their statutory human rights duties;
- the nature of the reporting obligation, eg comprehensiveness and depth;
- whether public reporting is built into the monitoring process;
- the level of participation by marginalised groups in the monitoring process;
- what happens as a result of the reporting, for example follow up by the monitoring authority;
- the ability of the agency to provide support for an organisation's change processes, for example, offering sample policies, training programs, identifying strategies the agency is receptive to;
- the ability of the monitoring agency to market/persuade other sectors as to the benefits of eliminating systemic discrimination; and
- political will.

Monitoring can also be undermined by agencies treating the process in a token way, by not reporting on time, neglecting to report for a number of years, or by providing a skewed view of a situation. When monitoring processes are accurate, objective, actively pursued and publicly valued, they offer a valuable (non-complaint driven) opportunity to make inroads into systemic discrimination.

The human rights professionals interviewed outline the following innovative strategies which they believe particularly impact on systemic discrimination.

#### Genuine participation in the monitoring process by marginalised groups

Whereas individuals or groups may be reluctant to bring complaints because of fear of reprisal or because of the considerable resources required to endure a long process, marginalised groups may be more willing to join in a formal monitoring process, especially when it is mediated by a third party. Having a position at 'the monitoring table', by verbal or written submission, helps the group to raise their experiences of discrimination and specific requests. Participating in a non-complaint based process, allows the group to come from a position which is not necessarily adversarial, changing what they may bring to the process or changing how they are perceived by other stakeholders during the process.

Another advantage for the group stems from the predictable time frame of the monitoring, that is, the cycle of consultation, submissions and recommendations. Additional resources can be mustered in time to participate in the monitoring cycle, whereas long complaint hearings can erode group resources.

#### **Case study – Monitoring equality policy in Northern Ireland**

The Northern Ireland Equality Commission monitors the implementation of the *Northern Ireland Act 1998*. Section 75 of the Act requires public

authorities to submit 'equality schemes', stating how they propose to fulfill their duty to promote equal opportunity and good relations. The equality schemes are a monitoring technique placing the onus of non-discrimination on the agency. The schemes cover a five-year period with annual review.<sup>26</sup>

The equality schemes must outline how management will demonstrate their commitment to non-discrimination, for example staff training ranging from awareness raising for all staff through to intensive training for people in key positions of responsibility. Where a scheme does not meet the criteria set out by Section 75, as explained in the Equality Commission's guidelines, and the public authority responsible is unwilling to make the necessary changes, a report on the authority will be made to the Secretary of State.

The Commission shares the monitoring role with marginalised groups. Under Section 75 of the Act agencies must conduct a two month consultation period with groups affected by the schemes to ensure the proposed strategies address inequality the groups may be experiencing. The consultation phase produces quantitative and qualitative evidence of how public authority's policy structures disadvantage for women and children. This 'thinking about their thinking' can help authorities see everyday policy and practices which on the surface are acceptable but which systemically discriminate against specific groups within or without their agency. The consultation is a starting point for developing solutions, with the help of the affected groups.

For Hinds, community participation in the monitoring process is a very concrete way of overcoming systemic discrimination:

*We believe that one of the main issues of (equality schemes) is to change the nature of the relationship between the people in power, policy makers and affected groups in terms of decision making and influencing the outcome.*<sup>27</sup>

The first schemes were submitted mid 2000 and, at the time of interview, the Commission was in the process of setting precedents by approving or rejecting the 120 schemes. Bronagh Hinds, Deputy Chief Commissioner of the Equality Commission, observed that the consultation requirement is an important but poorly performed aspect of the process to date. Many authorities have not met the Commission's expectation of at least two

---

<sup>26</sup> Equality Commission of Northern Ireland (1999) *Guide to statutory duties – A guide to the implementation of the statutory duties on public authorities arising from Section 75 of the Northern Ireland Act*, Belfast.

<sup>27</sup> Hinds, B (July 2000) Interview, Ulster People's College, Belfast. Bronagh Hinds was speaking in her capacity as Deputy Commissioner for Equality Commission of Northern Ireland and a women's sector representative to the Northern Ireland Good Friday Peace negotiations in the mid 1990s.

months consultation with affected groups, due largely to insufficient resources being allocated for consultation.

Hinds draws the following conclusions about the lack of consultation:

- i. there is a lack of familiarity with the process;
- ii. consultation is undervalued (evidence of cultural discrimination);
- iii. equality obligations are undervalued (cultural discrimination);
- iv. insufficient resources were allocated (structural discrimination);
- v. consultation networks do not exist (structural discrimination).

Hinds also suggests that it is difficult for people to respond to early drafts of an equality scheme because “they are writing their structures” which some people find too conceptual. Once later drafts emerge, people are generally more able to comment, so some consideration needs to be given about how and when to consult.

Monitoring processes, such as annual reporting on equality outcomes, are criticised by some as being tokenistic and window dressing. By involving the groups experiencing the greatest degree of disadvantage in an organisation or system, the reporting process becomes focused on real people with real needs. Solving a genuine problem with assistance from the groups affected can validate the exercise in a way that is not otherwise possible.

#### A right to judicial review

An interesting but as yet untested aspect of the *Northern Ireland Act 1998* is the right of affected groups to request a judicial review of an equality scheme, if they have not been consulted about the scheme. This means groups disadvantaged by the structure and culture of public authorities do not have to rely on complaint processes for redress.

The affected parties monitor the degree of involvement they have in the development of the schemes and can seek to enforce their right to participate, as outlined in Section 75 of the *Northern Ireland Act (1998)*, by requesting a judicial review. Hinds points out that “*the people who really have to enforce the equality schemes are the affected groups by taking judicial reviews.*”<sup>28</sup>

It is important that groups know about the monitoring roles they can take and be encouraged to make effective use of them. In 2000 the Northern Ireland Equality Commission offered training about the equality duty, as well small grants of 10,000 pounds sterling per community sector for capacity building to help them work with public authorities on the equality schemes.

---

<sup>28</sup> Hinds, B (July, 2000) Interview, Ulster People’s College, Belfast.

### Tripartite monitoring

The International Labour Organisation (ILO) has a long history of tripartite monitoring of labour standards, by governments, worker organisations and employer bodies.<sup>29</sup> Government reports from member countries to ILO review committees must involve consultation with employer and worker bodies during the development stage. Alternately, worker and employer bodies may make submissions to the ILO directly. The ILO then passes this information to the government who has a right of reply. This national level of verification is very important as it 'keeps government's on their toes'.<sup>30</sup>

In the case of an issue elevated to public debate at an ILO monitoring conference, government, employer and worker representatives are brought together to present evidence and comment publicly on the infringements of labour rights.<sup>31</sup> The Minister for Labour normally leads the government delegation in public debate, which indicates the strength of the debate. Uncooperative governments face public pressure from workers, large public interest groups in attendance and the media. In fact public abrogation, peer group pressure and publicity are effective ILO sanctions.

Tripartite monitoring impacts on systemic discrimination by providing affected parties with a voice, in particular, groups of workers. This process gives equal weighting to contributions by government, employees and employers. Submissions can help to air situations where workers rights are being breached. Women and young people, some of the most vulnerable groups in employment situations, can and do have their rights promoted through this monitoring process.

*These worker and employer comments (to the monitoring process) in a way can be a type of group complaint. The workers can write on behalf of one woman, or 20 or a class of home workers who they feel are unfairly discriminated against and get that complaint into the technical examination by experts and into the public debate.*<sup>32</sup>

Hodges points out that the three-way process alleviates some of the evidentiary tests that are stumbling blocks in individual complaint processes. The procedural rules used for conducting tripartite hearings are pretty simple, the evidence is taken at face value as the government has the right to reply. Independent experts

---

<sup>30</sup> Hodges, J (August, 2000) Interview, United Nations International Labour Organisation, Geneva. Jane Hodges was speaking in her capacity as Senior Legal Officer, Government and Labour Law Administration Department.

<sup>31</sup> Each year the ILO publishes a the findings of its annual International Labour Conference dealing with the agenda item 'Information and reports on the application of Conventions and Recommendations.' The publication is *Report of the Committee of Experts on the Application of Conventions and Recommendations – General report and observations concerning particular countries*. Subsequent to the report, a *Provisional Record containing observations and information concerning particular countries* is released documenting public debate of the problem.

<sup>32</sup> Hodges, J (August 2000) Interview, United Nations International Labour Organisation, Geneva.

working on problem cases shift the burden of proof to the government or employer once a prima facie case is made, for example where dismissals of pregnant women is endemic.

A downside of the monitoring process is that individuals cannot make use of it, it has to be a tripartite member. Unions, however, 'are getting very good at bringing comments from groups of women into reports'.<sup>33</sup>

Genuine participation in monitoring is one way of overcoming the backlash against equality strategies, for example the widely talked about perception in industrialised countries that gender equality has been achieved after 20 or 30 years of equal opportunity measures. This perception is perpetuated by one-sided reporting, ignoring de facto discrimination such as the pay gap, gender segregated industries, job instability for unskilled workers and fewer employment benefits for an increasingly part-time workforce. A tripartite monitoring model means evidence from more than one position is reported for consideration, giving a 360 degree view of a situation.

#### Voluntary compliance assessment

The Equal Treatment Commission (ETC) in the Netherlands encourages organisations to be pro-active about their equality responsibilities by making it possible for employers or organisations to submit their regulations to the ETC for a compliance assessment. A compliance assessment is a request for the Commission to assess how well the agency's structures, programs and actions meet their equality obligations.<sup>34</sup>

Requesting a compliance assessment could be an indicator of an agency's culture of willingness to address systemic discrimination. It is an opportunity for the Commission to provide formal feedback and to make recommendations in a positive context because it is at the organisation's invitation.

Compliance assessments may offer models or case studies of existing good practice or examples of agencies making a transition to a more equitable set of procedures. The advantage of such case studies is that they contain local and transferable solutions to complex discrimination problems.

#### Building human rights issues into regular inspections

Following the Stephen Lawrence Inquiry<sup>35</sup> in the United Kingdom, the Home Secretary developed an action plan to address institutional discrimination. The Commission for Racial Equality is working with Office for Standards in Education (OFSTED) to address the 'race specific underachievement (that) still blights many pupils from ethnic minority communities', based on evidence that the

---

<sup>33</sup> Hodges, J (August 2000) Interview, United Nations International Labour Organisation, Geneva.

<sup>34</sup> De Jongh, K (July 2000) Interview, Equal Treatment Commission, The Netherlands.

<sup>35</sup> Macpherson, W et al (1999) *The Stephen Lawrence Inquiry: Report of an inquiry by Sir William Macpherson*, London, Stationery Office

education system is ill-equipped to deal with racial inequality.<sup>36</sup> OFSTED has the lead responsibility under the action plan for examining and reporting on strategies for removing racial disadvantage in schools.

The Commission for Racial Equality commissioned research into how well OFSTED was discharging this responsibility through school inspections. School inspections are one of OFSTED's main quality assurance and institutional change mechanisms. The researchers found that racial equality, an element of the OFSTED school inspection framework, was given little attention and was treated inconsistently and with little rigor. School inspectors and school managers reported feeling ill-equipped to deal with racial equality issues in the inspection framework.

The researchers interviewed education administrators responsible for inspecting racial equality outcomes in schools (which is to become a legal requirement with the passage of amended racial equality legislation in late 2000). The interviews found a range of opinions of racial equality, with a minority seeing it as an issue central to school operations and others seeing racial equality as one of a number of 'baubles on a Christmas tree threatening to make the tree topple over'. The collective undertone is that such issues are not central to the operation of schools.<sup>37</sup>

The researchers found both cultural and structural barriers to racial equality in schools, such as:

- a lack of a corporate culture in which 'race equality is an explicit key principle, is confidently understood and is reflected in everyday decision making and discourse';
- a lack of communication from management to staff about OFSTED's racial equality responsibility;
- insufficient staff training on racial equality;
- inconsistent treatment of racial equality by inspectors – some seeing it as a priority requiring dedicated resources, others addressing it more globally under policies such as 'achievement for all' or educational inclusion;
- a preference for softening language and avoiding conflict;
- lack of explicit discussion of ethnicity, racial harassment, discrimination and stereotyping and racial equality by OFSTED staff and school staff;
- absence of data for inspectors to use as a basis of professional judgments and therefore a lack of confidence in reporting on racial equality;
- 'colour blind' inspectors;

---

<sup>36</sup> Osler, A and Morrison, M (2000) *Inspecting schools for race equality – OFSTED's strengths and weaknesses. A report for the Commission for Racial Equality*, Staffordshire: Trentham Books, p xi.

<sup>37</sup> Osler, A and Morrison, M (2000) p 56

- the difficulty of making racial equality relevant in a variety of settings, for example predominantly white, rural schools;<sup>38</sup>
- lack of a workable definition of institutional racism which can be applied sensitively during school inspections; and
- the belief that dealing with institutional racism is outside the purposes of school inspections.<sup>39</sup>

Identifying barriers is a starting point for finding solutions. The researchers made thirty-one recommendations to help education professionals make structural and cultural facilitating equality of access for all students<sup>40</sup>. The recommendations can be summarised as:

- publicising OFSTED's lead responsibility for monitoring strategies to address and prevent racism in schools;
- encouraging a corporate culture and developing a common language for discussing issues of race equality;
- making race an explicit issue in mandatory training of staff;
- systematic monitoring of ethnicity, racial equality, differential student achievement and teacher employment;
- providing evidence to inspectors about the relationship between racial inequality, harassment and bullying on educational achievement;
- ensuring inspectors have a contemporary understanding of multicultural education and anti-racist education;
- building human rights monitoring into the inspection framework, for example, requiring inspectors to report on successful strategies for promoting race equality;
- applying relevant human rights standards, for example the Commission on Racial Equality's *Learning for All - Standards for racial equality in schools*
- identifying ways of reporting racial equality to different audiences including parents and local education authorities.<sup>41</sup>

Osler and Morrison's research report is valuable because it offers a structural analysis of systemic discrimination (particularly racial discrimination) in an institutional setting (the institution of education). It offers a contemporary process and a possible model for working with institutional, or systemic, discrimination.

#### Cyclical monitoring of countries by United Nations committees

Many of the UN conventions have monitoring committees to which governments submit reports about progress towards realising convention commitments. Non-government organisations submit 'shadow reports' to present additional data about the conditions in a country.

<sup>38</sup> Osler, A and Morrison, M (2000) p 56

<sup>39</sup> Osler, A and Morrison, M (2000) p 39 - 68

<sup>40</sup> Osler, A and Morrison, M (2000) p xxiii - xxvi

<sup>41</sup> Commission for Racial Equality (1999) *Learning for All - Standards for racial equality in schools*, London.

The country reports have the potential to impact on systemic discrimination in a number of ways. The reports, over time, create a longitudinal pool of information showing patterns and trends of resource allocation, progress on key equality issues and complaints in a country. They also provide a voice for non-government organisations.

Paolo David, Secretary to the Committee on the Rights of the Child, explained a unique approach to monitoring adopted by the committee. The committee will monitor discrepancies between rural and urban areas, describing any discrepancies as discrimination. For example, where children do not have access to clean water in rural areas or cannot access comparable education services because of their geographic location, the government responsible will be asked to explain what is being done to address the discrimination.

David raised the need for human rights based indicators to assist the monitoring function of United National committees. Countries often report in terms of health indicators, for example, morbidity and mortality figures for various age groups. It is necessary to add a human rights dimension to this though. For example:

*If we take a country and we get information that says 93% of women are breast-feeding and if you are on the monitoring committee of the World Health Organisation you might be satisfied. In a human rights role you always look at the other 7% - what is the composition of the 7%? If you discover that the 7% represent 95% of a minority group and of those 95%, 92% are working full time... then you might want to address the issue with the State party.<sup>42</sup>*

The Research and Right to Development Branch in the Office of the High Commissioner for Human Rights in particular, is working with partner agencies to develop and improve sets of indicators for measuring progress towards human rights outcomes.

Both the committee review process and future sets of human rights indicators could consider both structural and cultural dimensions of systemic discrimination. A review of committee recommendations to various countries overtime would produce a data set for analysis, for example, the number and composition of recommendations addressing structural discrimination and which of these have actually been implemented as recommended. This in turn could inform sets of indicators by identifying which measures countries are adopting and what effect they have.

During discussions of monitoring, there was little distinction made between monitoring for direct, indirect or systemic discrimination. Specifically addressing systemic discrimination in monitoring processes is an area worth further

---

<sup>42</sup> David, P (August 2000) Interview, United Nations Office of the High Commissioner of Human Rights, Geneva

consideration. Systemic discrimination can be pronounced in monitoring processes by asking agencies to report on their organisational structure, for example providing a gender and race disaggregated organisation chart can be revealing. For examples of monitoring cultural components of systemic discrimination, the Office for Standards in Education (OFSTED) report, discussed later in this report, is useful.

The UN recognises it needs to find ways of making UN committee hearings more accessible, given the expense of traveling to Geneva or New York.<sup>43</sup> In the last three years efforts have been made to make United Nations resources more accessible via the UN web-site. For example transcripts from committee monitoring sessions are available in various languages via the internet promptly after committee and commission meetings.<sup>44</sup> Other ways are being sought for increasing the accessibility and potential impact of the committee review processes.

Gender budgets, which are a form of monitoring, are discussed separately later in this report.

### Key messages

- Monitoring is an essential tactic for overcoming systemic discrimination because it:
  - shifts the responsibility for acting on discrimination from the individual to the organisation;
  - provides evidence of patterns of entrenched discrimination and
  - triggers regular reviews within organisations, giving relevant human rights institutions and advocates leverage to raise equality and non-discrimination issues with organisations or sectors.
- Monitoring offers groups participation and negotiation roles not available to them in adversarial complaint processes.
- Human rights institutions could assist other human rights professionals by publishing case studies on monitoring, particularly when there are breakthroughs or failures, as such situations offer valuable tuition.
- Analysis of structure and culture by human rights monitoring agencies would help provide more detailed evidence of systemic discrimination.
- Collecting gender-disaggregated data is an essential component of monitoring discrimination.
- Osler and Morrison's structural analysis of systemic racial discrimination in schools offers a starting point for similar investigations in other jurisdictions, as well as a starting point for work on indicators of systemic discrimination.
- Publishing equality gains precipitated by monitoring can be used as leverage in similar, less progressed situations.

---

<sup>43</sup> Grant, S (August, 2000) United Nations Research and Right to Development Branch, Office of the High Commissioner for Human Rights, Geneva. Stefanie Grant was speaking in her capacity as Branch Head.

<sup>44</sup> Shiraishi, O (August, 2000) Interview, Research and Right to Development Branch, United Nations Office of the High Commissioner for Human Rights, Geneva.

## *Complaint processes – individual and group*

When an individual's rights are breached, being able to access complaint processes and remedies is their entitlement.

Individual complaint processes prevail in most countries in northern and southern hemispheres. Given that discrimination is usually a function of real or perceived group membership, it seems counterintuitive to rely on a process operating largely at an individual level. Group mechanisms are rare, and often under utilised when they exist.

Three aspects of complaints will be discussed in this section: individual complaints, attempts to broaden the scope of individual complaints and group complaints.

### The impact of individual complaints on systemic discrimination

The limited impact of individual complaints on systemic discrimination was raised in a number of interviews.<sup>45</sup> Reasons given include:

- the onus for action is placed on the individual with the least power in the situation;
- complaint action against an employer may lead to problems for the complainant, such as intimidation or jeopardising personal income;
- high costs (time, money, social stigma) dissuade individuals from making a complaint;
- individual complaints are costly and time consuming for the agency handling them;
- findings are generally limited in scope, any compensation awarded is of an individual nature, and there are limited repercussions of findings for people in identical situations of disadvantage;
- findings of individual cases do not always address the structure and culture of an agency, and
- the agency implementation of recommendations made in the finding may be slow, ineffective and not monitored by the complaint-handling agency.

The most appropriate level of operation of Individual complaint mechanisms is at a domestic level (as governments are responsible for protecting citizens' rights). In some cases individuals may be able to take complaints through international processes, for example if their country is a signatory to a relevant United Nations complaint mechanism, such as the CEDAW Optional protocol.

In the latter half of 2000, the United Nations Division for the Advancement of Women (DAW) was establishing the complaint process for Optional Protocol to

---

<sup>45</sup> Foulger, W (July, 2000) Interview, Equal Opportunity Commission, UK; Rayner, M (July, 2000) Greater London Authority Office for the Children's Commissioner, London; Hodges, J (August, 2000) International Labour Organisation, Geneva.

the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

Jane Connors<sup>46</sup>, DAW Director, urges people to bring complaints under the protocol to help establish its legitimacy and force. Straightforward cases that will pass through the complaint process quickly are preferable as they help to establish the protocol as a useful legal tool for overcoming patterns of discrimination against women. An example of a straightforward complaint is identifying any domestic legislation that discriminates against women on the ground of sex and presenting a list of discriminatory legislation to the CEDAW committee under the Optional Protocol.

Political will is critical to whether the recommendations made under the optional protocol process are implemented, however this external complaint and review mechanism is an opportunity for action in circumstances where national governments fail to offer legislative protections to women or young people. As yet there is no optional protocol to the Convention on the Rights of the Child.

#### Broadening the impact of individual complaint processes

Until group complaint measures are more widespread and accessible, it is necessary to pilot ways for individual complaint processes to have greater impact on systemic discrimination.

The Equal Treatment Commission in the Netherlands and the Human Rights and Equal Opportunity Commission in Australia are trialing innovative ways of broadening the scope of individual complaint processes to have system level impact. Also the National Child and Youth Law Centre in Australia is improving school based complaint processes by incorporating administrative law concepts into school based discipline, welfare and complaint processes in the spirit of the Convention on the Rights of the Child.

#### **Case study 1- Pay curve modeling in the Netherlands**

The Dutch Equal Treatment Commission is using its information gathering powers innovatively to produce models of discrimination, eg pay curve models. The Commission has the capacity to request a broad range of information not available under civil proceedings. The Commission has the power to gather detailed information, reminding agencies that it is a criminal offence to withhold information requested by a human rights institution during the investigation of a complaint.

De Jongh<sup>47</sup> observes that specialist equality agencies gather more specific and numerous types of information about conditions, organisational

---

<sup>46</sup> Connors, J (2000) Interview, United Nations Office of the High Commission of Human Rights, Geneva. Jane Connors was speaking in her capacity as Branch Head to the United Nations Division for the Advancement of Women.

<sup>47</sup> De Jongh, K (July, 2000) Interview, Equal Treatment Commission, Utrecht.

structure and culture, so they can make an informed decision. The court system by comparison is more passive about information gathering, relying on the information presented by the parties to the complaint.

For example, when investigating individual equal pay complaints, the Equal Treatment Commission collects information about the income of all the women and men performing different functions. This information is used to create a 'pay curve' for the company or department enabling gender-based comparisons, as well as ethnicity-based comparisons, revealing inequitable patterns and structures of an organisation.

*..it is a new step for us to investigate in this fashion because it gives a broader perspective of what is going on. Sometimes in an organisation when you have individuals comparing to each other [sic], you have the feeling that there is more going on and that the problem is all over. It is nice to have a way to show it.<sup>48</sup>*

Pay curve modeling provides evidence which the Commission uses to make system level recommendations to the agency concerned. It also provides grounds for bringing a discrimination notice.

### **Case study 2- Using 'open hearings' during complaint investigations**

In appropriate cases under the *Disability Discrimination Act* (1992) the Disability Discrimination Commissioner with the Australian Human Rights and Equal Opportunity Commission uses a public inquiry or 'open hearing' process during the investigation phase of individual complaints. If the complainant and respondent agree, the investigation of the relevant complaint is open to the public. People and agencies in situations similar to that of the parties to the complaint are able to make submissions, the contents of which may be considered during deliberations.<sup>49</sup>

Whether inquiry into a complaint should be conducted publicly depends on the circumstances of that complaint, taking into account any views of the parties to the complaint. When deciding whether to undertake an open hearing into a complaint, a number of factors are considered, including:

- *'how far and how directly the subject matter requires consideration of interests of persons or organisations beyond the immediate parties to the complaint*
- *how far inquiry into the complaint involves inquiry into allegations regarding individual behaviour (which may be less appropriate for public inquiry) or alternatively involves broader issues of public or social policy (which may more appropriately involve public inquiry)*

<sup>48</sup> DeJongh (July, 2000) Interview, Equal Treatment Commission, Utrecht.

<sup>49</sup> Mason, D and Innes, G (June, 2000) Interview, Human Rights and Equal Opportunity Commission, Sydney. Graham Innes and David Mason were staff in the Disability Discrimination Unit at the time of interview.

- *whether open inquiry is possible without unreasonable disclosure of personal information (taking into account that public elements of an inquiry process need not directly identify the parties to the complaint)*
- *whether the subject matter of the complaint can be appropriately investigated by reference only to material available from the immediate parties to the complaint*
- *potential impacts (positive or negative) of conduct of an open inquiry process on prospects for resolution of the matter concerned and related matters*
- *available resources and priorities.*<sup>50</sup>

It is possible that after receiving submissions, the Human Rights and Equal Opportunity Commission may publish an analysis of issues presented in submissions and any other investigation or research conducted. The submissions may also result in a public hearing or forum to discuss the issues further.<sup>51</sup>

An open hearing has a number of advantages over individual complaint processes:

- the complainant is linked into a support network of people with similar experiences and their advocates, in contrast to the usually solitary experience of individual complaints;
- agencies similar to the respondent are able to make submissions about the impact of the issues the complaint raises on their operation, for example the cinema industry in the case of a hearing impaired person bringing a complaint against a specific cinema; and
- the combined submissions provide a more detailed representation of the situation being investigated, broadening the set of factors (structures) and experiences (cultures) considered when final recommendations are made.

This innovative approach recognises that systemic discrimination, in this instance disability discrimination, requires a way of including groups in a complaint process. The innovation hasn't required legislative change and it offers economies of scale not otherwise available under individual complaint processes.

The submission and public forum steps produce a body of data which can be analysed to increase understanding of systemic discrimination as distinct from direct and indirect discrimination. The data may also help to develop better understanding of the costs and benefits of an individual versus group complaint system.

<sup>50</sup> Source: [http://www.humanrights.gov.au/disability\\_rights/inquiries/procedure.htm](http://www.humanrights.gov.au/disability_rights/inquiries/procedure.htm)

<sup>51</sup> Source: [http://www.humanrights.gov.au/disability\\_rights/inquiries/procedure.htm](http://www.humanrights.gov.au/disability_rights/inquiries/procedure.htm)

At the time of writing, the public inquiry process has trial status and is subject to review.

### **Case study 3 - Incorporating administrative law principles into complaint processes**

Natural justice and procedural fairness are two concepts fundamental to administrative law. These concepts apply wherever decisions affecting a person's rights or interests are made. An innovative use of administrative law principles in a human rights setting is the Australian National Children's and Youth Law Centre (NCYLC) resource *Being fair: a procedural fairness manual for school*, a resource which aims to improve the functioning of individual complaint processes in schools.<sup>52</sup>

*Being fair*<sup>53</sup> is in response to complaints from young people, as well as evidence collected via a national survey conducted by NCYLC and the findings of two government reports about young people. This body of information highlighted the absence of and need for due process in decisions affecting young people's education.<sup>54</sup> It also offers a considered and constructive response to the backlash against children's rights '...by those who view such attempts as leading inevitably to a breakdown in school discipline and teacher respect'.<sup>55</sup>

The manual offers practical guidance about school based decision making, which is becoming more complicated as a result of legislation, regulations, departmental policy and community expectations. Users are offered information about the concepts and requirements of procedural fairness and natural justice.

The resource also offers a model for making decisions, particularly about long term suspension and exclusion, because these decisions are regularly made without the participation of the young person in question, which contravenes Article 12 of the Convention on the Rights of the Child.

These case studies are valuable because they:

1. provide evidence of systemic discrimination, making the concept easier to understand;

---

<sup>52</sup> National Children's and Youth Law Centre (1999) *Being fair: a procedural fairness manual for Australian schools*, University of New South Wales, Sydney

<sup>53</sup> For information about the publication go to [www.lawstuff.org.au](http://www.lawstuff.org.au)

<sup>54</sup> See:

- i. House of Representatives Standing Committee on Employment Education and Training (1996) *Truancy and exclusion from school – Report into the inquiry into truancy and exclusion of children and young people from school*, Australian Government Publishing Service, Canberra, and
- ii. Human Rights and Equal Opportunity Commission (1997) *Seen and heard: priority for children in the legal process*, Australian Government Publishing Service, Canberra

<sup>55</sup> National Children's and Youth Law Centre (1999) *Being fair: A procedural fairness manual for Australian schools*, University of New South Wales, Sydney, p 4.

2. show it is possible to address systemic discrimination within the capacity of existing complaints resources; and
3. they offer s starting point for modeling systemic discrimination.

### iii. The impact of group complaints on systemic discrimination

Human rights agencies visited were asked about their capacity to take group complaints. Almost all of the agencies, with the exception of the Equal Treatment Commission, the International Labour Organisation and the United Nations (via the 1503 complaint process) dealt with individual complaints only and did not have a legislative base for group complaints.

Group or representative complaints have greater capacity to impact on systemic discrimination because:

- collective action may result in more complaints being lodged as the burden and cost of the process is shared across a number of people;
- they can provide evidence of patterns of 'big picture' or system wide discrimination which is not always available at an individual level;
- findings and recommendations based on more evidence of large scale discrimination can offer more specific information about changes required at an institutional level; and
- a greater number of individuals can benefit from a single complaint.

### Class actions in Dutch law

The Dutch Equal Treatment Commission has the jurisdiction to receive group complaints. Dutch law provides for 'class actions' (Dutch Civil Code S.3:305a and 3:305b). This permits legal persons and other entities to bring cases to court to enforce compliance with the relevant equal treatment laws. This provision is unique in European Union law. The Equal Treatment Commission has received 40 group complaints since 1996 representing on average 3.75% of the complaints received annually.<sup>56</sup>

*This prospect of group action offers considerable advantages to individuals who suffer discrimination, especially in situations where they are dependent on those who discriminate against them and thus unwilling to bring their case to the Commission. A group action, to be distinguished from an action brought on behalf of complainants by an organisation, can restore balance between complainants and the other party. In general it could be said that group action is a more obvious way than individual action to ensure enforcement of equal treatment laws.*<sup>57</sup>

---

<sup>56</sup> Cases received: 1996, 6; 1997, 16; 1998, 9; 1999, 9. The Equal Treatment Commission changed computer systems in 1998. This changed the method of registering cases, so figures provided since 1998 are indicative only.

<sup>57</sup> Goldschmidt, J & Goncalves Ho Kang You, L (1999) 'Enforcement of equal treatment: the role of the ETC in the Netherlands' in *Non Discrimination Law Comparative Perspectives*, Loenen, T. & Rodriguez, P.R. (Eds), Martinus Nijhoff Publishers, p 145 – 146.

Pressure groups may file complaints on behalf of individuals if they are organisations founded to promote the interests of the people to whom the regulations for equal treatment apply, for example Dutch Anti-Discrimination Bureaus which are similar to Australian public advocacy centres. Work councils and service committees may also file complaints about unequal treatment within their own company or organisation. An advantage of this is that organisations representing a group of individuals can generally bring more resources to the problem than an individual complainant would.<sup>58</sup>

For example the Equal Treatment Commission handled a group claim from the Institution for Women and Labour, an interest group for the improvement of the position of women. The question was whether the Minister of Education and Science's holiday regulation discriminated on the ground of sex. Maternity leave and illness were classified in the same way under the regulation and there was no compensation for illness during holidays. In this way pregnant women had less holidays than men did. The Equal Treatment Commission found that this practice was discriminatory.

Wider publication and discussion of the operation and effectiveness of the Equal Treatment Commission's group complaint mechanism is encouraged.

#### Group complaints under labour law

The International Labour Organisation also has a complaint procedure under the freedom of association convention, reported<sup>59</sup> to be the most successful of the International Labour Organisation's complaint procedures in terms of securing change. Complaints may be received from worker or employer organisations, or governments against governments but not from individuals. Most complaints come from unions.

*These cases could be characterised as group cases as the union is bringing them on behalf of 200 named people and on behalf of the class of unionist perceived to be under attack.<sup>60</sup>*

Hodges indicated there has been some discussion within the International Labour Organisation about establishing a partner committee on discrimination to work alongside the freedom of association committee because it is such a successful mechanism for ensuring fair hearings and getting people released, reinstated and compensated.

Labour law is an area where some significant impacts are being made on systemic discrimination and progress towards human rights outcomes achieved. The convention system, with the tripartite monitoring system and group complaint processes offer group level remedies not available under other types of law.

---

<sup>58</sup> DeJongh, K (July, 2000) Interview, Equal Treatment Commission, Utrecht, The Netherlands.

<sup>59</sup> Hodges, J (August, 2000) Interview, United Nations International Labour Organisation, Geneva.

<sup>60</sup> Hodges, J (August, 2000) Interview, United Nations International Labour Organisation, Geneva.

At a domestic level, building equality principles into industrial relations law helps to build a system to counteract systemic discrimination against women and children in employment. For example in New South Wales, non-discrimination principles are being inserted into industrial awards to reinforce non-discriminatory employment practices and conditions.

#### United Nations 1503 complaint process

The United Nations has a 1503 complaint procedure to deal with 'consistent patterns of gross and reliably attested violations', including institutional or systemic discrimination. Individuals and groups send communications detailing patterns of discrimination to the United Nations. Details of the written communications are sent to governments for a response.

The 1503 process gives anonymity to the complainant and an avenue for redress that may not be available via their own government. A downside of this process, however, is those raising the issue do not receive any feedback from the government or from the United Nations, as well as the time it can take for the matter to be responded to by the relevant government. Some individuals and groups choose to raise an issue knowing that not much will change for them, but in the hope of change for future generations.<sup>61</sup>

#### Conciliation and mediation in individual and group complaint processes

There is a trend towards conciliation and mediation in both individual and group complaint handling. Reasons for this trend include:

- the inability of formal justice to cater for socially marginalised groups;
- the prohibitive cost of formal litigation;
- informal processes are simpler and cheaper while also offering confidentiality and privacy, therefore encouraging people to lodge complaints;
- greater flexibility and creativity in problem solving.<sup>62</sup>

Thornton,<sup>63</sup> Hunter and Leonard<sup>64</sup> argue that conciliation does not benefit the disadvantaged group because of the failure of the process to address power imbalances between complainants and respondents. Also, conciliated outcomes are usually far less demanding in comparison with court orders on similar matters. A further limitation is that conciliation officers may settle for lesser terms because resolving the matter rather than equality becomes the driving force. Conciliation can also keep cases out of tribunals and the public domain.

---

<sup>61</sup> Kahlife, L (August, 2000) Interview, United Nations Office of the High Commissioner for Human Rights, Geneva.

<sup>62</sup> Guest, K (1999) *The Elusive Promise of Equality: Analysing the Limits of the Sex Discrimination Act 1984*, Parliament of Australia, Law and Bills Digest Group Research Paper, Canberra, p 1 – 45.

<sup>63</sup> Thornton, M (1990) *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Oxford University Press, Melbourne.

<sup>64</sup> Hunter, R and Leonard, A (1995) *The Outcomes of Conciliation in Sex Discrimination Cases*, University of Melbourne Centre for Employment and Labour Relations Law Working Paper, Melbourne.

The shift towards increased use of conciliation by the justice system requires both critical and feminist analysis to ensure that systemic discrimination is not being amplified. Further, the appropriateness of conciliation for group claims and claims of systemic, rather than direct or indirect discrimination, requires further research and analysis.

Given the centrality of complaints in remedying human rights breaches, the area warrants further innovation of the type described in the case studies above. A continued reliance on individual complaints is not sufficient to reduce direct or indirect discrimination, and has very limited impact on systemic discrimination. Shifts into other sectors, such as industrial relations and the merging of administrative law principles in education sector decision making are positive gains requiring further attention and resourcing.

### Key messages

- Individual complaint processes are inadequate for addressing systemic discrimination because:
  - findings are generally limited in scope, ie compensation is of an individual nature;
  - findings lead to limited or no repercussions for people in identical situations of disadvantage;
  - judgments rarely address the structure and culture of an agency.
- There are ways of modifying individual complaint processes to increase the impact on systemic discrimination, such as 'open hearings' and pay curve modeling.
- The case studies included in this section could be analysed to help develop an understanding of systemic discrimination as distinct from direct and indirect discrimination.
- Information about group complaint methods employed by human rights institutions should be made available and discussed to encourage uptake in other jurisdictions.
- Under-utilisation of existing group complaint processes should be examined and addressed, for example the representative complaint powers in the New South Wales *Anti-Discrimination Act (1977)*.
- Publishing information about innovative strategies would help to make systemic discrimination recognisable.

### *Investigation and inquiry powers*

The Equal Opportunity Commission (UK), the Equal Treatment Commission (the Netherlands) and the Racial Equality Commission (UK) are agencies with a legislative base to conduct investigations and inquiries. When using investigation powers, agencies may request from the body under scrutiny, information, records, documentation and access to relevant staff.

The process can have a number of outcomes:

- making a ruling of discriminatory behaviour;
- serving a discrimination notice under the relevant Act;
- delivering a set of recommendations;
- public reporting, and
- a requirement for the respondent to report on the implementation of findings within a set time frame.

#### Impact on systemic discrimination?

The Equal Treatment Commission in the Netherlands is legislated to undertake investigations into cases of persistent discrimination. Such investigations must cover a 'whole sector' rather than being on an agency basis. The Commission 'does not have to wait for complaints. The investigative powers of the Commission are not limited to (individual) complaints upon request.'<sup>65</sup> The Commission may investigate a number of sectors at one time.

The Commission has conducted sector wide investigations into:

- racial discrimination against immigrants in the agriculture sector;
- consideration of a 'seniors regulation', an informal agreement between labour organisations and employers re older employees; and
- the failure of some hospitals to provide single or lesbian women access to fertility services.

De Jongh points to the complexity of the issues and the whole-of-sector approach to explain why investigations may take 3 – 5 years to complete. Once the findings have been delivered, the phase for the agency to respond then commences. While the time taken to carry out an investigation can raise the profile of discrimination, it can also test the 'concentration span' of the sector responsible, sometimes leading to 'discrimination fatigue'. Lengthy investigations are also expensive for the Commission. In light of this, the ETC has requested from government the power to conduct individual agency investigations, as well as whole-of-sector, on the basis that choosing a representative agency is likely to reflect sector wide discrimination.<sup>66</sup>

Agency specific investigations are also resource hungry. At the Equal Opportunity Commission in Britain a formal investigation into an agency may take 18 months or longer to complete. Foulger<sup>67</sup> raised the difficulty of balancing staff time between complaint handling, with its sense of urgency, and systemic investigations.

---

<sup>65</sup> Goldschmidt, J & Goncalves Ho Kang You, L (1997) 'Enforcement of equal treatment: the role of the Equal Treatment Commission in the Netherlands' in *Anti-discrimination law enforcement: a comparative perspective*, MacEwan, M (Ed), Ashgate Publishing, United Kingdom.

<sup>66</sup> De Jongh, K (July, 2000), Interview, Equal Treatment Commission, Utrecht.

<sup>67</sup> Foulger, W (July, 2000) Interview, Equal Opportunity Commission, Manchester.

Investigation outcomes vary according to the Act the agency operates under. For example Equal Opportunity Commission staff '*can only order that unlawful acts of sex discrimination stop; we cannot impose changes in practice, either for the benefit of an individual or for a group*'.<sup>68</sup> Discrimination notices can be served and reports made public but such limited parameters make it difficult to make recommendations addressing structural elements and cultural practices.

Outcomes will also be influenced by what transpires during the investigation. Formal notice of intention to conduct an investigation may be enough to get an employer to agree to work with a human rights agency, 'which means you can't be as punchy', reducing the opportunity to report in public.<sup>69</sup>

The Racial Equality Commission has two types of formal investigation powers – conducting a research exercise and the ability to subpoena information in instances where it is believed that discrimination has occurred. Smith describes the procedures required under the Act as cumbersome and time consuming. At times the investigation effort is deemed disproportionate to the value of outcomes, such as a non-discrimination notice which can be appealed leading to a drawn out process and reducing the impact of any intervention.<sup>70</sup>

Human rights agencies factor political will into decisions about when to initiate investigations. Agencies may go through cycles of support. For example when political support is low, there may be a reluctance to push a big employer and it is seen as unfair to challenge a small employer, so the human rights agency may choose to use other strategies that will have better leverage during that particular climate.

Given that recommendations stemming from investigations generally are not enforceable by law, various incentives are used by human rights institutions to secure compliance from the agency under examination, such as:

- using the status of the human rights agency to 'shame' and scrutinise an organisation;
- public reporting, for example parliamentary reporting where the findings are deemed to be in the public interest; and
- pressure groups, such as unions and advocates, leveraging any findings made public, encouraging compliance on the grounds of their constituent's interests.

Preserving the status of an equality agency's findings or recommendations is vital to ensuring investigative powers have effect. The Equal Treatment Commission made a submission to the Dutch government recommending that Commission rulings be given more status. For example, if a judge goes against a Commission ruling, they should explain which part of the Commission ruling they

---

<sup>68</sup> Equal Opportunity Commission (1998) *Equality in the 21<sup>st</sup> century: A New Sex Equality Law for Britain*. Submission to government, Manchester, page 13.

<sup>69</sup> Foulger, W (July, 2000) Interview, Equal Opportunity Commission, Manchester.

<sup>70</sup> Smith, P (July, 2000) Interview, Commission for Racial Equality, London.

don't agree with. This requirement means they would have to give a reasoned response and participate in public discussion of Commission rulings. This recommendation is based on the belief that the Commission represents a specialised equality agency giving their findings informed gravitas whereas judges may have handled relatively few cases about unequal treatment and therefore may not have thought through the issues as much.<sup>71</sup> Exchanges between the Commission and judges about decisions may help to reinforce accurate, consistent and relevant understanding of equality law.

Even though investigations into direct discrimination may be easier to launch than system wide investigations into an 'amalgam of structural and cultural problems'<sup>72</sup>, it is important to investigate entrenched discrimination. The Equal Treatment Commission took approximately three years to investigate sex discrimination in the medical sector and found that the sector was discriminatory. Three years is a relatively short time compared to the decades of discrimination preceding the investigation.

Laying bare the structure of an organisation is itself a valuable achievement, providing evidence for parties to pursue future complaints or for there to be a ripple effect across similar organisations, particularly if unions and advocacy bodies sustain a focus on the issues.

Reflecting on the use and impact of their investigative powers, the Equal Opportunity Commission suggests the following in order to make investigations more effective against sex-based systemic discrimination:

- introducing strict time limits for formal investigations, in particular agencies submitting evidence within times specified in the Act;
- extending the scope of non-discrimination notices to cover ending specific practices which have been identified to cause sex discrimination;
- creating legally binding commitments between the Commission and people and organisations that have agreed to make the necessary changes, as an alternate to issuing non-discrimination notices,<sup>73</sup> and
- empowering human rights bodies to investigate one part of a sector and using this as a basis to make recommendations applicable to the entire sector.<sup>74</sup>

In the opinion of Moira Rayner, a former state level Equal Opportunity Commissioner in Australia,<sup>75</sup> there is little point having a human rights institution unless it has the capacity to undertake investigations. It is encouraging that a

---

<sup>71</sup> De Jongh, K (July, 2000) Interview, Equal Treatment Commission, Utrecht.

<sup>72</sup> Foulger, W (2000) Equal Opportunity Commission, Manchester

<sup>73</sup> Equal Opportunity Commission (1998) *Equality in the 21<sup>st</sup> century: A new sex equality law for Britain*, Manchester, p 13.

<sup>74</sup> Foulger, W (July, 2000) Interview, Equal Opportunity Commission, Manchester.

<sup>75</sup> Rayner, M (July, 2000) Interview, Greater London Authority Office for the Children's Commissioner, London.

newly established human rights agency, the Disability Rights Commission in Britain, has investigation powers vested by Parliament. The work of this newly established Commission offers another context in which to progress investigations as a strategy for overcoming systemic discrimination.

**Case study - Inquiry into institutional racism in the United Kingdom**

Inquiries are another type of investigation, usually carried out in the public interest and at the request of government. Certain government and statutory agencies have inquiry powers. The 'Stephen Lawrence Inquiry' into institutional racism, which delivered a final report in 1999, is noteworthy because it is specifically an inquiry into systemic discrimination, in this case institutional racism in the British police force.

On 22 April 1993 Stephen Lawrence, a young black man, was murdered in England. The police investigation of Lawrence's murder led his parents to make a complaint of racism against the police. This resulted in an inquiry, conducted by Sir William Macpherson for the Home Office, to identify the 'lessons to be learned for the investigation and prosecution of racially motivated crimes.'

The Lawrence Inquiry placed the concept of institutional racism firmly in the public domain, describing it as a type of discrimination that 'manifests itself in a wide number of ways that could be direct, indirect, in the culture – it permeates it all'.<sup>76</sup> The inquiry report defines 'institutional racism' as:

***Those established laws, customs and practices that systematically reflect and produce racial inequalities in society. If racist consequences accrue to institutional laws, customs or practices, the institution is racist whether or not the individuals maintaining those practices have racial intentions.***<sup>77</sup>

The definition is important for three reasons because it:

- establishes the existence of systemic discrimination, in this case at an institutional level;
- shows that structure and culture are both elements of systemic discrimination; and
- distinguishes between the institution as a body corporate and the individuals who are part of it, that is 'It doesn't resort to singling out a few 'bad apples' and asking for their removal.'<sup>78</sup>

While the definition is open to criticism, for example it doesn't address intentional racism, it could be argued that intentional (direct and indirect)

---

<sup>76</sup> Cohen, B (July, 2000) Commission for Racial Equality, London. Barbara Cohen was speaking in her capacity as Head of Legal Policy at the Commission.

<sup>77</sup> Commission for Racial Equality (1998) *Evidence to the Lawrence Inquiry, Part 2*, London.

<sup>78</sup> Cohen, B (July, 2000) Commission for Racial Equality, London.

discrimination is well established in the community. The definition does help to establish the concept of systemic discrimination, which is not widely recognised. The value of the definition of institutional racism is that since it was reported 'most organisations in the public sector (are) prepared to put their hand up to say it was an issue they need to consider'.<sup>79</sup>

The Racial Equality Commission submission to the inquiry made a number of comments about dealing with institutional racism, based on the Commission's experience of working explicitly in this field. These observations are applicable to systemic discrimination generally:

- challenging individuals or targeting groups within an organisation will have limited impact and 'will leave virtually intact the racism that permeates the organisation as a whole';
- an effective response requires corporate acknowledgment and understanding of the issue and a corporate commitment to deal with it;
- the necessity of avoiding the 'bad apple syndrome', which is the dominant culture's response to allegations of improper conduct, that is, tinkering round the edges rather than 'disinfecting the whole barrel for better future prospects'; and
- the critical importance of political will within and without the institution to see the entire process through.<sup>80</sup>

The Lawrence Inquiry helped the Racial Equality Commission to publicly reiterate successful strategies they have used to tackle systemic discrimination, such as:

- discussing the issue in a public way across an organisation;
- speaking with the people who are affected to find out what they want;
- than agency, particularly management, undertaking 'self inspection' to realise the impact of past decisions and existing practices rather than going straight to solutions and actions; and
- basing any action plan on clear and agreed recognition of what is discriminatory.

Gay McDougall, member of the United Nations Committee for the Elimination of Racial Discrimination, suggests why investigations into systemic discrimination may be used infrequently:

---

<sup>79</sup> Cohen, B (July, 2000) Commission for Racial Equality, London.

<sup>80</sup> Commission for Racial Equality (1998) *Evidence to the Lawrence Inquiry, Part 2*, Submission made to the Home Office, London, p 2.

*(People) are not as comfortable looking directly at (discrimination) as a system that is ensconced and one which, as long as you build on top of the current rules of that institution, will never be an institution that represents or serves or incorporates a truly diverse constituency.*<sup>81</sup>

The discomfort McDougall refers to is Barbara Cohen's starting point in her work for the Commission for Racial Equality. Cohen stresses that engagement with the issue at an attitudinal level, in particular by those in leadership in an organisation, is essential if systemic discrimination is to be addressed:

*To me it seems to be that first stage of acknowledging that you are getting it wrong, that is the turning point.*<sup>82</sup>

Without genuine commitment from management to build a supportive culture, those who are discriminated against will not raise complaints for fear of victimisation or damaging career prospects. Further, any attempts to change structures or culture are likely to be seen as intrusions on a system that is working well. Therefore any attempted changes are prone to failure.

Training within institutions can no longer focus on 'making it better' without attempting to help people understand and accept the institutional nature of the problem. Lack of understanding at management levels can undermine the political will necessary for persisting with proposed changes, particularly in the event of a backlash against any changes. Lack of understanding at officer levels led to some metropolitan police claiming 'I won't stop and search any body because I'll be accused of being racist'. Backlashes illustrate a lack of acceptance of the cultural, historic and entrenched nature of the problem.

Inquiries are often born from, and generate, a sensitive political climate which places pressure on agencies at the centre of the process 'to be seen to be doing something'. This can be compounded by an organisation's culture of 'taking action' such as that of police, teaching and local government sectors. One consequence is that the analysis/reflection stage can be overlooked or undervalued. It is also difficult to sell internal analysis to the public as a worthwhile process to be carried out before other actions can be started.<sup>83</sup>

Internal monitoring of the impact of existing policies and annual reporting to an external agency are important strategies for measuring the degree of cultural change, particularly if benchmarks are established and reported against.. Persistence in always applying the standard is important too.

*My view is that over time if you are a middle level policy officer and you keep having your policy rejected because of negative race implications,*

---

<sup>81</sup> Gay MacDougall (August, 2000) Interview, United Nations Committee for the Elimination of Racial Discrimination, Geneva.

<sup>82</sup> Cohen, B (July, 2000) Interview, Commission for Racial Equality, London.

<sup>83</sup> Cohen, B (July, 2000) Interview, Commission for Racial Equality, London.

*over time you will do self scrutiny. Eventually it will make a difference. The critical factor...is that there is political will.*<sup>84</sup>

In the long term, defining institutional racism gives the Commission for Racial Equality a good lever to say that if such discrimination exists, a public organisation is not doing the best job possible and should find ways to prevent it from continuing. The Commission also has the support of the Home Secretary who stressed the importance of a partnership approach in his first progress report one year after the inquiry.<sup>85</sup>

A positive consequence of the Lawrence inquiry is the tabling of the *Race Relations (Amendment) Bill* (2000). The Bill proposes a number of changes that the Racial Equality Commission believes will strengthen the regulatory environment in a way that is necessary to meet the challenges of institutional racism. One of the changes is bringing a broader section of policing and their public authority duties under the scope of the *Race Relations Act* (1976). This is the first step towards harmonising legislation in light of the findings of the Lawrence inquiry as well as the introduction of the *Human Rights Act* (1999) in the United Kingdom.

The Lawrence Inquiry documentation and processes, in combination with the work of the Commission for Racial Equality and long term monitoring of the inquiry recommendations, offers a significant base for future analysis of systemic discrimination.

### Key messages

- Investigations and inquiries are mechanisms particularly well suited to demystifying and addressing systemic discrimination.
- Investigation and inquiry processes have the potential to impact on systemic discrimination if:
  - findings are reported in terms of the structural and cultural dimensions of discrimination to be addressed, and
  - precipitators and indicators of systemic discrimination are identified during an investigative process or as part of a meta-analysis of a number of investigations conducted by an agency.
- While they may be resource intensive, the costs are actually a consequence of failing to accept and address systemic discrimination earlier. The benefits could be seen to outweigh the cost as the potential for many to benefit is great, particularly in comparison to the costs and of individual complaints.
- Investigations and inquiries may benefit groups of people are less likely to bring complaints, such as young people.

---

<sup>84</sup> Cohen, B (July, 2000) Interview, Commission for Racial Equality, London.

<sup>85</sup> Home Secretary (2000) *Stephen Lawrence Inquiry, Home Secretary's Action Plan: First Annual Report on Progress*, Home Office, London.

- The Lawrence Inquiry is a landmark investigation of systemic discrimination. The circumstances, process, findings and outcomes warrant further analysis and monitoring, which should be published widely.

### *Pay equity*

Pay inequity is one of the clearest forms of systemic discrimination against women. Pay equity was recognised as a rights issue by the International Labour Organisation in 1951 when it passed the 'Equal Remuneration Convention' (No.100). The widespread persistence of sex-based pay inequity highlights the necessity of actively taking measures to address systemic discrimination.

### Impact on systemic discrimination?

Recently, a number of Australian states have undertaken pay equity inquiries through industrial commissions. The findings from the New South Wales inquiry offers a basis for test cases in industries that are predominated by women employees. The findings have international significance as they remove barriers which have undermined previous pay equity cases.

### **Case study – New South Wales pay equity inquiry**

The New South Wales inquiry was established late in 1997 by the Industrial Relations Minister, the Honorable Jeff Shaw, on the recommendation of the Pay Equity Task Force, which included representatives of unions, employer organisations, government, the Premier's Council for Women, industrial relations academics and lawyers. The inquiry was the most comprehensive investigation ever carried out in Australia into pay equity issues. It comes 29 years after the first equal pay cases, with full time adult women workers still earning only 80 per cent of men's earnings, a figure that has not improved in over a decade.

The inquiry heard around 100 witnesses in over 40 hearing days, and examined the work of hairdressers, librarians, child care workers, seafood processors, clothing workers, clerks, metal workers, geoscientists, coal miners, teachers and nurses. Workers and employers, unions, employer organisations and training providers all contributed. Experts from a range of relevant disciplines provided information, analysis and opinions on the existence and causes of, and remedies for, gender pay disparities.

At the heart of the inquiry was the issue of whether women's work is underpaid for its value, because of gender bias in assessing the value of the work women do. Some have said the gender pay gap arises from differences in women's labour market characteristics-experience, hours, qualifications and so on. Others point to research taking account of all those factors and still finding an unexplained pay gap.

The industrial system itself was examined for possible gender bias, especially the various ways of assessing the value of work. There was

also consideration of how the equal pay decisions of 1969 and 1972 were implemented, and of how women's work has been dealt with under later wage fixing principles (including the structural efficiency principle, minimum rates adjustments, anomalies and inequities and changes in work value principles).<sup>86</sup>

At the end of the pay equity inquiry, the Industrial Relations Commission found that:

- women's work in female dominated occupations is undervalued;
- the causes of evaluation include occupational segregation, an absence of work value reviews to assess skills, knowledge and responsibilities and also gendered assumptions in a work value assessments; and
- that comparisons between male and female dominated industries should not be a pre-requisite for pay equity claims.<sup>87</sup>

The Commission concluded that:

*'...remedies designed to remove undervaluation of work in female dominated industries and occupations should be established within the framework of the existing industrial relations system in New South Wales.'*<sup>88</sup>

One of the proposed remedies was the development of a new equal remuneration principle.

The pay equity inquiry led to an equal remuneration test case before the full bench of the New South Wales Industrial Relations Commission. The case was an attempt to determine the remedies called for at the end of the inquiry. The decision was highly favourable in relation to overcoming systemic discrimination.

Aspects of the Commission's decision which directly impact on systemic discrimination include:

- a new principle (central mechanism) of gender-related under-valuation in wage fixing;
- fresh logic on how value work and the appropriate rates of pay which overcomes the problem of female dominated occupations being historically undervalued;

---

<sup>86</sup> Hall, P (2000) *Equal remuneration test case decision*, Department for Women, [www.women.nsw.gov.au](http://www.women.nsw.gov.au). The NSW Department of Industrial Relations has prepared a summary of the Report's findings and recommendations. The summary can be viewed or downloaded from <http://www.dir.nsw.gov.au/pubs/equity/index.htm>

<sup>87</sup> Women's Equity Bureau (1999) *NSW Government's Pay Equity Strategy*, Sydney.

<sup>88</sup> Industrial Relations Commission (1998) *Pay Equity Inquiry Report*, Sydney, Vol 2, p 149.

- removing the requirement for proof that pay inequity between men and women workers for work of equal or comparable work is caused by discrimination; and
- removing the requirement for a comparator to establish discrimination or to establish rates of pay.

The new pay equity principle is not restricted to female-dominated occupations. The decision applies, however, only to award arrangements, although there may be some impact on outside award arrangements.

The cases developed in the inquiry and test case provide evidence of systemic discrimination, which were accepted by the Industrial Relations Commission and the state government. The equal remuneration principle offers way of addressing the historic under-valuation of women's work without some of the barriers, such as the need for proof of discrimination and a comparator, which undermined previous cases in Australia and overseas.

#### Key messages

- The sex-based pay gap is a clear example of the systemic discrimination built into industrial relations and wage fixing systems.
- Women's work in female dominated occupations is undervalued.
- The causes of evaluation include: occupational segregation, an absence of work value reviews to assess skills, knowledge and responsibilities and also gendered assumptions in a work value assessments.
- It is possible to create a central mechanism which appropriately values women's work without reproducing historic under-valuation of women's work.
- The NSW Industrial Relations Commission equal remuneration principle makes pay equity possible in Australia.
- The logic of the equal remuneration principle is transferable to overseas jurisdictions.

#### *Gender mainstreaming and gender analysis*

Gender mainstreaming is a process of building non-sexist concepts of gender into routine organisational decision making and practices. Gender analysis, sometimes an aspect of gender mainstreaming, sometimes a stand-alone process, reveals underlying assumptions that form the basis of the agency's existing structures and cultures. Gender mainstreaming is usually carried at an organisational or system wide level, while gender analysis can occur at macro as well as micro levels. The Beijing Platform for Action describes gender mainstreaming as a key strategy for promoting equality.<sup>89</sup>

<sup>89</sup> United Nations (1995) *Beijing Platform for Action*, New York.

Efforts are being made to incorporate gender perspectives into the substantive work of the United Nations. Examples of gender mainstreaming activities implemented by the United Nations include:

- allocating resources to gender mainstreaming in program budgets;
- building gender mainstreaming into Medium Term Plans;
- conducting studies such as 'Mainstreaming a gender perspective in multidimensional peace-keeping operations';
- developing and disseminating fact sheets on gender and disarmament;
- increasing the representation of women on UN committees, tribunals and in expert group meetings; and
- training and fellowship programs.<sup>90</sup>

#### Impact on systemic discrimination?

Mainstreaming gender has emerged since the mid 90s as a new direction for in gender equality work. In the past, gender equity strategies were coordinated through 'gender focal points', targeting specific sections of an agency. Gender mainstreaming, however, involves all managers and employees at all levels and in all areas making gender equity part of their day-to-day political and administrative work. In a mainstreaming approach, everyone has to take responsibility for how their actions can perpetuate gender norms by constructing structures or supporting particular cultures.<sup>91</sup>

Birgitta Aseskog, Deputy Director, Division for Gender Equity at the Swedish Ministry for Industry, Employment and Communications, has worked on gender mainstreaming projects over a number of years. She suggests that:

*Mainstreaming is a strategy and a method for achieving the gender equality objectives. It means that:*

- *different conditions and requirements for women and men should be identified;*
- *every question which concerns individuals should be examined from a gender perspective; and*
- *the expected consequences of changes for women and men respectively should be analysed.*<sup>92</sup>

Gender analysis strategies being used by Swedish central, regional and local governments include:

- disaggregating statistics by sex;
- introducing a term of reference requiring all government committees to produce gender impact statements as a decision making step in project development;

---

<sup>90</sup> United Nations Division for the Advancement of Women (2000) *Preliminary analysis of the Beijing+5 outcome document*, New York.

<sup>91</sup> Aseskog, B (July, 2000) Interview, Ministry of Industry, Employment & Communications, Stockholm.

<sup>92</sup> Ministry of Industry, Employment & Communications (1999) *Gender mainstreaming in Sweden – A gender equality perspective in all policy area*, Stockholm. [www.regeringen.se](http://www.regeringen.se)

- gender budget analysis in the sectors of higher education, industry and employment/unemployment;
- a gender equality round table with government and business representatives;
- developing gender analysis tools, and
- trialing a 'gender balance scorecard' in business settings.<sup>93,94</sup>

The gender-balanced scorecard is a strategy discussed by the round table. The Division for Gender Equality is a member of the group, which is championed by the State Secretary, with membership from private industry managers, statutory authorities and government. Statoil (a government owned oil company) has a representative on the group and their work is a good case study for industry members.<sup>95</sup>

One of the most comprehensive projects undertaken in Sweden is the Jamkom project. With the assistance of a gender equity academic and financial assistance from the Equality Affairs Division of the Ministry of Industry, Employment and Communications, participants from the Swedish Association of Local Governments developed and trialed a gender analysis tool called the '3R method'. The tool specifically aims to understand the distribution of power between women and men, how gender influences the formation of structures and the interaction of gender and norms in local decision making.<sup>96</sup>

'3R' stands for:

- *Representation*: How many, and in what ways, are men and women represented in all groups participating in local government decision making?
- *Resources*: Allocation of resources between girls/boys and women/men. How are the priorities for resource allocation (money, time, space) set?
- *Realia*: What norms, values and quality measures steer the organisation? Who sets the standards? Whose needs does the organisation meet?<sup>97</sup>

In her capacity as Project Coordinator for the JamKom project, Birgitta Aleskog worked closely with local government authorities coming to terms with gender analysis. While the practice is time consuming, requiring scrutiny at all stages of decision making, it produces decisions based on thorough consideration of various criteria, making them easier to promote and defend. Aleskog rejects the suggestion that gender mainstreaming adds work. Rather it is just a way of doing

<sup>93</sup> Aleskog, B (July, 2000) Interview, Ministry of Industry, Employment & Communications, Stockholm.

<sup>94</sup> Irelinger, I (July, 2000) Interview, Equality Ombudsman, Sweden.

<sup>95</sup> Irelinger, I (July, 2000) Interview, Equality Ombudsman, Sweden.

<sup>96</sup> At time of interview (July 2000) the JamKom project report was in the drafting phase.

<sup>97</sup> Ministry of Industry, Employment & Communications (1999) *Gender Mainstreaming in Sweden – A Gender Equality perspective in all policy areas*, Stockholm. [www.regeringen.se](http://www.regeringen.se)

every day work differently and is based on good government decision-making practices.

The task of analysing decisions can be confronting. One local board in Northern Sweden found it hard to know that they had placed a leisure centre in the wrong location due to poor analysis. Aseskog argues that gender mainstreaming can help to prevent poor decisions in the future.

All levels of Swedish government are now required, by regulation, to conduct gender impact statements and provide gender-disaggregated data when developing proposals for government activity. The aim is to introduce gender at the start of the planning process, rather than trying to insert it during the approval stages of the planning process. Aseskog believes gender analysis can provide new opportunities for improving the status of women. For example, rather than seeking additional funds, gender analysis can examine how current funds are spent in the industry sector.

Aseskog believes the importance of political will for implementing equality strategies should not be underestimated.

*The most important aspect is political commitment ....(with) that you can really do something. It is not always about having resources. It is also what results they would like to see at the highest political level.<sup>98</sup>*

Political will has also been important in a United Nations context, with an instructive from the Secretary-General requiring all branches and teams to incorporate gender mainstreaming in their processes and practices. Since the Cairo world conference in 1994, the United Nations has been working to build its capacity to deal with gender on a day to day basis.

In 1998 Ana Angarita was seconded to the Office of the High Commissioner for Human Rights (OHCHR) in Geneva to work on gender mainstreaming and reproductive rights. Angarita's priorities are offering training to introduce OHCHR staff to the basic concepts of gender, developing tools such as checklists to help integration into daily practices and developing a policy on gender mainstreaming. A considerable amount of training with follow up has been conducted. A gender mainstreaming policy was ready for release at the Beijing + 5 conference held in New York in 2000. Work is continuing on checklists for staff at all levels of UN activity.

Angarita<sup>99</sup> notes that initially there were areas of resistance to introducing gender-mainstreaming practices within the United Nations. One type of resistance is the perception that women's human rights are dealt with by one specific part of the organisation, for example, the Division for Advancement for

---

<sup>98</sup> Aseskog, B (2000) Interview - Ministry of Industry, Employment & Communications, Stockholm.

<sup>99</sup> Angarita, A (August, 2000) Interview, Office of the High Commissioner for Human Rights, Geneva.

Women in New York rather than Geneva based branches. Another barrier is the belief that 'women have arrived' after a decade promoting women's rights, therefore equal opportunity has been achieved.

While gender mainstreaming had a high profile after the Beijing conference for women, work on gender mainstreaming is now being squeezed by resource constraints. Equality teams are being disbanded in various parts of the UN (except in the ILO where the new Director General is very committed to women's rights) which is an initial reaction to gender mainstreaming being seen as everyone's responsibility.

To overcome these perceptions and resource constraints, and to take gender issues into the work of all types of UN staff, the Division for the Advancement of Women and the OHCHR brought together the chairs of treaty bodies and special rapporteurs in 1999 to consider gender mainstreaming. An additional aim is to look for ways they could work together to achieve a greater effect.

The workshop was an opportunity to discuss the gender mainstreaming work already being carried out in the UN, including:

- the Human Rights Commissioner making a general comment on gender equality in mid 2000;
- the Committee for the Elimination of Racial Discrimination delivered a general recommendation on the gender dimension of racial discrimination;
- there is also the work of the Special Rapporteur on Violence Against Women, and
- discussion at the Sub Commission's session in August 2000 demonstrated consensus on the need for long term education to address gender inequity.

Angarita believes that the gender-mainstreaming network OHCHR is building in countries such as Bosnia, Palestine, Latin America and El Salvador illustrates the way in which gender mainstreaming is capable of fitting a variety of situations. During the reconstruction period in Bosnia, gender is being integrated into policies and structures as these are redeveloped. In Palestine the OHCHR has helped to establish a non-government organisation which looks into violence, human rights and education.

Angarita acknowledges that gains made by gender mainstreaming are made possible by decades of feminist activity, but gender mainstreaming may also offer something distinctive, enabling women to participate in discussions in a way that previous strategies have not:

*When I started working for the UN at the start of the 90s, I don't recall people talking about gender mainstreaming. I recall talking about discrimination, equality, inequity and women having access. Probably from that point of view*

*it was probably harder to advocate equality but when you bring in gender mainstreaming and you are saying women should have a voice, participate, be at the discussion table, it brings in something different. It's like you and I are partners. Maybe we can think about it together and come to some agreement, maybe it will make sense to both of us and none of us will be worse off – we will both benefit.*<sup>100</sup>

Angarita believes a powerful aspect of gender mainstreaming is that it gives people a different way of looking at life, helping them to see how they conceptualise power structures and culture they are part of. Gender mainstreaming means 'digging into patriarchy, political structures and power.' There is no end to the process, there will always be different dimensions to the problem and no matter where you put those people, they will always bring a gender perspective. Aleskog is of the same view – that people who use gender analysis 'never think the same way again'.

A strength of the discussing 'gender' rather than 'women' is that it creates a space for men to enter equality discussions which previously they were reluctant to engage in.<sup>101</sup> Angarita points out that gender mainstreaming is a way to educate men, who have a responsibility for changing discriminatory structures. A by-product of this may be that the responsibility for change is spread, not just relying on the women to bring complaints. In this way the organisation can take responsibility for change by knowing how to see the inequity, allocating resources to it, making it a priority. Gender mainstreaming may also offer communities a way to progress issues without having to rely totally on government to create change.

Gender mainstreaming is different from other strategies discussed so far because the base unit for analysis is 'groups' rather than individuals. This distinguishes it from complaints based discrimination law, moving it closer to affirmative action strategies. The ability to operate at a group level is a characteristic that should be capitalised on:

*In order to come to terms with the male norm, you really need to know what the structures are. You can do this with groups and not with individuals.*<sup>102</sup>

There are criticisms of gender mainstreaming, for example, that it will be used to wind back and reduce all other affirmative action programs. Aleskog acknowledges but does not support this concern. Rather she argues that you need positive programs, special measures and gender focal points more than ever, particularly as there will be more interest and support for them. Angarita agrees, explaining that previously people thought the 'gender specialist' should

---

<sup>100</sup> Angarita, A (August, 2000) Interview, Office of the High Commissioner for Human Rights, Geneva.

<sup>101</sup> Angarita, A (August, 2000) Interview, Office of the High Commissioner for Human Rights, Geneva.

<sup>102</sup> Aleskog, B (July, 2000) Interview - Ministry of Industry, Employment & Communications, Stockholm.

do all the work. Mainstreaming turns this perception 'on its head', reinforcing the responsibility shared by everyone but supported by gender specialists.

Gender mainstreaming has been described as a 'broad but superficial' practice compared with the 'narrow but deep' practices typical of targeted equity strategies and affirmative action measures.<sup>103</sup> If this proves to be the case, gender mainstreaming should be accepted for what it can realistically achieve and used in tandem with affirmative action strategies which have the capacity to 'drill down' into discrimination issues. By working in concert, gender mainstreaming can build on past work, can call for depth of treatment where appropriate and can constantly communicate the gains to be made by building gender analysis into day to day practices by groups en masse. Perhaps gender mainstreaming can help create supportive environments to minimise backlash against targeted affirmative action strategies.

The approach taken by the Department for Women in New South Wales in Australia, is to trial gender analysis processes in a variety of settings, identifying macro and micro steps of the process, as well as outcomes. This case study approach is designed to produce an understanding of how the process of gender analysis works in different settings and the types of systemic discrimination problems gender analysis can successfully address.

There is considerable body of literature about gender mainstreaming processes but not outcomes. Professionals working in the area of gender equity are keen to see reports of outcomes from the process as well as analysis of how gender mainstreaming can address both discriminatory structures and cultures.

### Key messages

- Gender mainstreaming aims to have coordinated agency wide approach to gender equality.
- Gender analysis is a strategy designed specifically to address systemic discrimination by revealing and remedying sexist assumptions underpinning an agency's culture and structure.
- It is a long-term process with the potential to impact on systemic discrimination at structural and cultural levels.
- Publishing evidence of outcomes will help equality professionals determine appropriate situations in which to use gender mainstreaming.
- Gender mainstreaming is not a substitute for positive measures but can make a contribution to overcoming systemic discrimination when introduced in tandem with targeted measures.

### *Women's budgets*

Women's budgets, or 'gender-sensitive' budget analyses, 'seek to breakdown, or disaggregate, the government's mainstream budget according to its impact on

---

<sup>103</sup> Hoskyns, C (2000) *Gender politics in the European Union*, Women's Executive Development Program seminar presentation, University of Technology, Sydney.

women and men, and different groups of women and men'.<sup>104</sup> Women's budgets are used to monitor economic and social equality between women and men, including access women and girls have to government resources and the gender impact of government budgetary policy. From this conclusions can be drawn about the government's commitment to gender equity.

A number of professionals, both government representatives and community advocates, expressed interest in gender budgets as a contemporary strategy. Birgitta Aseskog with the Swedish Ministry for Industry, Employment and Communications, Jane Connors at the International Labour Organisation and Rinno Arna from the Women's Coalition for Justice and Democracy in Indonesia each discussed the value of gender budgets as a contemporary strategy. Gender budgets can be used in a range of cultural settings.

#### Impact on systemic discrimination?

Women's budgets are based on a number of cultural and structural assumptions:

##### *Cultural*

- women and men's economic and social relations are shaped by gender relations;
- gender is an economic issue as well as being a cultural, social and political issue;
- government budgets are not gender neutral, largely because men and women continue to have different roles in the workforce, household, family and community;

##### *Structural*

- government budgets can perpetuate or redress sex-based economic and social inequalities;
- the effectiveness of targeted and non-targeted government spending on poverty alleviation is enhanced by an understanding of the gender dimension of poverty;
- budgets impact on women and men 'directly by design' and 'indirectly as part of general policy'; and
- sex-based disaggregated data is a basis for disaggregating mainstream policies and drawing quantitative conclusions about government resource allocation.<sup>105</sup>

By linking these assumptions to the process of government resource allocation, Sharp believes gender-sensitive budgets can:

- raise awareness of the economic and social position of women relative to men;

---

<sup>104</sup> Sharp, R (2000) *The economics and politics of auditing government budgets for their gender impacts*, Hawke Institute working paper series (3), University of South Australia, Magill.

<sup>105</sup> Sharp, R (2000) *The economics and politics of auditing government budgets for their gender impacts*, Hawke Institute working paper series (3), University of South Australia, Magill, p 3 – 7.

- forge links between policies, programs and resource allocations;
- highlight the 'gender blindness' tendency of economic analysis and policy; and
- highlight the tendency to overlook the economic contribution of unpaid work.

Gender-sensitive budgets enable the drawing of quantitative conclusions, providing hard evidence of gender-based systemic discrimination. For example, in the 1985-86 South Australian government budget:

*Direct allocations in the form of specifically targeted budget allocations to women and girls in the community averaged 0.75 of a percent of the global budgets of the 26 participating agencies...[however] because such special programs are often highly visible politically it often appears that disadvantaged groups are well served...*

*...the remaining 99 percent of the budget that comprises indirect, or general, budget allocations for women in the community are crucial in their impact on women's economic and social positions because of their sheer size.<sup>106</sup>*

Quantitative findings provide a basis for analysis of patterns and implications of government resource allocation. In Sweden, work has commenced on developing gender budgets in the areas of government activity - health, employment/unemployment, industry and tertiary education. Aleskog describes the Swedish project as a long-term project to determine the basis for distribution of resources.

Researchers working with Swedish Ministry staff looked at South African models of gender budgeting as well as Australian work where the 'first and longest-running audit of gender impacts of budgets' has been undertaken.<sup>107</sup> Some of the problems encountered by the Swedish Ministry for Equality to date are:

- having sufficient gender disaggregated data to construct allocation patterns;
- developing relationships between the statistics and economic figures in the state budget;
- resistance from government/bureaucracy to seeing the budget process as a policy process, therefore warranting intervention by a non-treasury policy unit; and
- difficulty quantifying resources allocated to industry across different regions and understanding the context in which such decisions are made.<sup>108</sup>

<sup>106</sup> Sharp, R (2000) *The economics and politics of auditing government budgets for their gender impacts*, Hawke Institute working paper series (3), University of South Australia, Magill, p 7.

<sup>107</sup> Sharp, R (2000) *The economics and politics of auditing government budgets for their gender impacts*, Hawke Institute working paper series (3), University of South Australia, Magill, p 3.

<sup>108</sup> Aleskog, B (July 2000) Interview, Ministry of Industry, Employment & Communications, Stockholm.

As previously discussed, gender analysis is best carried out at all levels of government and across different stages of decision making processes, particularly during the formulation stage. At a national level, the Minister for Equality has requested the Auditor-General to perform gender analysis on budgets submitted by different statutory and government authorities. This work is complicated by the practice of only a few Ministers using gender-disaggregated information in their budget statements. The information provided by the Auditor-General in the future will help the Equality Minister liaise with other Ministers about their obligations to implement strategies and to evaluate what has been achieved for women and girls.

At a regional level, analysing the use of tax incentives to employers as a form of employment assistance in scattered regions of northern Sweden where high levels of unemployment exist, provides evidence of the underlying assumptions about the value of men's work over women's work as a basis for distribution of government resources.

Ideally, equality staff will be involved at all stages of financial decision making. For example in Britain the Minister for Equality sits on the Treasury committee that approves department projects and expenditure.<sup>109</sup> In Sweden, all expenditure proposals must pass through the Gender Equity Unit. Aleskog feels that this is too late in some ways:

*You can avoid big mistakes but you can't really change the whole proposal. If they haven't really been thinking about gender when starting the process....<sup>110</sup>*

Some work examining corporate financial sector practices is also being considered in Sweden, for example, examining the outcomes of women's applications for small to medium bank loans and income support to start enterprises when the banking sector has a history of approving large loans.

In Indonesia the representatives of the Women's Coalition for Justice and Democracy are investigating women's budget strategies to support the Minister for Women in the Indonesian government and to inform the woman's caucus in national parliament. The Coalition is lobbying for a 'gender aware' government budget<sup>111</sup> and is interested in work being conducted in countries such as Australia.

Children's budgets were also raised<sup>112</sup> as a way of highlighting the priorities reflected by patterns of government spending. Such budgets also require

---

<sup>109</sup> Stephens, K (July, 2000) Interview, Women's Unit, Cabinet Office, British Government, London.

<sup>110</sup> Aleskog, B (July 2000) Interview, Ministry of Industry, Employment & Communications, Stockholm.

<sup>111</sup> Arna, R (September, 2000) Interview, Women's Coalition for Justice and Democracy, Jakarta.

<sup>112</sup> David, P (August, 2000) United Nations Office of the High Commissioner for Human Rights, Geneva; Kelly, P (July, 2000) Children's Law Centre, Belfast.

departments and agencies to identify their areas of activity catering for children and young people. To date there has been little work on this strategy.

Conclusions drawn by Hall, based on the Australian experience of women's budgets statements since mid 1980s, help to flag issues for countries embarking on this type of systemic discrimination strategy. Issues raised include:

- the tension between high levels of government involvement in gender budget analysis (which promotes a 'whole-of-government' approach to gender analysis of financial decision making and enhances the legitimacy of the analysis exercise) versus high levels of community involvement (which forms an external critique and requires accountability of government);
- women's budget statements are very resource intensive and 'ultimately ... were too much work for the returns they yielded';
- the complex technical and administrative requirements can obscure the value of gender budgets, that is, they are just one aspect of gender analysis; and
- the impact of this type of budget analysis depends on the readiness and ability of others to take up the issues raised by the exercise, which is largely a product of the political context.<sup>113</sup>

Sharp<sup>114</sup> suggests that countries undertaking women's budget statements need to choose from a number of models, question the appropriateness of conceptual frameworks and tools, and consider relevant theoretical critiques. Hall's findings help others to calibrate their expectations of what gender-sensitive budget analysis can and can't achieve.

#### Key messages

- Economic decision making and resource allocation, eg government budgets, are areas that have traditionally been considered gender neutral.
- Gender-sensitive budget analysis reveals the gender impact of direct and indirect government resource allocation, helping to build an overview of the systemic discrimination inherent in government financial decision making.
- Whether the budget analysis is macro or micro influences the amount of resources required to conduct the exercise. Women's budgets generally require high levels of resourcing as a rule.
- Political will largely determines who employs this strategy and the impact the analysis has on government practice.
- Women's budgets can be useful at a particular point in time, creating understanding of how government budgets can perpetuate or redress sex-based economic and social inequalities.

---

<sup>113</sup> Hall, P (2000) *Institutional mechanisms for the advancement of women: Women's budget statements*, paper presented at the International Forum on Women's and Gender Studies, National Women's Education Centre, Japan, p 7-8

<sup>114</sup> Sharp, R (2000) *The economics and politics of auditing government budgets for their gender impacts*, Hawke Institute working paper series (3), University of South Australia, Magill, p 18.

### Gaining an equal share of power and decision-making positions

The key challenge facing current, or third-wave feminists, is gaining an equal share of power and decision-making positions for women.<sup>115</sup> This challenge is being addressed in the Scandinavian countries, visited specifically because of their record on achieving an equal number of women and men in parliament.

The experience of the Irish women's movement, whose activism and lobbying led to the establishment of a women only political party in 1996 - the Women's Coalition, sheds some light on the importance of women's representation as a pathway into political and decision-making positions.

### Impact on systemic discrimination?

There are three central barriers to women gaining an equal share of power and decision making positions:

- i. gender segregation across public and private life;
- ii. the 'male as norm'<sup>116</sup>, and
- iii. a prevailing culture that treats the discussion of 'power in the context of gender equality (as) controversial':

*Many people have found it hard to accept an approach that in their view incorporates the idea of a male conspiracy. But male power structures have developed as a direct result of men having a dominant position in political and economic life and being able to take decisions based on their own experience'.<sup>117</sup>*

In many countries men and women enjoy formal or legal equality. Sweden and Norway, unlike other countries, have managed to achieve a parliament with between 40% and 50% representation by women. In 1995 the United Nations declared 'that Sweden has advanced further along the path to equality and equal opportunity than any other nation'.<sup>118</sup>

There is a difference between arriving in parliament and being welcome, however:

*...research has shown that women find it more difficult to enter male (parliamentary) preserves than the other way round. They come up against the same difficulties as those described by women seeking to pursue a career in male dominated occupations. They are exposed to various kinds of exclusion mechanisms such as being ignored, being ridiculed or having information withheld from them.<sup>119</sup>*

---

<sup>115</sup> O'Loughlin, C (2001) *Women fighting feminism's third wave*, The Advertiser, Adelaide, 10/3/2001. Ms O'Loughlin, CEO of the South Australian Office of the Status of Women, notes the challenges faced by previous waves were gaining the vote (first wave) and gaining equal opportunity (second wave). Access to decision making and power is sometimes referred to as the 'glass ceiling'.

<sup>116</sup> Furst, G (1999) *Sweden – The equal way*, Swedish Institute, Stockholm p 63

<sup>117</sup> Furst, G (1999) *Sweden – The equal way*, Swedish Institute, Stockholm p 64

<sup>118</sup> Furst, G (1999) *Sweden – The equal way*, Swedish Institute, Stockholm p 8

<sup>119</sup> Furst, G (1999) *Sweden – The equal way*, Swedish Institute, Stockholm p 68

While the representation of women in parliament is a significant structural gain, it is undermined by the absence of women in leadership and executive positions in government and business sectors. A further barrier is gender-segregated allocation of portfolio responsibilities – women are more likely to be found managing social welfare issues such as health and education rather than economic and external portfolios such as treasury/finance or foreign affairs.

The women's movement in Northern Ireland is working on increased representation of women in parliament as well as the cultural difficulties experienced by women in parliament.

*The Northern Ireland Women's Coalition can be seen as a direct descendent of the work undertaken by women in the 1990s to gain access to shaping their future. It was founded in 1996 "as one answer to the lack of participation by women in politics in general; and in particular their lack of participation in negotiating the future political structures, relationship and conditions of Northern Ireland".*<sup>120</sup>

The first women only political party in Northern Ireland, the Women's Coalition has two motivations – delivering women an equal political footing with men and achieving a political structures on which a stable and peaceful. The Coalition has had party members elected in Northern Ireland parliament since 1996.

At a cultural level, key members of the women's movement, such as Bronagh Hinds, Director of the Ulster People's College and Deputy Human Rights Commissioner for Northern Ireland, are also working for change at a cultural level. The People's College in collaboration with an American women's lobby group, offers a training program for women in political parties. *DemocraShe*, launched in May 2000, is an intensive and accredited six-week training program for women.

*DemocraShe* includes sessions on communication, gender policy issues, assertiveness, building a media profile and strategies addressing the male dominated nature of political parties. It is about getting women more empowered politically – by making links between women politicians, the way men operate, between women NGOs and business women.

To encourage women's leadership in other sectors as a way of broadening support for women politicians, the Ulster People's College also runs a peace building program with Harvard University for women in conflict situations. The international program involves local preparation before a two-week placement at Harvard. Women in conflict situations then meet to exchange strategies and build networks.

---

<sup>120</sup> Hinds, B (1999) 'Women working for peace in Northern Ireland' in *Contesting politics: Women in Ireland, North and South*, Galligan, Y, Ward, E, and Wilford, R (Eds), Westview Press, Oxford, p 121.

A third element of leadership training for women in Ireland is a mentoring program for community advocates. Women NGO leaders will undertake training programs in Belfast and Washington. In particular the program covers lobby training and developing networks with women from a range of different sectors.

One outcome of the political training is that women in business and the public sector have approached the College to access the same training. In fact one company has offered some small resources because they are so interested in it.

Targeting a number of audiences and sectors is a deliberate strategy, aiming to build not only gender equitable structures but *'new structures that (are) different from previous ones and ... that could actually create better relationships in the future.'*<sup>121</sup> The approach of the Ulster People's College offers a case study on tackling both structural and cultural discrimination so as to gain an equal share of power and decision-making positions.

#### Key messages

- Women's limited participation in power and decision-making positions is a barrier to achieving substantive equality.
- Women who are in such positions bear the burden of the expectation they will effect significant cultural change. For this to happen, women in these positions need an understanding of gender equality issues and principles.
- Women working in parliament, either where they are in the minority or where their participation is more equitable such as in the Scandinavian countries, experience a culture of resistance by male colleagues who are not willing to share power.
- Women in key positions report feeling isolated and value having a broad base of women at all levels of their own agency and partner institutions, for example in government, business and leading social positions.

#### *Participation*

One of the fundamental principles for addressing systemic discrimination is participation by groups normally excluded from key processes. Participation by marginalised members of an organisation challenges the cultural power sharing, traditional structures within an agency and constructs about less powerful groups held by the dominant group. Participation is therefore a confronting and powerful strategy.

Participation is a central principle of the United Nations Convention on the Rights of the Child. Article 12 requires governments to ensure that children capable of forming their own views are given the right to 'express those views freely in all matters affecting the child, the views of the child being given due weight in

---

<sup>121</sup> Hinds, B (July, 2000) Interview, Ulster People's College, Belfast.

accordance with the age and maturity of the child'<sup>122</sup> and makes specific reference to the right to be heard in judicial or administrative proceedings.

Since the ratification of the convention, there has been much debate about participation, about whether or when it is appropriate and how to ensure it in a meaningful rather than tokenistic.

*The Convention on the Rights of the Child has given a legal basis for children and adolescents to discuss anything they want with adults – in schools, families, public authorities. They are not passive in society – they are partners, they should be heard but they should not have more power than any adult, not overpower them.*

*We have to know what the meaning of participation is and what the limitations are.*<sup>123</sup>

The Committee on the Rights of the Child stresses two aspects of Article 12. First, that children must be seen 'as [an] active subject(s) of rights'. Second, that the 'rights of the child set out in .... Article 12 does not in themselves amount to self-determination but to involvement in decision-making.'<sup>124</sup> Getting the balance right between these two elements of participation is a challenge acknowledged by children's rights activists, reflecting the tensions in the participation debate.

The tensions in the debate also draw attention to the social construction of children, in the way that the suffragette movement and feminism challenged the portrayal of women:

*I think both the United Kingdom and Australia share this ambivalent attitude towards children being objects and attachments rather than citizens. The model of citizens that they have excludes children at a very deep, basic level – it is common law tradition.*<sup>125</sup>

#### Impact on systemic discrimination?

Reflecting on her experience in the United Kingdom women's movement, as well as the Good Friday Peace negotiations in Northern Ireland, Bronagh Hinds firmly believes that participation through consultation is one of the main ways of 'changing the nature of the relationships between the people in power, policy makers and affected groups'.<sup>126</sup>

---

<sup>122</sup> United Nations (1989) Article 12, the Convention on the Rights of the Child, Geneva.

<sup>123</sup> David, P (August, 2000) Interview, United Nations Office of the High Commissioner for Human Rights, Geneva.

<sup>124</sup> UNICEF (1998) *Implementation handbook for the convention on the rights of the child*, New York, p 145.

<sup>125</sup> Rayner, M (July, 2000) Interview, Greater London Authority Office for the Children's Commissioner, London.

<sup>126</sup> Hinds, B (2000) Interview, Ulster People's College, Belfast.

Ten years after the ratification of the Convention on the Rights of the Child, both the concept and requirement of participation with children and young people continues to challenge cultural thinking. Reluctance to acknowledge children's civil rights is akin to the suffragettes' struggle for voting rights. Country reports to the UN Committee on the Rights of the Child show that civil rights are the most challenging aspect of the convention at the end of its first decade. The 'fears raised by this article have served to justify' an examination by parents and teachers of language and practices contrary to the child's interest.<sup>127</sup> It will be interesting to examine country reports ten years hence for new cultural positions in participation and whether others beyond parents and educators are also questioning cultural practice.

Rayner sees participation as the only way of making sure that marginalised groups, such as children, are taken seriously. The board members of the Greater London Authority Office for the Children's Commissioner are young people aged 9 to 16 years. They are involved in the day to day affairs of the office and regularly visit the office to raise issues and hold discussions. The office staff is answerable to the board of children in a de facto sense, and to the UK Council of Children's Rights Alliance in a de jure sense.

Consultation is a popular form of participation. Rayner argues that genuine consultation is particularly important for children as a group because:

*...most children aren't going to run a discrimination case so they rely on the good will of adults and the existence of advocates in the institutions that they perceive ignore or imprison them. Being ignored is the worst complaint and it is the most common complaint we get – being ignored, not listened to or taken seriously.<sup>128</sup>*

Consultation helps to ensure that the policy being developed does not perpetuate discrimination in an intentional or unintentional way. Consultation with marginalised groups is an important way of overcoming the silencing of marginalised groups. Consultation and participatory decision making, which can be time and resource consuming, are also essential for an accurate understanding of the experience of systemic discrimination.

The Equality Commission for Northern Ireland stipulates that public authorities must discuss the agency's equality scheme with affected sectors of the community.<sup>129</sup> In fact the *Northern Ireland Act 1998* actually imposes a 'good relations' duty, requiring the promotion of good relations with persons of different religious belief, political opinion and racial origin. Special mention is made of the Irish Travelers community, a section of the community living a transient or nomadic life and who experience discrimination as a consequence of their

<sup>127</sup> UNICEF (1998) *Implementation handbook for the convention on the rights of the child*, New York, p 148.

<sup>128</sup> Rayner, M (July, 2000) Interview, Greater London Authority Office for the Children's Commissioner, London.

<sup>129</sup> Under S 9 par 4 2 (a) and (b) of the *Northern Ireland Act 1998*

lifestyle.<sup>130</sup> Consultation with constituent groups is a pre-requisite stage in the development of the equality schemes.

Paddy Kelly, Children's Commissioner with the Northern Ireland Human Rights Commission, recalls how difficult it was to get young people to be seen as a constituency during the development of the equality schemes required of all public sector agencies in Northern Ireland.<sup>131</sup> Agencies reported being generally at a loss in knowing how and where to start consulting with children and young people. One of the problems is not having an identified network of young people to consult with even though children may represent their core constituency, for example in the education or juvenile justice sectors. It is also complicated by the tendency to separate children's rights from other human rights, resulting in inequitable treatment of young people.

David<sup>132</sup> identified schools and education institutions for young people as one of the most challenging areas to realise children's rights, largely because of the traditional demarcation of power. A lack of human rights curriculum and an absence of human rights language in school policy and practices reflect an inequitable distribution of power and a reluctance to give young people participation status.

David warns against the mis-use of the participation principle, particularly children's groups (and any other advocacy groups) being manipulated by other players in the human rights sector.<sup>133</sup> At the time of interview, there was discussion in a number of countries about non-government organisations being established as 'fronts' to other agencies wishing to mediate the human rights discussion.

Others warn of participation as 'a new form of tyranny'.<sup>134</sup> There are pitfalls in the participation processes that are tokenistic. When participation is not well planned or appropriately matched to problems, it cannot achieve what it sets out to.

Ways of measuring levels of participation are yet to be worked out,<sup>135</sup> but over time country reports to UN monitoring committees shall provide some evidence. Developing human rights indicators, a current project within the Office of the High Commissioner Research and Right to Development Branch, is an important element of a right-to-development approach. Accessing information is often the first step in participation. 'Children's rights shops' have been set up in the Netherlands, Belgium and Israel offering young people rights based information

---

<sup>130</sup> Equality Commission for Northern Ireland (1999) *Guide to the Statutory Duties – A guide to the implementation of the statutory duties on public authorities arising from Section 75 of the Northern Ireland Act 1998*, Belfast, p 11.

<sup>131</sup> Kelly, P (July, 2000) Interview, Children's Law Centre, Belfast

<sup>132</sup> David, P (August, 2000) Interview, Office of the High Commissioner for Human Rights, Geneva.

<sup>133</sup> David, P (August, 2000) Interview, Office of the High Commissioner for Human Rights, Geneva.

<sup>134</sup> Cooke, B and Kothari, U (2001) *Participation: the new tyranny?*, Institute for Development Policy and Management, University of Manchester.

<sup>135</sup> David, P (August, 2000) Interview, Office of the High Commissioner for Human Rights, Geneva.

and access to professionals such as lawyers and health specialists. It is a very simple concept that is functioning well. The shop fronts help young people feel equipped to navigate systems which may otherwise be inaccessible to them.<sup>136</sup> In New South Wales, the Women's Information Referral Service serves the same purpose. Women can make free calls from anywhere in the state to access information about services that will help them improve their well-being and quality of life.

The barriers to civil, political, and economic participation experienced by young people echo the experience of suffragettes and contemporary feminists. They also have some parallels with the indigenous experience of self-determination, enabling culturally appropriate and comprehensive participation. The right to social, political, economic and political participation for women, children and young people has yet to be realised.

#### Key messages

- Participation disrupts entrenched structures and cultural practices. Women and children continue to find resistance to their right to participate equally economically, socially, politically and culturally.
- Participation offers an important alternative to disempowered groups unlikely to use a complaint process.
- Increasingly participation via consultation with target groups is a pre-requisite to government decision-making and policy development.
- It is possible to mis-use and abuse participation processes, eg 'tokenistic participation and consultation processes'.
- Ways of measuring outcomes of participation are yet to be worked out.
- Participation is subject to the political will and ideological persuasion of central agencies.

#### *Human rights education and awareness raising*

The United Nations declared 1994 – 2004 the international decade of human rights education. The purpose of the decade is to draw international attention to education, training and public information in the human rights field and to establish capacity within institutions to support and maintain such education. Elena Ippolitti, the United Nations staff member with responsibility for the decade of human rights education, describes education as a life long process aimed at empowering people as well as changing behaviours.

Education is used in a broad sense, involving all sectors, with schools treated as just one part of a 'human right education infrastructure'.

*Even within the school system you have to address all different categories of people within it – teachers, parents, others working in the school, school administration, community. Everyone is involved, not only the students. It is a participatory process, which all can be involved in and it is more than*

---

<sup>136</sup> David, P (August, 2000) Interview, Office of the High Commissioner for Human Rights, Geneva.

*just transferring information. The question of human rights is something everyone has had an experience of and you do not have to have learnt maths to experience human rights violations or principles.*<sup>137</sup>

To emphasise participation, Ippolitti talks about learning environments (rather than teaching environments) where the informal curriculum, such as decision making processes and grievance procedures, is just as important as the formal curriculum.

#### Impact on systemic discrimination?

For many people, human rights are inaccessible, intimidating and irrelevant. Education can help to shift cultural perceptions by desensitising people, helping them to understand what is accurate and what is mythical about human rights.

The long term outcomes of education and awareness raising are dependent on a number of things – the context people live in, the state of readiness of the audience; the perceived costs/benefits; the social culture (intimidating or democratic); previous experience of rights violations. More immediate outcomes, however, can be achieved by correcting beliefs based on myths and making the concept of human rights personally relevant.

Education can help to address the ‘what about me?’ syndrome – the perception that ‘my rights must be diminished if I acknowledge someone else’s rights’. For example, teachers and parents concerns that increased recognition and exercising of children’s rights will erode or undermine adult rights as well as their ability to control/discipline children. Ippolitti uses the ‘what about me?’ as a starting point when working with adults.

Another dimension of the ‘what about me’ syndrome, which is a deficit model, is the ‘with rights comes responsibilities’ approach, used most frequently when children’s rights are being discussed.<sup>138</sup> The concept of responsibilities is offered as a logical counterweight to awarding rights, but the sub-text is one of curtailing the power given to children or other marginalised groups. It is argued that children are not developmentally capable of assuming responsibilities. Similar arguments were used when discussing women’s ability to hold political or professional positions. Such reactions reflect the absence of a human rights culture.

Human rights can be personalised by encouraging people to think about the rights they have but also consider how they may be violators and upholders of the rights of others.

There are also long-term cultural benefits when operating from a rights basis. For example in a school situation, a rights approach can help prevent conflict. By

---

<sup>137</sup> Ippolitti, E (August, 2000) Interview, United Nations Office of the High Commissioner for Human Rights, Geneva.

<sup>138</sup> Flynn, C (1994) *Rights into reality - Report on national consultations with young people and children’s and youth advocates*, National Children’s and Youth Law Centre, University of New South Wales, Sydney.

working in non-confrontational way, conflict can be diffused rather than escalated. A medium to long term outcome is a climate of respect, which is generally more rewarding than working in a climate of fear or distrust.

The mid term evaluation of the decade of human rights education, being conducted by the United Nations OHCHR in 2000, will gauge how much human rights education is happening and whether it is a coordinated approach between ministries, with non-government organisations, academics, unions and so on. It is also a chance to identify trends among different sectors. In 2001 the UN will work on a compilation of different practices and approaches for different sectors of the community.

The reform process in Northern Ireland following the Good Friday Peace Agreement offers an interesting case study on human rights education. Education is seen as an important part of implementing the Agreement across the community. Human rights activists working on the project feel strongly that the content needs to be frank and sophisticated in order to help future generations in dealing with the legacy of the conflict.

The Children's Law Centre conducted an audit of human rights education and teaching. Kelly points out that while it wasn't a formal audit, it did help to identify some gaps and areas where the Centre could work with the education department to increase the effectiveness of human rights education. The audit found that most human rights education is at a basic 'what are human rights?' level and that it is not offered to all age groups. There is little instruction about the rights children and young people have and how to exercise them. Kelly believes that historically children's rights have been ignored because the conflict determined other priorities.

Two areas Kelly and others identified as practical starting points in education programs is discussion of a Bill of Rights, while the other is building human rights education into all curriculum levels. Both of these projects require working with the non-government sector and influencing stakeholders. The aim is to build a culture of human rights in school age generations and to support long-term implementation of the Good Friday Peace Agreement to show alternate ways of responding to the conflict children and young people have lived with since they were born. The Northern Ireland curriculum development project promises to be instructive for educators and human rights professionals in other countries.

To impact at a structural level, education programs need to target central agency audiences such as policy makers, legislators and regulators. In Belgium, the Flemish Children's Ombudsman, a recently established office with links to the European Network of Children's Ombudsmen, works to ensure that legislative developments comply with the Convention on the Rights of the Child. A target audience for the Ombudsman is legislators and politicians, helping them ways proposed legislation can take into account the needs and rights of children, a

group frequently overlooked as an interested party in legislative change. Ombudsman's office staff describes this approach as long term but essential if there is to be both structural and cultural embedding of children's rights.

It is worth mentioning social activism as a form of education and awareness raising. Australian Moira Rayner, former Equal Opportunity Commissioner for Victoria and current executive director of the Office of Children's Rights Commissioner for London, is in a good position to draw comparisons between the acceptance of a human rights approach in Australia versus European countries such as the United Kingdom.

Rayner suggests that the level of human rights social activism in the United Kingdom that is far beyond that found in Australia, is a key factor in desensitising people towards a human rights approach. This could be attributed to the European Union's rights framework and 'rights and good government (being) unconsciously associated at one level or another with economic development'.<sup>139</sup> Human rights activism and constant use of human rights language are strategies that must continue to be employed in Australia.

At the time of writing, rights based debates in Australia are helping to shine the spotlight on rights issues and the rights system. The issues being debated are varied, covering:

- mandatory sentencing laws which have a discriminatory effect on indigenous youth;
- a high court case involving the rights of single and lesbian women to access in-vitro fertilisation services, and
- the plight of 'illegal' refugees arriving on Australian shores.

The high profile public debates become defacto education campaigns. While the outcomes of the defacto campaigns are unpredictable, they do serve to bring rights based examples, concepts and conventions into people's day to day consciousness. The politicisation of the issues while helping to draw public attention can also undermine an objective airing of the issues. It is an opportunity, however, for individuals to publicly take a stand for rights, demonstrating support for progress in this area.

While the debate concerning single and lesbian women's access to assisted fertility services (the IVF case) brought both CEDAW and CRC into the spotlight, it also showed how one group's rights may be used over another groups to maintain the status quo and perpetuate systemic discrimination. The 'best interests of the child' in the CRC was interpreted as the right of the child to know and have access to both a mother and father. This interpretation endorses traditional family structures. Others argued the case on the grounds of

---

<sup>139</sup> Rayner, M (July, 2000) Interview, Greater London Authority Office for the Children's Commissioner, London.

discrimination against women on the grounds of marital status, thus making restricted access to services in contravention of CEDAW.

The IVF case illustrates the myth that human rights are finite – that if one group's rights are granted, then another group's rights must be diminished. Granting rights to a group, such as children, increases rather than decreases the pool of rights available. The aim of human rights conventions is to broaden access to rights that is increasing them. The real challenge is that decision making power and authority is being redistributed, unsettling the systemic relationships established over time. Human rights educators must find ways to communicating the benefits of broadening the pool of rights and collective decision making.

Debates such as those played out in Australia help to remind us that human rights discourse does not provide all the answers at present, but it is a necessary framework for progressing issues.

Social culture is an important factor in the success or failure of education strategies. Human rights in a totalitarian and non-participatory environment don't mean much. It is also important to work across society including media, the corporate sector, government and religious institutions. A 'whole of society approach' is one of the goals of the decade of human rights education.

Any program to overcome systemic discrimination must include an element of education and awareness raising, otherwise a backlash to cultural and structural change is likely.

#### Key messages

- Education and awareness raising are necessary components of any strategy for tackling systemic discrimination, particularly as the early reform relies on understanding the need for structural and cultural reform.
- A range of outcomes is possible with education – from dispelling myths to producing behaviour change.
- To be effective human rights education needs to use a 'whole of society' and as much as possible be reflected, rather than undermined, by the corporate culture of organisations.
- The Northern Ireland curriculum development project is a valuable case study on school based human rights education.
- Education is a 'never ending' strategy – there will always be new human rights situations challenging normative assumptions, structures and practices.

#### *Self determination*

The concept of indigenous self-determination clearly overlaps with discussion of systemic discrimination. It seeks to establish a set of parallel structures, which do not inhibit the participation of indigenous communities.

Self-determination has three stages:

1. establishing the principle of non-discrimination (via a treaty statement);
2. affirmative action strategies to realise the principle of non-discrimination; and
3. Self-determination, enabling the group to 'freely determine their political status and freely pursue their economic, social and cultural development'.<sup>140</sup>

The draft United Nations treaty on indigenous rights combines the three stages into one framework. The treaty uses three principles: non-discriminatory access to resources, positive discrimination measures and self-determination. Society is at least familiar with the first two principles, although they are yet to be fully realised. It is, however, the third principle on self-determination that offers the greatest challenge.

#### The impact on systemic discrimination?

Self-determination is the building of a culturally appropriate system within a mainstream system.

*Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.*<sup>141</sup>

Rather than struggle to find a toehold in the majority culture, self-determination enables indigenous people to establish structures based on their culture and social values. The stable community can then meet the dominant community as an equal partner in economic, political and cultural transactions. New inequities, such as gender inequities, however may be established and perpetuated in the structures of the indigenous community.

While self-determination is being discussed in a number of countries, Burger<sup>142</sup> points to the difficulty people have conceptualising what is needed to enable self-determination, that is going beyond non-discrimination and equal access. Self-determination is new ground for majority cultures that are still traveling from their assimilation backgrounds. From another angle, legal structures emphasising individual rather than group rights further complicates recognising collective rights, undermining moves towards self-determination.

Self-determination challenges two core elements of assimilation policies that have become entrenched as structural discrimination in the dominant culture.

---

<sup>140</sup> Burger, J (August, 2000) Interview, Office of the High Commissioner for Human Rights, Geneva.

<sup>141</sup> United Nations (2000) *Draft Treaty on the Rights of Indigenous Peoples*, Article 21 (web source)

<sup>142</sup> Burger, J (August, 2000) Interview, Office of the High Commissioner for Human Rights, Geneva.

First, the belief that minority cultures should be assimilated so they become 'like us', thereby eliminating difference. Second, the power relationships produced by assimilation policies that placed minority groups at the 'bottom of the ladder'. These are the reasons why self-determination can be seen as a strategy for overcoming systemic discrimination. At the same time, these are the reasons why self-determination is so confronting and difficult to establish.

It is possible to draw parallels between the process of self-determination and realising substantive equality for women.<sup>143</sup> Non-discrimination principles underpinned the international push for women's voting rights and Aboriginal voting rights in Australia. Positive discrimination strategies such as affirmative action in public sector employment and representation in decision-making positions aim to realise both indigenous and sex-based rights. Self-determination movements and third wave feminism face the same stumbling block – access to power and decision-making.

A final similarity is the importance of maintaining difference. Feminists have been accused and ridiculed for 'wanting to be like men'. This is actually a mistaken belief. Instead women are seeking to maintain their sex-based identity while having equal participation and substantive equality. Indigenous people are seeking to maintain their cultural integrity and therefore their difference. An example of this is the debate over indigenous law versus dominant culture law. In a sense, women's rights movement and indigenous rights are both working towards co-existence.

Advocates of self-determination strategies argue that society benefits by realising the potential of the minority groups as well as the spin offs from social harmony, cultural sustainability and political stability.

Gay McDougall, however, suggests that self-determination is a different discourse to systemic discrimination and that:

*'...they are heading down a different road. Even within indigenous peoples, it has different implications in different places. The situations of indigenous people in North America is quite different in terms of their legal status than indigenous groups in Russia or Guatemala. I think that is a complex to draw an analysis from.'*

### Key messages

- Self-determination seeks to value and preserve differences between majority and minority groups.
- It challenges the ideology of assimilation and entrenched power structures that place marginalised groups at the 'bottom' of the ladder.
- Self-determination overcomes systemic discrimination by establishing structures based on the cultural heritage of minority groups, which operate separately to the dominant culture's system.

---

<sup>143</sup> Burger, J (August, 2000) Interview, Office of the High Commissioner for Human Rights, Geneva.

- There is an argument that self determination is a different discourse to systemic discrimination. It offers, however, a conceptual framework that models of systemic discrimination can be compared against.

## Emerging themes and conclusions

Discrimination is conceptualised as interpersonal rather than systemic. It is this conceptualisation which:

*...shapes (our) tactics. People are not as comfortable looking directly at it as a system that is ensconced and one which, as long as you build on top of the current rules of that institution, it will never be an institution that represents or serves or incorporates a truly diverse constituency.*

*I think it [systemic discrimination] is a hard concept for a lot of people to understand. I think that it is the issue, certainly in racism, the contemporary situation.<sup>144</sup>*

The key concern driving this study is that systemic discrimination will never be overcome as long as there is a reliance on direct and indirect complaint mechanisms. There is a philosophical tension between constructing discrimination as a relationship between individuals in the liberal tradition and considering discrimination as a group experience entrenched in and perpetuated by the operation of social institutions. This study sought practical examples of strategies for overcoming systemic discrimination while operating within a legal framework based on the liberal tradition of individualism.

The interviewees emphasised the flaws in a model that is reliant on individual complaints, showing how it fails to address direct and indirect discrimination. As discussed earlier, it is difficult to get women and young people to bring individual complaints. Adversarial discrimination practice, like that found in Australia, is high in financial and personal costs while having a low impact on systemic issues:

*In the end I thought, well, I've had enough of you guys and I took it to the Anti-Discrimination Board and got an apology. But it was two years of hard work, I'll never ever go through it again.<sup>145</sup>*

Findings delivered in direct or indirect complaint cases rarely address the systemic dimension of the situation. In discrimination cases, findings and penalties focus on the individual complainant, limiting the potential gain from a single complaint. In indirect discrimination cases, the discriminatory policy or practice is isolated from the rest of the institutional culture, leaving the culture largely unchallenged. By using the concept of systemic discrimination, the structure and culture of the organisation comes into focus, so the context of the discrimination can be addressed.

---

<sup>144</sup> Gay MacDougall (August, 2000) Interview, United Nations Committee for the Elimination of Racial Discrimination, Geneva.

<sup>145</sup> Public Interest Advocacy Centre and Wirringa Baya Aboriginal Women's Legal Centre (2001) *Discrimination – Have you got all day? Indigenous women, discrimination and complaints processes in NSW*, Sydney, report summary.

Where group remedies exist they are under-utilised, for example the representative complaint mechanism in the NSW Anti-Discrimination Act (1977) Section 88 (1A) and the *Sex Discrimination Act* (1984) Section 69 (2). Ronalds<sup>146</sup> notes that little use has been made of these mechanisms and *'their potential impact remains largely unexplored'*. Implementing class complaints under the Sex Discrimination Act is unnecessarily 'expensive and complex'. Ronalds describes it as *'an example of falling into the practices of lawyers by increasing complexities unnecessarily... whether they are realistic in terms of the complaint itself or the type of remedy which may be available at the end of the hearing'*.

While examining the limited use of the representative complaint mechanisms may lead to changes precipitating more complaints, it may also highlight the difficulties created by situating representative complaints within a system that reinforces individuals over groups.

Thinking at a systemic level is challenging, as demonstrated by the Lawrence Inquiry and the introduction of child protection legislation in NSW following the Wood Royal Commission into police corruption and child abuse. It is necessary, however, to specifically tackle systemic, accepting that is a long-term commitment.

Responding to systemic discrimination is complicated by a lack of overt discussion of it as a type of discrimination, distinct from direct and indirect discrimination. The Lawrence Inquiry highlights the importance of defining and talking explicitly about systemic discrimination. Foulger suggests that systemic discrimination is a term associated with the 70s and 80s, which has since fallen out of use. There was support by the majority of interviewees for a definition of systemic discrimination, which they felt would assist them in their work.

There was support from all interviewees for work on modeling systemic discrimination as a type of discrimination:

*I think there is some utility in that. Institutional racism is real, at least for people that experience it and not real for people that don't. Even people that would recognise interpersonal racism... cannot see a system that is constructed in a way to benefit some people and be a disability for others. So I think the more we work to define that and give it more of a sense of visibility to the people that aren't experiencing it, the better.*<sup>147</sup>

*The language used to discuss human rights is usually deliberate and critical to defining problems and associated solutions. 'Systemic discrimination' is a useful term because it helps to distinguish between individual practice and institutional practice which in turn helps to identify*

---

<sup>146</sup> Ronalds, C (1998) *Discrimination law and practice*, The Federation Press, Sydney, p 168 – 169.

<sup>147</sup> Gay MacDougall (August, 2000) Interview, United Nations Committee for the Elimination of Racial Discrimination, Geneva.

*either individual or institutional ways of addressing human rights violations.*<sup>148</sup>

Modeling systemic discrimination has two potential benefits. First, as we are unlikely to abandon the concepts of direct and indirect discrimination and associated complaint processes, a better understanding of systemic discrimination could show how individual complaints can be broadened to consider the systemic nature of discrimination. Second, modeling may help to document alternative to complaint based discrimination processes. As a starting point for modeling, agencies such as ombudsmen, human rights, equal opportunity and affirmative action bodies are well positioned to analyse their work in terms of structural and cultural impact.

Agencies that have started applying a systemic approach to stages of their complaint and inquiry processes make interesting case studies on which to base a model. The work of the Human Rights and Equal Opportunity Commission (Australia) and the Equal Treatment Commission (the Netherlands) demonstrate how to apply a systemic approach to information gathering in complaint handling and inquiries.

The Anti-Discrimination Board in New South Wales uses the concept of group in a report analysing Hepatitis C discrimination. The report, called *C-Change*, has a chapter on discrimination experienced by particular communities, describing the shared experiences of groups and the consequences of group membership. The rationale for this chapter is that by understanding group level discrimination it is possible to identify 'unique qualities, particular implications and or needs to be understood in a broader context.' Also highlighting community level issues 'gives a more accurate picture of the nature of' discrimination for communities.<sup>149</sup> Acknowledgment of discrimination against groups is a step towards creating systems capable of addressing group needs, such as the Dutch system for group complaints.

The findings stage of discrimination complaints and inquiries has the capacity to draw attention to the structural and cultural elements of systemic discrimination. Hodges<sup>150</sup> recalls an instance when an industrial tribunal commissioner in India as part of her findings required an agency to address specific structural and cultural problems that produced and reinforced the discrimination under discussion. Hodges described this as revolutionary and a feasible way of stretching existing systems to fit the challenge of systemic discrimination.

Current legal processes for protecting human rights can also be analysed as part of a systemic discrimination modeling exercise helps. Such analysis can reveal

---

<sup>148</sup> Ippolitti, E (August, 2000) Interview, United Nations Office of the High Commissioner for Human Rights, Geneva.

<sup>149</sup> Anti-Discrimination Board (NSW) (2001) *C-Change – Report of the inquiry into Hepatitis C related discrimination*, Sydney, p 100.

<sup>150</sup> Hodges, J (August, 2000) Interview, United Nations International Labour Organisation, Geneva.

discriminatory practices such as legislative ceilings on pay-outs (a structural barrier) and trends of conservative tribunal assessments of the value of distress (a cultural barrier).

*Where ceilings are placed on the amount of available damages or where tribunals steer an overly conservative course, the trauma of discrimination is compounded by a sense that the legal system operates in a discriminatory way, placing one class of litigant [such as defamation complainants] above another [such as discrimination complainants]. This is especially ironic when the instrument which generates the imbalance was itself designed to prevent and eliminate discrimination.*<sup>151</sup>

Interviewees generally did not talk about incentives for change as part of current practices. When specifically asked about incentives, respondents commented this is a difficult area of systemic change. Responses, which were limited, fell into three groups – public shaming/moral duty, reducing/avoiding costs associated with ongoing complaints and acceptance of statutory duty. Given that discrimination penalties are not binding in some jurisdictions, analysing incentives as part of an exercise in modeling systemic discrimination may show how to increase the impact from individual complaints.

In addition to modeling systemic discrimination, documenting rights processes and outcomes from a collective or systemic framework can also help. Documenting changes in culture and structure can help us understand the characteristics of social change and helps foster the transfer of solutions. Documenting failures can help us answer the questions of what the barriers to change are, what is required for social change to occur and show the areas still to be tackled.

Publications that help to introduce the concept of collective rights are a necessary part of the documenting process. One example is the *Implementation handbook for the Convention on the Rights of the Child*, released by UNICEF in collaboration with the United Nations Committee on the Rights of the Child<sup>152</sup>. This publication makes the convention, its language, spirit and processes accessible to a wide range of audiences. David<sup>153</sup> describes it as an attempt to debunk unhelpful mythology that often grows around human rights structures. The publication seeks to 'defuse' the inevitable backlash against rights from sections of the community that are threatened by other groups exercising their rights.

The 'paradox of equality' presents a case for continued work on systemic discrimination. After a century of suffragette and feminist activity, and after a

---

<sup>151</sup> Andrades, C (1998) *What price dignity? Remedies in Australian anti-discrimination law*. Research paper no. 13, Law and Bills Digest, Parliamentary Library, Canberra., p 15 and 16.

<sup>152</sup> United Nations Children's Fund (1998) *Implementation handbook for the Convention on the Rights of the Child*, UNICEF Division of Communication, New York.

<sup>153</sup> David, P (August 2000) Interview, United Nations of the High Commissioner for Human Rights, Geneva.

decade of the Convention on the Rights of the Child, many people think that equality must have been achieved by now. The following comments by Furst about equality in Sweden (one of the most progressive equality nations) are widely applicable to countries in both hemispheres:

*The ideology is equal but the reality is segregated. Values have changed but structures persist. The fact is that most of what we see around us is gender-typed. Things that are gender-typed as female are considered less valuable. Family life and everyday problems carry less political clout because they are considered women's issues.*<sup>154</sup>

The fact the structures continue to exist may suggest that the change in social values is not widespread enough. The paradox highlights a continuing need for simple narratives showing everyday experiences of systemic discrimination to help people recognise the costs of such discrimination. The narratives can also show that formal equality does not ensure substantive equality.

In the current conservative domestic and international climates, it is difficult to imagine women and children's rights gaining currency as social norms. However where revolutions may not flourish, evolutionary processes may succeed. Organisations in many of the countries participating in this study tour are trialing new approaches addressing the context and structures, that is the social systems, which fuel and perpetuate discrimination. The plateauing of the impact of direct and indirect discrimination methods could be a catalyst for exploring new ways of doing human rights business.

It is now necessary to focus on systemic discrimination, always in the background of human rights evolution. Now is the time to bring systemic discrimination to the foreground as the basis of a revolution in women and children's rights.

#### Key messages

- The concept of systemic discrimination brings the structure and culture of an organisation into focus, so the context the discrimination occurs can be addressed.
- Responding to systemic discrimination is complicated by an absence of overt discussion of it as a type of discrimination distinct from direct and indirect discrimination.
- There is widespread support for modeling systemic discrimination among the Fellowship participants.
- Modeling could inform direct and indirect complaint processes, broadening the impact of these processes on systemic discrimination.
- An area of analysis yet to be fully explored is which incentives facilitate organisational change and how to structure such incentives into individual complaint and investigation judgments.

---

<sup>154</sup> Furst, G (1999) *Sweden – The equal way*, Swedish Institute, Stockholm.

- Simple narratives are required to expose the 'paradox of equality' and the failure to deliver substantive equality to women, children and young people.

## Appendix 1 - Participating organisations

### Australia

Winston Churchill Trust  
Phone: 02 6247 8333/ 1800 777 231  
Website: [www.churchilltrust.org.au](http://www.churchilltrust.org.au)  
Location: Canberra

United Nations Information Centre  
Phone: 02 9262 5111  
Email: [unsyd@ozemail.com.au](mailto:unsyd@ozemail.com.au)  
Location: Sydney

Human Rights and Equal Opportunity Commission  
Phone: 02 9284 9600  
Website: [www.hreoc.gov.au](http://www.hreoc.gov.au)  
Location: Sydney

National Children and Youth Law Centre  
Phone: 02 9398 7488  
Website: [www.ncylc.org.au](http://www.ncylc.org.au)  
Location: Sydney

Anti-Discrimination Board, New South Wales  
Phone: 02 9268 5555  
Website: [www.lawlink.nsw.gov.au/adb](http://www.lawlink.nsw.gov.au/adb)  
Location: Sydney

New South Wales Department for Women  
Phone: 02 9287 1860  
Website: [www.women.nsw.gov.au](http://www.women.nsw.gov.au)  
Location: Sydney

### Sweden

Division for Gender Equity  
Ministry of Industry, Employ, Commission  
Phone: 46.8.405 1000  
Website: [www.naring.regeringen.se](http://www.naring.regeringen.se)  
Location: Stockholm

Office of Equal Opportunities Ombudsman  
Phone: 46.8.440.1060  
Website: [www.jamombud.se](http://www.jamombud.se)  
Location: Stockholm

### Norway

Office of Gender Equality Ombudsman  
Phone: 47.22 242 526  
Website: [www.likestillingsombudet.no](http://www.likestillingsombudet.no)  
Location: Oslo

### France

UNESCO Youth Coordination Unit  
Phone 33.1.4568 1653/54  
Website: [unesco.org/youth](http://unesco.org/youth)  
Location: Paris

### Belgium

University of Ghent Children's Rights Centre  
Website: <http://allserv.rug.ac.be/~fspieess/>  
Location: Ghent

Flemish Children's Rights Commissioner  
Phone: country code + 2.552 98 00  
Website: [www.kinderrechtencommissariaat.be](http://www.kinderrechtencommissariaat.be)  
Location: Brussels

The Netherlands  
Equal Treatment Commission  
Phone: 030 233 4800  
Website: [www.cgb.nl](http://www.cgb.nl)  
Location: Utrecht

### Britain

Office of Children's Rights Commissioner for London  
Phone: 44.20. 7278 4390  
Website: [www.londonchildrenscommissioner.org.uk](http://www.londonchildrenscommissioner.org.uk)  
Location: London

Commission for Racial Equality  
Phone: 44.207.828 7022  
Website: [www.cre.gov.uk](http://www.cre.gov.uk)  
Location: London

The Women's Unit, Cabinet Office  
Phone: 44.22.7273 8813  
Website: [www.cabinet-office.gov.uk/womens-unit](http://www.cabinet-office.gov.uk/womens-unit)  
Location: London

Equal Opportunities Commission  
Phone: 44.845.601 5901  
Website: [www.eoc.org.uk](http://www.eoc.org.uk)  
Location: Manchester

### Ireland

Irish Equality Authority  
Phone: 353.1.417.3333  
Website: [www.equality.ie](http://www.equality.ie)  
Location: Dublin

**Switzerland**

United Nations  
Office of the High Commissioner for Human Rights  
Research and Right to Development Branch  
Phone: 41.22.917 0234  
Website: [www.unog.ch](http://www.unog.ch)  
Email: [webmaster@unog.ch](mailto:webmaster@unog.ch)  
Location: Geneva

International Labour Organisation  
Equality and Human Rights Coordination Branch  
Website: [www.ilo.org](http://www.ilo.org)  
Location: Geneva

**Indonesia**

Indonesian Women's Coalition for Justice & Democracy  
Phone: 62.21. 573 6873  
Fax: 62.21. 573 6873  
Location: Jakarta

National Commission on Violence Against Women  
Phone: 62.21.390.3963  
Website: [www.kmonasperempuan.or.id](http://www.kmonasperempuan.or.id)  
Location: Jakarta

Indonesian Human Rights Commission  
Phone: 62.21.392 5227  
Website: [www.komnas.gov.id](http://www.komnas.gov.id)  
Location: Jakarta

**Northern Ireland**

Equality Commission for Northern Ireland  
Phone: 028.90.500.600  
Website: [www.equalityni.org](http://www.equalityni.org)  
Location: Belfast

Ulster Peoples College  
Phone: 44 28 9066 5161  
Website: [www.ulsetrpeoplescollege.org.uk](http://www.ulsetrpeoplescollege.org.uk)  
Location: Belfast

Northern Ireland Human Rights Commission  
Phone: 44.28.9024.3987  
Website: [www.nihrc.org](http://www.nihrc.org)  
Location: Belfast

Children's Law Centre of Northern Ireland  
Phone: 44.12.3224 5704  
Website: [www.childrensloawcentre.org](http://www.childrensloawcentre.org)  
Location: Belfast

Committee on the Administration of Justice  
Phone: 44.28.90.96.11.22  
Website: [www.caj.org.uk](http://www.caj.org.uk)  
Location: Belfast

## Appendix 2 – Recommended actions

Key messages suggesting future actions are grouped here.

- A widely supported definition of systemic discrimination would help make such discrimination visible and create a point of reference for future discussions.

In this report systemic discrimination is defined as the discriminatory culture and structures of political, economic, social or cultural systems resulting in less favourable treatment of marginalised groups. The discriminatory culture is entrenched and permeates many, if not all, levels of the system's structure.

- There is widespread support from participants in this study for work on developing a model of systemic discrimination.
- Institutions with a monitoring responsibility are encouraged to include explicit analysis of structural and cultural discrimination in monitoring reports. This would provide more detailed evidence of systemic discrimination to assist modelling of systemic discrimination.
- To increase the net gain of monitoring processes, human rights institutions are encouraged to publish case studies on monitoring, particularly when there are breakthroughs or failures, as such situations offer valuable tuition. Documentation can give human rights professionals and activists in other jurisdictions leverage for change.
- Osler and Morrison's structural analysis of systemic racial discrimination in schools can be referred to as a basis for modelling systemic discrimination. It also offers instruction on indicators of systemic discrimination.
- Further research is required on ways of modifying individual complaint processes to increase the impact on systemic discrimination.
- The case studies about innovations in individual complaints in this report, for example 'open hearings' and pay curve modeling, offer information about the differences between systemic discrimination as distinct from direct and indirect discrimination.
- Information about group complaint methods employed by human rights institutions should be made available and discussed to encourage uptake in other jurisdictions.
- Under-utilisation of existing group complaint processes should be examined and addressed, for example the representative complaint powers in the New South Wales *Anti-Discrimination Act (1977)*.

- Investigation and inquiry processes have the potential to impact on systemic discrimination if:
  - findings are reported in terms of the structural and cultural dimensions of discrimination to be addressed, and
  - precipitators and indicators of systemic discrimination are identified during an investigative process or as part of a meta-analysis of a number of investigations conducted by an agency.
- The Lawrence Inquiry is a landmark investigation of systemic discrimination. The circumstances, process, findings and outcomes warrant further analysis and monitoring, which should be published widely.
- The landmark NSW Industrial Relations Commission equal remuneration principle is transferable to overseas jurisdictions. It warrants international consideration and wide discussion.
- Documenting the outcomes of gender analysis and gender mainstreaming work, rather than describing the process, is necessary to progress these strategies.
- Developing methods for measuring the outcomes of participation is an area yet to be worked out. Given the emphasis on participation in recent conventions, legislation and approaches, it is an area warranting research.
- The Northern Ireland human rights curriculum development project is a valuable case study of school based education which should be analysed and widely reported on.
- While there is an argument that self-determination is a different discourse to systemic discrimination, it offers a conceptual framework that future models of systemic discrimination can be compared against.
- An area of analysis yet to be fully explored is which incentives facilitate organisational change and how to structure such incentives into individual complaint and investigation judgments.
- Simple narratives are required to expose the 'paradox of equality' and the continuing failure to deliver substantive equality to women, children and young people.

-----