The importance of regulators and inspectorates to the realisation of equality and human rights: Ensuring compliance and supporting mainstreaming

Introduction

The introduction of the Human Rights Act and the public sector equality duty were intended to instil an equality and human rights culture into all public sector organisations in England and Wales. Yet, so far, this culture has not effectively taken hold. The Joint Committee on Human Rights labelled the operationalisation of human rights in public authorities as 'patchy' and the Independent Review of the Public Sector Equality Duty found very few concrete examples of where the duty had led to improved outcomes.[1]

It was recognised from an early stage, that regulators and inspectorates had a significant role to play in establishing an equality and human rights culture in their sectors. In contrast to other enforcement mechanisms, regulators (which have coercive powers to compel action from regulatees) and inspectorates (which have powers to inspect services and report but lack coercive powers) have greater potential to establish real 'sustainable behavioural change' in the organisations that they oversee.[2] However, so far the performance of regulators and inspectorates in this area is severely lacking. A report into the promotion of human rights found that the approaches of these bodies were ad hoc, uncertain and inconsistent and there was a general lack of confidence.[3] Additionally, the Women and Equalities Committee recently criticised the Health and Safety Executive and Ofsted in two separate inquiries for a lack of inclusion of key equality issues in their work.[4]

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[1] Joint Committee on Human Rights, *Enforcing Human Rights* (2017-19, HL 171, HC 669) para 155; Independent Steering Group, 'Review of the Public Sector Equality Duty' (Government Equalities Office 2013).

[2] EHRC, *Our strategic plan 2012-2015* (EHRC 2012) 12; Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework* (Hart 2000); Sandra Fredman and Sarah Spencer, 'Delivering Equality: Towards an Outcome-Focused Positive Duty' (COMPAS 2006) <https://www.compas.ox.ac.uk/wp-content/uploads/ER-2006-Equal_Opportunities_Review.pdf> accessed 6 December 2018.

[3] Office for Public Management, *The role and experience of inspectorates, regulators and complaints-handling bodies in promoting human rights standards in public services* (EHRC 2009).

[4] Women and Equalities Committee, *Pregnancy and maternity discrimination* (HC 2016-17, 90); Women and Equalities Committee, *Sexual harassment and sexual violence in schools* (HC 2016-17, 91).

One of the key reasons for the limited performance of regulators and inspectorates in equality and human rights enforcement to date is that it is yet to be made clear what role regulators and inspectorates can play in the enforcement of equality and human rights. This article is intended to begin to fill this gap by arguing that they have two important roles: (i) ensuring compliance in the organisations they oversee, and (ii) encouraging mainstreaming by embedding mechanisms for reflexive learning within organisations. The article begins by outlining the distinction between the negative and positive elements of equality and human rights and makes clear that while a compliance model is appropriate for negative elements, it is ill-suited for positive elements, which as forms of reflexive regulation require more proactive enforcement. The second section outlines one such model put forward by Sandra Fredman.[5] It is argued that to better advance equality and human rights three significant developments need to be made to this model. I then argue that regulators and inspectorates have an important role in this expanded model. The rest of the article then goes on to outline how regulators and inspectorates can be most effective within this model by incentivising the embedding of reflexive learning within organisations. The article concludes by illustrating these arguments with the example of the Care Quality Commission.

Positive Duties and Reflexive Regulation

Equality and human rights obligations have both positive and negative elements.[6] The negative elements, such as the right to freedom from interference with the person or property or direct discrimination which prohibits organisations from treating individuals less favourably because of a protected characteristic,[7] focus on preventing the state and other regulated organisations from engaging in certain prohibited actions. The negative elements have primarily been enforced using the compliance model, where litigation is used to ensure that regulated organisations comply with both the formal legal rules (first-order compliance) and rulings of judicial or other bodies (second-order

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[5] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) ch 6.
[6] Asbjørn Eide, 'The Right to Adequate Food as a Human Right' (1983) UN Doc E/CN4/Sub.2 2; Bob Hepple, The New Single Equality Act in Britain (2010) 5 The Equal Rights Review 11, 11-12.
[7] *Entick* v *Carrington* (1765) 2 Wilson KB 275*; R. (on the application of Juncal)* v *Secretary of State for the Home Department* [2007] EWHC 3024 (Admin) [47]; *Secretary of State for the Home Department* v *GG* [2009] EWCA Civ 786 [12]; H Woolf, J Jowell and A Le Sueur, De Smith's Judicial Review (8th edn, Sweet and Maxwell 2018) 11-054; Equality Act 2010, s 13.

compliance).[8] However, it has been recognised that there are many other barriers to full participation in a society other than state interference (such as poverty, stereotypes, assumptions and conformist pressures). This has led to an increasing recognition of the positive elements of equality and human rights which advance a richer conception of freedom that focuses on removing a wider range of barriers.[9]

These positive elements of equality and human rights, such as the public sector equality duty and the requirement to protect individuals whose lives are at risk,[10] require positive measures such as preventing individuals from being harmed and/or improving their situation.[11] Mainstreaming has been recognised as particularly important for fulfilling positive duties.[12] This requires that equality and human rights norms, standards and principles are incorporated into 'decision-making on policies, operational issues and budgets, be made part of an organisation's bureaucratic process, culture, and be internalised by staff.'[13] Positive duties recognise that there are different ways to mainstream equality and human rights norms into an organisation and the most effective methods are likely to be organisation specific and so general goals are set rather than prescribed steps. Additionally, it recognises that mainstreaming is a continuous endeavour and that equality and human rights can always be further advanced. Deliberation is especially important as organisations mainstream most effectively if they understand the equality and human rights consequences of their actions on their users.[14]

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[8] Jana von Stein, 'The Engines of Compliance' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012) 477, 493.

[9] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) ch 1; Sandra Fredman, 'Substantive equality revisited' (2016) 14(3) International Journal of Constitutional Law 712; Aernout Nieuwenhuis, 'A positive obligation under the ECHR to ban hate speech?' [2019] Public Law 326.

[10] S 149 Equality Act 2010; *Osman v United Kingdom* (2000) 29 EHRR 245.

[11] Sandra Fredman, 'Human rights transformed: positive duties and positive rights' [2006] Public Law 498; Sandra Fredman, 'Substantive equality revisited' (2016) 14(3) International Journal of Constitutional Law 712.

[12] Bob Hepple, The New Single Equality Act in Britain (2010) 5 The Equal Rights Review 11, 13; Paul Hunt, 'Configuring the UN Human Rights System in the "Era of Implementation": Mainland and Archipelago' (2017) 39 Human Rights Quarterly 489, 501.

[13] Gerd Oberleitner, 'A Decade of Mainstreaming Human Rights in the UN: Achievements, Failures, Challenges' (2008) 26 Netherlands Quarterly of Human Rights 359, 386; Christopher McCrudden, 'Mainstreaming Human Rights' in Colin Harvey (ed), *Human Rights in the Community: Rights as Agents for Change* (Hart 2005).

[14] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 155.

At the same time as the restrictions of negative duties have been recognised, the compliance model of enforcement has also been criticised. It is limited in that it is reactive rather than proactive, it is costly and inaccessible, it is limited to where there is an identifiable victim and wrongdoer, and it is largely individualistic so does not address the underlying structural issues.[15] In particular, as there is no one way to effectively mainstream, the compliance model of enforcement has been recognised as ill-suited to enforcing positive duties and thus alternative models have been put forward based on reflexive regulation theory.

Reflexive regulation theory argues that society is made up of different systems (such as law, education, health, politics) and that each system has its own norms and rationality. Systems are normatively closed meaning they produce their own norms and thus do not recognise norms from other systems. On the basis of this, it is argued that the classic models of regulation (formal law with universal legal rules and substantive law with purposive goal-orientated interventions) are ineffective as these norms will not necessarily be heard and enacted by the different systems in the manner intended by the legal system.[16] This results in what Teubner terms the 'regulatory trilemma' where law is ignored by the sub-system, damages the receiving sub-system or the legal system is itself damaged.[17]

Reflexive law can overcome the regulatory trilemma. This is because, although systems are normatively closed, they are cognitively open, meaning that they can observe other systems and the environment and be indirectly affected by them. Reflexive law aims to work within this paradigm by adopting indirect regulation strategies. It does this by utilising procedural norms to develop reflexion structures within other social systems by shaping systems' internal discourses and methods of

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[15] Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 285-6; Colm O'Cinneide, 'The catalytic potential of equality and human rights commissions' (2016) 24(1) Journal of Poverty and Social Justice 7, 8; Tom Hickman *Public Law's Disgrace* (2017), available at https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace.

[16] Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17(2) Law & Society Review 239; Gunther Teubner, *Law as an Autopoietic System* (Blackwell 1993).

[17] Gunther Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in Gunther Teubner (ed), *Juridification of Social Spheres: A Comparative Analysis of the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Walter de Gruyter 1987).

coordination between systems.[18] By seeing the positive elements of equality and human rights law as reflexive law, Fredman recognises that positive duties will be more effective if they are aimed towards more general rather than specific goals. On this basis, she argues that there are different routes to achieving these goals and thus that deliberation is particularly important as it encourages organisations 'to review and revise their conclusions in the light of their exposure to their own and others' experiences and perspectives' making it more likely that mainstreaming will be real and effective.[19] Fredman then goes on to outline the ideal enforcement model based upon this reflexive law system, which should facilitate and enhance deliberation. The next section discusses this ideal enforcement model and argues that it needs to be developed in three key ways. On the basis of this developed model, there is a greater role for regulators and inspectorates and the rest of this article then discusses how this can best be realised.

Positive Duties and The Ideal Enforcement Model

Fredman argues that the ideal enforcement model should involve a wide range of actors including stakeholders/right-bearers, civil society, national equality and human rights institutions, and courts.[20] The model should contain both internal and external mechanisms of enforcement. Internally, deliberation would act as a mechanism of enforcement by deliberators holding organisations to account. However, these internal mechanisms would be insufficient on their own as deliberation takes place within limits. These limits include that it is not open-ended but must be undertaken with the aim of advancing specific equality and human rights goals; it can result in no outcome being reached; power differentials can make it ineffective and; evidence shows that without external mechanisms some organisations will resist change.[21] Consequently, there is a need for external mechanisms in the form of incentives and sanctions to trigger action within organisations. However, it is important that the balance between internal

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[18] Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17(2) Law & Society Review 239; Julia Black, 'Constituting Self-Regulation' (1996) 59(1) Modern Law Review 24.
[19] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 155; Olean Hankivsky, Diego de Merich, Ashlee Christoffersen, 'Equalities 'devolved': experiences in mainstreaming across the UK devolved powers post-Equality Act 2010' (2019) 14(2) British Politics 141.
[20] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 169.
[21] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 156-7.

and external mechanisms is sufficient as, if it is too focused on external mechanisms, this can inhibit deliberation. Therefore, Fredman, building on the work of Hepple and responsive regulation scholars such as Ayers and Braithwaite, argues that an enforcement pyramid should be utilised.[22] This envisages that most enforcement will take the form of persuasion or advice. However, if this is not effective then more severe methods are increasingly utilised as enforcement moves up the pyramid. On the basis of this, Fredman argues that the bottom levels should consist of a combination of internal enforcement via deliberation and external enforcement by stakeholders, right-bearers and civil society holding organisations to account. Further up the pyramid, equality and human rights institutions hold organisations to account and help them to build mechanisms for mainstreaming equality and human rights and the infrastructure for deliberation. At the top of the pyramid are courts that require decision-makers to deliberate. Through the use of the pyramid, the enforcers in this proactive enforcement model should 'produce a whole that is greater than the sum of the parts'.[23] Finally, although regulators and inspectorates do not feature centrally in Fredman's model, building on Black's work, she argues that they should play the role of mediators to help overcome problems of deliberation (by translating between deliberators and mapping and resolving discourses).[24]

As outlined above, given the complexity of mainstreaming and that there is no one correct result to be achieved, the use of reflexive regulation is apt. In particular, the use of deliberation is important to make organisations aware of the experiences of those that are directly affected by the organisation's actions. The enforcement model is well designed to advance positive duties. However, it can be developed in three key ways which will make it more effective. By expanding the ideal enforcement model it is possible to outline an important role for regulators and inspectorates, which will be developed in the rest of the article.

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[22] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992); Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework* (Hart 2000).

[23] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 158, 169.

[24] Julia Black, 'Proceduralizing Regulation: Part II' (2001) 21(1) Oxford Journal of Legal Studies 33; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 158.

There are three main ways the ideal proactive enforcement model put forward by Fredman can be developed: (i) a re-casting of the enforcement pyramid; (ii) the model incorporating mechanisms to deal with situations where deliberation fails; (iii) and the model recognising an expanded role for regulators and inspectorates. In relation to the enforcement pyramid, although it is outlined as a means to encourage positive action, in reality, it is better suited to ensuring compliance. This is because, as outlined earlier, positive measures require action to be taken towards specific goals, but there is no one correct way to advance these goals and the means and solutions adopted will be most effective if they are organisation-specific. Given the different approaches adopted by organisations and that courts will not be involved in deliberation, it will be difficult and arguably inappropriate, for courts to assess the quality and effectiveness of these steps. Instead, courts will only be able to assess positive duties to a certain minimum threshold level (for example, whether organisations have had due regard, or progressively taken steps to realise the goals).[25] However, beyond this threshold level, a wide variety of action can be taken of varying quality. If we want to advance equality and human rights as fully as possible then organisations need to be incentivised to adopt the very best practice. The enforcement pyramid, with courts at the top, is not the most effective structure in which to achieve this as it is focused on ensuring organisations meet (or comply) with the threshold level and does not encourage action beyond this. This risks the legal threshold becoming a ceiling for positive action rather than a floor. A more appropriate use of the pyramid would be to invert it. In this way, court action would be the first action taken against the small number of organisations that are unwilling to comply (for example, those that have not had due regard). Then after this point, enforcement mechanisms would get softer, more educative and more supportive to help further embed mainstreaming into organisations. It will be argued later that regulators and inspectorates are especially apt in fulfilling this role.

Secondly, although recognising deliberation may be inadequate or may not reach a conclusion, the enforcement model has no clear mechanism for encouraging mainstreaming in the absence of deliberation, with all steps of the pyramid geared towards encouraging deliberation. There is a danger of circularity with unsatisfactory deliberation being met with enforcement mechanisms that encourage more

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[25] Equality Act 2010, s 149; International Covenant on Economic, Social and Cultural Rights, Art 2(1).

unsatisfactory deliberation, which organisations can use as an excuse for inaction. Even successful deliberation can take time and so there is a need for any model to have mechanisms in place to encourage and guide organisations where deliberation is ongoing or is proving unsuccessful, otherwise the advancement of equality and human rights can be continually delayed. Again, it will be argued later that regulators and inspectorates are uniquely placed to undertake this task.

Finally, the role given to regulators and inspectorates in the enforcement model should be expanded. The primary role Fredman advocates to regulators and inspectorates, based on the work of Black, is that of a mediator, mediating when there are problems of deliberation within organisations. However, Black's work focuses on how to ensure the public interest is taken into account in private regulation. It is not clear that the same approach is feasible in relation to public regulation. Thus, the sheer scale of public organisations in Britain, the frequency in which actions of these organisations raise equality and human rights concerns, and the regularity of deliberation means that it is simply not possible for regulators and inspectorates to play this role and thus this overstates what these bodies can achieve. However, regulators and inspectorates can play a much greater role within the expanded enforcement model, which will be discussed in the next section.

Ensuring compliance and supporting mainstreaming through reflexive learning
The previous section developed Fredman's equality and human rights enforcement model for positive duties, arguing that to maximise the advancement of equality and human rights, the ideal enforcement model requires institutions that encourage deliberation but have mechanisms in place for when deliberation fails, ensures organisations comply with the law and encourages organisations to go further and mainstream. This section argues that regulators and inspectorates can play a key role in this expanded model. This is because, as Teubner and Black recognise, regulators and inspectorates are in a privileged position, operating between systems (e.g. the CQC operates between the health, social care and legal systems). This enables them to have greater influence within specific systems than other outsider enforcement bodies and can make the legal requirements more system-specific so they are more

relevant and accessible to organisations within the regulated system.[26] In particular, it is argued that through their frameworks, they can embed models of learning into the organisations they oversee, which can incentivise organisations to mainstream equality and human rights and go beyond their formal legal duties.

Theories of learning have been utilised in other contexts such as healthcare governance and administrative justice but have not yet been incorporated into theories of equality and human rights enforcement.[27] Learning theory moves the focus away from the idea of reaching a point of complete knowledge to ideas of continuous learning.[28] This is especially apt for the positive measures of equality and human rights as it recognises that there is no fixed point to reach but that continuous evolution is required, which sits well with the idea of mainstreaming and the model of reflexive regulation.[29] Learning operates at different levels (for example the individual, the team and the organisation) and one of the current limitations of learning theory concerns how learning at different levels links together (e.g. how knowledge gained by an individual is transmitted to the organisation).[30] While recognising these difficulties, the article aims to avoid them by focusing on learning at the organisational level (i.e. how regulators and inspectorates can encourage learning with the organisations they oversee). There are different theories of learning,[31] but the framework put forward by Lenoble and Maesschalck is best suited to enforce positive models of equality and human rights as it works well in the enhanced enforcement model outlined in the previous section which centres on facilitating deliberation, is progressive (so suited to

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[26] Gunther Teubner, *Law as an Autopoietic System* (Blackwell 1993) 89-90; Julia Black, 'Constituting Self-Regulation' (1996) 59(1) Modern Law Review 24, 46.

[27] Peter Vincent-Jones, 'Embedding Economic Relationships through Social Learning? The Limits of Patient and Public Involvement in Healthcare Governance in England' (2011) 38(2) Journal of Law and Society 215; Robert Thomas, 'Administrative justice, better decisions, and organisational learning' [2015] Public Law 111.

[28] Jan-Peter Voβ and René Kemp, 'Sustainability and reflexive governance: Introduction' in Jan-Peter Voβ, Direk Bauknecht and René Kemp (eds), *Reflexive Governance for Sustainable Development* (Edward Elgar 2006) 7.

[29] Neil Gunningham, 'Regulatory Reform and Reflexive Regulation: Beyond Command and Control' in Eric Brousseau, Tom Dedeurwaerdere and Bernd Siebenhüner (eds), *Reflexive Governance for Global Public Goods* (MIT Press 2012).

[30] James Samuel Colemen, *Foundations of Social Theory* (Harvard University Press 1990); Fabrizio Gilardi and Claudio M Radaelli, 'Governance and Learning' in David Levi-Faur (ed), *The Oxford Handbook of Governance* (Oxford University Press 2012).

[31] For example, Jean Lave and Etienne Wenger, Situated learning: Legitimate peripheral participation (Cambridge University Press 1991).

an inverted pyramid) and also at the same time addresses situations where deliberation is ineffective.

Lenoble and Maesschalck outline four approaches to learning, all of which operate on a scale, progressively expanding the conditions for the success of learning.[32] The attainment of maximum learning requires a combination of all four approaches.[33] The first approach is *neo-institutionalist*, which rather than imposing arbitrary external conditions on organisations, requires that the external conditions that are imposed are optimal (i.e. the most effective they can be).[34] For regulators and inspectorates, this would mean that, rather than encouraging one standard path to mainstreaming in organisations, regulators and inspectorates would learn about different paths through evaluation of organisations' performances across the sector and advocate the best one(s) to organisations. Although the neo-institutionalist approach is the least expansive for learning, it is particularly important in the context of equality and human rights as it provides opportunities for learning when deliberation is ineffective, which it was argued in the previous section is crucial under the developed enforcement model.

However, the neo-institutionalist approach is not sufficient on its own to establish full learning and hence deep mainstreaming, as the approach does not ensure that those who apply the conditions (i.e. organisations) do so in the manner intended by those who imposed the conditions (i.e. the regulator/inspectorate) and thus how mainstreaming is executed and the effects it has may be different from those envisaged by the regulator/inspectorate. The second approach, the *deliberative* approach, expands on the neo-institutionalist approach, with learning taking place through different actors sharing their unique perspectives on the best way to undertake

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[32] Jacques Lenoble and Marc Maesschalck, 'Renewing the Theory of Public Interest: The Quest for a Reflexive and Learning-based Approach to Governance' in Olivier De Schutter and Jacques Lenoble (eds), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Oxford: Hart, 2010) 8.

[33] Peter Vincent-Jones, 'Embedding Economic Relationships through Social Learning? The Limits of Patient and Public Involvement in Healthcare Governance in England' (2011) 38(2) Journal of Law and Society 215, 221.

[34] Olivier De Schutter and Jacques Lenoble, 'Renewing the Theory of Public Interest: The Quest for a Reflexive and Learning-based Approach to Governance' in Olivier De Schutter and Jacques Lenoble (eds), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Oxford: Hart, 2010) 11-2.

collective action.[35]   Under this approach, regulators and inspectorates would incentivise organisations to have measures in place to encourage deliberation, such as involving right-holders in decisions made about them and engaging with a diverse range of individuals and groups in discussions about the future direction of services. Nevertheless, learning is still constrained as deliberation takes place within pre-determined power dynamics and actors often lack the capacities to effectively engage in deliberation.

The third *pragmatic* approach aims to overcome the restrictions of the deliberative approach by encouraging actors to engage in a process of joint inquiry, where discussions are open and all actors contribute to, and should learn from, the inquiry. All actors are involved in designing solutions, monitoring performance and adjusting solutions accordingly.[36] Yet, even if actors are equal partners in deliberation, they can still lack the capacities to engage in the joint inquiry in reality. Thus, other proponents of the pragmatist approach argue that the pre-existing frames (such as previous experiences and beliefs) which inhibit learning also need to be questioned.[37] Therefore, actors should not only engage in joint action but also agree on the framing of issues (e.g. what are the problems, what are possible solutions, what are the challenges) to more effectively learn and thus increase their success. Regulators and inspectorates could embed the pragmatic approach into organisations by requiring organisations not just to deliberate with right-holders and stakeholders but show how they were actively involved at all stages of any discussion, such as examining the extent that front-line staff at the organisation are able to develop and enact policies. The limit of the pragmatist approach is that it assumes that knowledge of the limitations of framing is sufficient to encourage actors to reframe issues.

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[35] Jacques Lenoble and Marc Maesschalck, 'Renewing the Theory of Public Interest: The Quest for a Reflexive and Learning-based Approach to Governance' in Olivier De Schutter and Jacques Lenoble (eds), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Oxford: Hart, 2010) 13.

[36] Charles Sabel and Joshua Cohen, 'Directly-Deliberative Polyarchy' (1997) 3 European Law Journal 313; Charles Sabel and Jonathan Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) 14 European Law Journal 271.

[37] Chris Argyris and Donald Schön, *Theory in Practice: Increasing Professional Effectiveness* (Hoboken, NJ: Jossey Bass, 1974); Chris Argyris and Donald Schön, *Organizational Learning: A Theory of Action Perspective* (Boston, MA: Addison Wesley, 1978); Chris Argyris, *Knowledge for Action: A Guide to Overcoming Barriers to Organizational Change* (Hoboken, NJ: Jossey Bass, 1993).

The final approach, the *genetic approach,* argues that knowledge of the problems of framing is insufficient to induce actors to overcome them. Instead, conditions must be put in place that encourage actors to question their representations and the role that they play and construct a new identity that the context requires. Actors should achieve this by learning from their past (by considering what specific identities were taken in the past and what capacities contributed to these identities) and then re-imagining ways to act collectively in the future that are not constrained by the existing frames.[38] In this way, actors are truly free to learn without constraints and thus can most effectively engage in joint inquiries to tackle collective problems. Regulators and inspectorates could encourage the embedding of a genetic approach in organisations by assessing the extent that past lessons are openly shared and discussed by all parties to arrive at new innovative solutions.

This article has argued so far that equality and human rights law consists of negative and positive elements. The negative elements have traditionally utilised a compliance model of enforcement and both have been recognised to be limited in the pursuit of the maximum realisation of equality and human rights. This has led to increased emphasis being placed on the positive elements. However, the compliance model of enforcement is generally ill-suited for the enforcement of positive duties. In this light, an enforcement model put forward by Fredman was discussed and expanded. On this basis, it was argued that the enforcement model should encourage deliberation, have mechanisms in place to encourage mainstreaming where deliberation was not possible and be able to work in the context of an inverted pyramid (i.e. ensure organisations comply with the legal obligations but then incentivise and support them going beyond this). Finally, it was argued that the privileged position of regulators and inspectorates across different systems meant they had a crucial role to play in this context, both ensuring that regulated organisations comply with equality and human rights law, while, at the same time, encouraging and supporting organisations to go further and mainstream. I argued that in terms of supporting organisations to mainstream, regulators and inspectorates could do this by using their assessment

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[38] Jacques Lenoble and Marc Maesschalck, 'Renewing the Theory of Public Interest: The Quest for a Reflexive and Learning-based Approach to Governance' in Olivier De Schutter and Jacques Lenoble (eds), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Oxford: Hart, 2010) 19-20.

frameworks to embed learning into organisations. The final section explores these arguments in the context of the work of the Care Quality Commission.

Ensuring Compliance and Supporting Mainstreaming in Practice: The Example of the Care Quality Commission

The remainder of this article will explore the practices of the CQC through the previously outlined lens of compliance, mainstreaming and reflexive learning. The CQC has been chosen for two reasons. Firstly, the CQC has both a regulatory and inspectorate role and thus the potential of both regulators and inspectorates can be observed by examining the operations of one body in depth. Secondly, the CQC has gone further than most other regulators and inspectorates in incorporating equality and human rights standards into its work. It started doing this at an early stage of its creation[39] and now has a clearly set out and transparent approach to incorporation. It has worked closely with a range of other organisations to optimise its approach (particularly the British Institute of Human Rights and the Equality and Human Rights Commission)[40] and it is continuously evaluating and improving this approach.[41] Thus, the CQC provides a good illustration of how regulators and inspectorates can both ensure compliance and support mainstreaming in organisations.[42]

Ensuring Compliance

The CQC inspects a wide range of providers within the health and social care sector and uses key lines of enquiry to rate services based on four levels of provision: outstanding, good, requires improvement and inadequate. The Commission focuses on ensuring the standard of care is good (i.e. goes beyond what is expected under the fundamental standards in the regulations) and so this forms the starting point of any inspection.[43] If it appears to the inspectors that the provided care may go beyond the level of good they will assess the provider against the outstanding level. Alternatively, if they think the standard of care may be below the level of good they will explore if it

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[39] CQC, 'Human rights approach for our regulation of health and social care services' (CQC 2014) 5.
[40] CQC, 'Human rights approach for our regulation of health and social care services' (CQC 2014) 18-26.
[41] CQC, 'Human rights approach for our regulation of health and social care services' (CQC 2014) 27-29.
[42] This does not mean that the CQC has been without criticism though. For example, the EHRC has criticised it for not explicitly referring to human rights in its work: EHRC, 'Close to home: An inquiry into older people and human rights in home care' (EHRC 2011) 87.
[43] CQC, 'Guidance for providers on meeting the regulations' (CQC 2015) 9.

meets the requires improvement or inadequate levels. At this stage, alongside assessing whether the standard of care is inadequate or requires improvement, inspectors will also consider if any of the fundamental standards in the regulations have been breached.[44] It is at this stage that compliance with equality and human rights is primarily enforced as the fundamental standards incorporate many of the requirements of equality and human rights law.

For example, regulation ten requires that service users are treated with dignity and respect. This requires that providers respect the privacy of service users when they provide care. The Commission has expanded on the need to respect privacy by requiring providers to take reasonable steps to make sure discussions about care only take place where they cannot be heard, that individuals have privacy when they receive treatment and that any surveillance is in the best interests of service users.[45] Although not explicitly linked to human rights law, these requirements incorporate aspects of the right to privacy.[46] Providers also need to deliver care in a non-discriminatory way in order to comply with regulation ten. The guidance explicitly links this requirement to the prohibited conduct in the Equality Act 2010 (discrimination, harassment and victimisation) and the public sector equality duty.[47]

Not meeting the fundamental standards contained in the regulation can have serious consequences for providers. There are two methods of enforcement that the Commission can take, and a combination of both methods is possible. The first method is informal, in which enforcement powers are not used and the Commission works with a provider to improve standards. The second method is formal, where enforcement action is taken to compel improvement.[48] In relation to the informal method, where a provider has fallen below the fundamental standards it will normally

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[44] CQC, 'Enforcement policy' (CQC 2015) 8. The Commission worked with the Department of Health to ensure that equality and human rights considerations were incorporated into the fundamental standards: Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, SI 2014/2936.
[45] CQC, 'Guidance for providers on meeting the regulations' (CQC 2015) 34.
[46] For example, recognising a right to confidentiality around information relating to a person's health (*Z* v *Finland* (1998) 25 EHRR 371), a positive obligation to ensure a minimum level of privacy during detention (*Szafrański* v *Poland* (2017) 64 EHRR 23), and a right to protection from state surveillance (*Klass and Others* v *Germany* (1979-80) 2 EHRR 214).
[47] CQC, 'Guidance for providers on meeting the regulations' (CQC 2015) 35.
[48] CQC, 'Enforcement policy' (CQC 2015) 7.

be rated inadequate.[49] Where the standard of care provided by a provider is judged to be inadequate, the provider is placed into special measures. Through special measures, the Commission ensures that providers do not continue to provide inadequate care, provide a clear and consistent timeframe within which providers are required to improve, provide criteria for providers to exit special measures and outline the consequences of failing to make sufficient progress within the timeframe.[50] At the end of the timeframe, if the provider has made sufficient improvements it will be taken out of special measures. Alternatively, if the provider has not made suitable progress, the Commission will resort to its formal enforcement powers (although as stated earlier, it may also utilise its formal powers earlier if the standard of care is especially low, for example where there is a risk of harm to service users).[51] The formal enforcement powers include issuing a requirement notice (requiring the provider to produce a report that shows how it will comply with its legal obligations); issuing a warning notice (which warns a provider that the Commission thinks it has breached/is breaching its legal duties); imposing, varying or removing conditions of registration; suspending registration; cancelling registration; and prosecution.[52]

By incorporating equality and human rights standards into the fundamental standards that all providers of health and social care providers must meet and having the ultimate powers to cancel a provider's registration and/or prosecute the provider (and individuals at the provider), the CQC can use sanctions to enhance compliance with equality and human rights standards within the health and social care sector in England. Even more important than ensuring compliance, regulators and inspectorates have a crucial role in supporting organisations to mainstream equality and human rights through incentivising the embedding of reflexive learning into organisations and it is on this role that the rest of the article focuses.

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[49] The best rating is can receive in requires improvement but inadequate is the normal rating: CQC' 'Enforcement policy' (CQC 2015) 8.

[50] For instance, adult social care providers placed in special measures are re-inspected within six months to assess whether sufficient action has been taken (CQC, 'How CQC monitors, inspects and regulates adult social care services' (CQC 2017) 23).

[51] CQC, 'Enforcement policy' (CQC 2015) 24-25.

[52] Health and Social Care Act 2008, ss 17, 18, 29, 33, 34; Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, SI 2014/2936, reg 22; CQC, 'Enforcement policy' (CQC 2015) 18-31. The powers differ slightly between private and NHS organisations with the strongest sanctions not being available for NHS providers.

Supporting mainstreaming

In addition to ensuring that providers within the health and social care sector comply with equality and human rights law, the CQC, using incentives, also heavily encourages organisations to go further and implement higher standards in their practices. The minimum expectation is that providers will be rated as good and the standards of care required under the good rating exceed the fundamental standards that all providers are expected to meet (i.e. in many circumstances the Commission requires providers to go beyond what is formally required by law). For example, in the key lines of enquiry for healthcare services, when assessing the quality of care, a provider rated as good would not only have to refrain from engaging in discriminatory conduct but would also need to take steps to understand a person's personal, cultural, social and religious needs and incorporate these needs into the person's care, treatment and support.[53] Additionally, in relation to effectiveness, a good provider of adult social care services does not only ensure that people are involved in decisions about their care but also gathers information about consent-related activities and uses this information to improve how services are delivered in the future.[54]

Furthermore, the highest rating a provider can achieve, outstanding, is heavily linked with a high level of implementation of equality and human rights into a provider's organisation and service provision. For example, while a good provider of adult care services will always respect people's right to privacy and confidentiality and challenge behaviour and practice that falls short of this, an outstanding provider will have an equality, diversity and human rights approach to support people's privacy and dignity which is well embedded in the service and has positive outcomes for people.[55] Additionally, whereas a good provider of healthcare services will understand people's personal, cultural, social and religious needs and incorporate these into the individual's care, treatment and support, an outstanding provider will recognise the totality of these

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[53] CQC, 'Key lines of enquiry, prompts and ratings characteristics for healthcare services' (CQC 2017) 39.
[54] CQC, 'Key lines of enquiry, prompts and ratings characteristics for adult social care services' (CQC 2017) 41.
[55] CQC, 'Key lines of enquiry, prompts and ratings characteristics for adult social care services' (CQC 2017) 47.

needs, find innovative ways to meet them and regard them as important as their physical needs.[56]

Regulators and inspectorates can encourage reflexive learning and thus greater mainstreaming of equality and human rights through the provision of information around best practice and via the encouragement of practices that will lead to self-learning within providers. This approach is combined with panopticism - providers know they will be assessed on these aspects during inspections but they do not know when inspections will take place (the majority of inspections are unannounced), and thus providers need to behave as if they could be assessed at any time, which acts to ensure these behaviours are permanently in place.[57] In addition to incorporating equality and human rights into the fundamental standards and key lines of enquiry for the different services, the CQC also provides a good practice guide for implementing equality and human rights into health and social care providers. The guide contains case studies of seven providers who were rated outstanding and are judged to be the very best providers in relation to equality and human rights.

The case studies provide illustrations of the examples of outstanding standards discussed earlier. Thus, Castlebar Nursing Home is an example of a provider taking an equality, diversity and human rights approach to support people's privacy and dignity which is well embedded in the service and has positive outcomes for people. There, people were cared for in a way that respected their cultural identity. The diversity of staff matched that of the service users and where possible service users were matched with a staff member with a similar cultural background. In this way, the inspection team observed a service user with dementia and a staff member discussing stories from their home country and both were visibly enjoying these conversations. The Care Centre was able to help the user maintain their cultural heritage through these conversations and from the playing of cultural music. This relationship had a positive effect on the user's care as she was more willing to communicate her needs in relation to her treatment and care.[58]

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[56] CQC, 'Key lines of enquiry, prompts and ratings characteristics for healthcare services' (CQC 2017) 39.
[57] Jeremy Bentham, *The works of Jeremy Bentham: Volume 4 (Panopticon, Constitution, Colonies, Codification)* (William Tait 1843).
[58] CQC, 'Castlebar Nursing Home' (CQC 2016) 12.

East London NHS Foundation Trust and Herstmonceux Integrative Health Centre are examples of outstanding providers that recognise the totality of an individual's emotional and social needs, find innovative ways to meet them and regard them as important as their physical needs. In the East London NHS Foundation Trust, there was a department of spiritual, religious and cultural care that recognised the importance of these needs in contributing to individuals' mental well-being. The department thus provided training to equip staff on the wards to holistically support individuals suffering from mental distress and connected patients to faith leaders and communities (e.g. had worked with the local mosques to help patients celebrate Ramadan).[59] At Herstmonceux, the provider took a proactive approach to understanding the needs of different local groups and addressed these alongside providing physical health care. For example, the practice was aware that 40% of its patients did not have access to the internet, therefore, concerned about loneliness and isolation, it organised regular social events where individuals could meet other individuals. Through these events, patients gained confidence and many had taken up new healthy activities as a result of trying them at these sessions.[60] Through the linking of the outstanding rating with these exemplars of best practice, the CQC is encouraging a neo-institutionalist approach to learning in providers, where providers are incentivised to survey the range of examples and consider which practices they can adopt within their setting. The Commission explicitly supports this behaviour by having a 'question for reflection' box alongside the case studies which explicitly asks 'what learning from the case studies could I transfer into my organisation?' As stated earlier, this is important as it encourages positive action even where deliberation is not possible.

Alongside encouraging a neo-institutionalist approach to learning through the promotion of best practice, the CQC also requires mechanisms to be put in place that can support deliberative, pragmatic and genetic learning within organisations. The Commission does this by placing a heavy emphasis on person-centred care, allowing staff to voice concerns and make suggestions in a non-hierarchical manner, and

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[59] CQC, 'East London NHS Foundation Trust' (CQC 2016) 11.
[60] CQC, 'Herstmonceux Integrative Health Centre' (CQC 2017) 23.

ensuring providers have procedures in place to ensure that learning from errors and mistakes takes place. In terms of deliberative learning, the CQC has numerous requirements that will be assessed in inspections. These include the extent staff routinely involve service users and those close to them in planning and making shared decisions about their care, support and treatment;[61] whether services take account of the particular needs and choices of different people (especially supporting individuals to make informed choices);[62] and whether people who use services, those close to them and their representatives are actively engaged and involved in decision-making to shape services and culture, including a range of equality groups.[63] For example, the Commission outlines how Herstmonceux Integrative Health Centre particularly excelled at this, establishing a very active patient participation group that has resulted in projects such as coffee mornings and health walks.[64]

In terms of pragmatic learning, this involves removing hierarchies between actors within an organisation and establishing an environment where all individuals can engage in collective action on a joint basis. In particular, all parties should be involved in designing solutions, monitoring performance and making adjustments and all parties should learn through these endeavours. The Commission advances these conditions within providers by assessing during inspections whether the culture of an organisation encourages openness and honesty at all levels (including with service users), whether staff can raise concerns without fear of retribution and whether appropriate learning and action takes place as a result of concerns raised.[65] Viewing staff as improvement partners is especially important to achieve a high level of equality and human rights mainstreaming and there should be a 'no blame' culture of learning throughout the organisation.[66] The CQC particularly praised East London NHS Foundation Trust for

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[61] CQC, 'Key lines of enquiry, prompts and ratings characteristics for healthcare services' (CQC 2017) 14; CQC, 'Key lines of enquiry, prompts and ratings characteristics for adult social care services' (CQC 2017) 13.
[62] CQC, 'Key lines of enquiry, prompts and ratings characteristics for healthcare services' (CQC 2017) 16-17; CQC, 'Key lines of enquiry, prompts and ratings characteristics for adult social care services' (CQC 2017) 15-16.
[63] CQC, 'Key lines of enquiry, prompts and ratings characteristics for healthcare services' (CQC 2017) 24; CQC, 'Key lines of enquiry, prompts and ratings characteristics for adult social care services' (CQC 2017) 20-21.
[64] CQC, 'Equally outstanding: Equality and human rights – good practice resource' (CQC 2017) 26.
[65] CQC, 'Key lines of enquiry, prompts and ratings characteristics for healthcare services' (CQC 2017) 21; CQC, 'Key lines of enquiry, prompts and ratings characteristics for adult social care services' (CQC 2017) 20-21.
[66] CQC, 'Equally outstanding: Equality and human rights – good practice resource' (CQC 2017) 19.

their work in this area as one of their overriding principles is that 'the people who know the problem [i.e. the staff] are pivotal to creating the solution.' Through this, the Board supported a staff idea to reduce violence on mental health wards, which resulted in a massive reduction in violence.[67]

Genetic learning is difficult to assess but involves organisations looking at past efforts and openly discussing why they were not effective and learning from this exercise. The lessons learnt can then be used to inform practices in the future. This is encouraged in providers of care by the Commission assessing the extent to which concerns and complaints are used as an opportunity to learn and drive continuous improvement;[68] and considering whether there are robust systems and processes across the organisations for learning, continuous improvement and innovation.[69] Again, this drive to improve is key to a high level of equality and human rights mainstreaming with the best providers being organisations that 'learned from mistakes and were always looking for the next thing that they could improve'.[70] For example, the Docs GP Practice was praised for establishing a learning environment with no blame so that when things went wrong it was viewed as a learning opportunity.[71]

It can be seen that the CQC aims to ensure health and adult social care providers in England comply with equality and human rights law by integrating equality and human rights into their fundamental standards, measuring the performance of organisations against the standards and subjecting non-compliant organisations to sanctions with serious consequences. At the same time, alongside this role, they can also support organisations to mainstream equality and human rights into their work by encouraging them to engage in reflexive learning.

Conclusion

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[67] CQC, 'Equally outstanding: Equality and human rights – good practice resource' (CQC 2017) 23.
[68] CQC, 'Key lines of enquiry, prompts and ratings characteristics for healthcare services' (CQC 2017) 19.
[69] CQC, 'Key lines of enquiry, prompts and ratings characteristics for healthcare services' (CQC 2017) 24; CQC, 'Key lines of enquiry, prompts and ratings characteristics for adult social care services' (CQC 2017) 21.
[70] CQC, 'Equally outstanding: Equality and human rights – good practice resource' (CQC 2017) 19.
[71] CQC, 'Equally outstanding: Equality and human rights – good practice resource' (CQC 2017) 25.

Regulators and inspectorates have a significant role to play in establishing an equality and human rights culture in their sectors. Yet, so far this role has been largely unrealised due to it not being previously clear what role regulators and inspectorates could play in the enforcement of equality and human rights. The article argued that regulators and inspectorates should use their powers to (i) ensure compliance in the organisations they oversee, and (ii) encourage mainstreaming by embedding mechanisms for reflexive learning within organisations. It began by outlining the limitations of negative duties and the compliance model of enforcement. The increased emphasis on positive duties means that alternative models of enforcement are required. The second part of the article discussed and expanded on the proactive enforcement model put forward by Sandra Fredman, arguing that any enforcement model must encourage deliberation, have mechanisms in place to incentivise positive action where deliberation is not possible and work in the context of an inverted enforcement pyramid (where mechanisms are increasingly encouraging and supportive). The third section argued that regulators and inspectorates were especially crucial in this environment and that in particular, they should use their powers to incentivise the embedding of learning within organisations in order to develop deeper mainstreaming. The article concluded by illustrating these arguments in the context of the work of the Care Quality Commission.

The article aims to make two main contributions to the academic literature. First, it expands on the increasing literature on the effective operationalisation of equality and human rights law, outlining an alternative mechanism (the use of regulators and inspectorates) to instil an equality and human rights culture within organisations rather than solely focusing on public sector organisations themselves.[72] Second, the article builds on the work of other scholars such as Vincent-Jones and Thomas, to highlight the importance of learning in public sector organisations, particularly in the administrative justice context and illustrates the specific importance of learning for equality and human rights.[73] This opens up avenues for further research, for example,

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[72] Simonetta Manfredi, Lucy Vickers and Kate Clayton-Hathway, 'The Public Sector Equality Duty: Enforcing Rights Through Second-Generation Regulation' (2018) 47(3) Industrial Law Journal 365.
[73] Peter Vincent-Jones, 'Embedding Economic Relationships through Social Learning? The Limits of Patient and Public Involvement in Healthcare Governance in England' (2011) 38(2) Journal of Law and Society 215; Robert Thomas, 'Administrative justice, better decisions, and organisational learning' [2015] Public Law 111.

exploring empirically the extent regulators and inspectorates can and have embedded learning both through their assessment frameworks and through their assessments. Additionally, learning can be explored at different levels (i.e. organisation, team and individual and the relationship between the three). In this way, the effectiveness of regulators and inspectorates can be enhanced so they can make a significant contribution to the realisation of equality and human rights in the twenty-first century.