



# **The Evolution of Modern Equality Law**

## **Trevor Phillips' speech to Cardiff Law School on 22 October 2009**

It is an honour to be here in Cardiff University, celebrating 126 years of scholarship. I'd also like to say how honoured I am that the Presiding Officer Dafydd Elis Thomas is here in the audience. I'm grateful for the detailed introduction and for the appreciation of the breadth of our work as a Commission – tackling the pay gap, racial bigotry and discrimination against those with mental health conditions. It's daunting but when I consider Edward Said, JK Galbraith, Albie Sachs and others who have stood on this platform my own preoccupations fade in comparison.

This is not the first time that the Commission and University have made common cause. Together we run a practical course helping advocates from trade unions and Citizens Advice Bureaux understand discrimination law. Next month the University's senior lecturer in public policy, Dr Paul Chaney, will give the first of what we hope will become an annual series of lectures, presenting his report: *Equal Opportunities and Human Rights: The First Decade of Devolution in Wales*. I'm delighted to celebrate the partnership between Commission and University.

It is also a pleasure to be in Wales. The Equality and Human Rights Commission is a British body, but it has a specific programme of work dedicated to all things Welsh. As chair of the Welsh committee, Dr Neil Wooding has brought huge expertise and enthusiasm, and our Welsh team, mostly based here in Cardiff, have already put themselves firmly on the map. They have given a voice to schoolchildren with Croeso, a project that challenges prejudice and celebrates the diversity of Wales. They have participated in this year's Eisteddfod, giving 165,000 people the chance to learn more about our work. They have brought together different groups in a constructive debate about the interface between religion and sexual orientation. They have set the tone for how we approach the same question elsewhere.

Much of this progress has been possible because of a strong working relationship with the Assembly, grounded in practical cooperation. This is of course a time of change for the Assembly, but whoever is elected as new First Minister, the Commission stands ready to continue and strengthen our partnership.

Finally, on introductions, thank you all for turning out. We have a strong contingent of lawyers, both practicing and training.

That's one of the reasons why my theme will be "the evolution of modern equality law:" but the main reason is because this is perhaps the most important issue on the Commission's agenda today.

I want to explore the importance of: the development of: and the limits of legislation in bringing equality and human rights to life.

The Founding Fathers of the United States held it a self-evident truth that all men are created equal.

Yet however great the natural thirst for justice, however deeply ingrained our sense of fair play, history shows us that a society without progressive laws can too easily become a place where the meek are at the mercy of the powerful; where the individual is at the mercy of the state; and where the factor that decides between competing interests is neither principle nor argument but brute force.

A strong legislative framework is a prerequisite for a fair society, and lawyers play a central role in the story of equality and human rights.

Where philosophers defined concepts, and politicians proclaimed them, lawyers helped set them in statute, gave them practical application, and often led the strongest arguments for their extension.

British lawyers have been instrumental in encouraging the international spread of the concepts of human rights. Today this is controversial, but historically it was central to our jurisprudence.

The British contingent played an important role in the drafting of the Universal Declaration of Human Rights in 1948, designed to safeguard against the totalitarianism and abuse of power so brutally demonstrated in the Second World War and the Holocaust.

Shortly after, David Maxwell Fyfe, who would later become a Conservative Home Secretary, led the British lawyers who exercised a major influence on the European Convention on Human Rights.

Welsh lawyers, too, have made a significant contribution. David Lloyd George, a lawyer by profession, laid the foundations of the welfare state as Chancellor and Prime Minister. While the old age pension and incapacity benefit might not be the first things that spring to mind when talking about equality and human rights, they guarantee a basic standard of dignity and respect without which it would be hard to have a meaningful discussion of any more sophisticated notions of equality.

Figures like Lloyd George and Maxwell Fyfe remind us that today's equality legislation has not come out of the blue. It has historical precedent, and sits within a long tradition of progressive lawmaking.

But it is true that the past four decades have yielded new approaches to equality distinct from anything that has gone before.

The first major piece of what let's call "modern" equality law was the Race Relations Act 1965.

After the Second World War, successive governments— represented by Ministers including Enoch Powell himself - had welcomed migration in order to help a war-weary country rebuild.

After 1948, men and women came from the Caribbean, from Pakistan, from Ghana and elsewhere. Some became nurses. Others, bus drivers. Others still worked the night shift in the textile factories of Bradford.

Not all new arrivals had dark skin. A significant number of Polish people who had served in the war chose to make Britain their home. The Irish Republic – as it had been before the war - remained an important source of labour.

These men and women played an important role in helping the economy and public services flourish. When Harold McMillan told Britons in 1957 that they had never "had it so good," the resurgent global economy was the major factor, but surely migrants deserved a little of the credit.

Yet these same men and women sometimes faced intolerable prejudice. They could find themselves with little choice of housing other than slums run by the most exploitative landlords. They toiled in menial jobs, with scant hope of progression. And when, as was not infrequent, they fell victim to crime or abuse, they knew that going to the police could sometimes create new problems rather than solve them.

Now I don't mean to suggest that life was non-stop misery. For many people, especially the young (as I was then), opportunity was out there. Education, in particular, opened up new possibilities. But success sometimes came at a price. To acquire the rewarding job, or the influential position, you had to emulate those who were already in power. You were asked, however discreetly or indirectly, to conceal your faith, your origins, the cultural heritage that was a part of you. Of course in some ways this was nothing new: I think an audience who knows the history of, for example, the Welsh language in education will understand what I mean. Opportunity, but not on your own terms.

The Race Relations Act was designed to be a first step in addressing these problems and to ensure – in the words of the Home Secretary, Frank Soskice – that Britain should not become a land of first and second class citizens.

The scope of that first act was limited. It did not even extend as far as employment, housing or public services. Nonetheless, it established a concept that would run like a steel thread through much of the equality law that followed.

That concept was individual redress: when someone has been overcharged, or underpaid, or denied a service simply because of a particular aspect of who they happen to be, then they can pursue justice in a civil court.

Over time, step by step, parliament has legislated to extend the concept to other characteristics: gender in the 70s, disability in the 90s, and more recently age, sexual orientation, and religion or belief. Government has also clarified that protection on the grounds of gender applies to people who are transgender.

For a generation, these provisions have empowered individuals to access justice. Take just one aspect of life – the workplace.

Those of you who are employment lawyers will have examples coming out of your ears, but let me give you three.

Bridget Bodman, an accountant, discovered that her male successor was paid several thousand pounds more each year for doing the same job as she had done. In 2006 she was awarded £25,000.

Mr Kirker was a chemist. When his employer was looking to make redundancies, Mr Kirker's name was top of the list, simply because he was partially sighted. In 1998 a tribunal awarded him £100,000.

And sometimes the law can help you even if you don't make it as far as court. In 2006 Michael Bryceland, a lawyer, claimed he had been badly treated at work because he was gay, and was preparing to sue. His former employers settled out of court.

The pursuit of individual remedy has also empowered individuals to test discrimination law against other pieces of legislation. The recent Heyday case, for example, used the age discrimination regulations to probe the legality of statutory retirement at 65. Similarly, the Seldon case – due to go before the court of the appeal – will test the legality of compulsory retirement in legal partnerships: I imagine that some of you with an eye on the future may be watching out for the outcome of that case with interest.

At the same time as individuals have acquired new rights, the knowledge that they can be held to account has motivated public bodies and private companies to put their house in order, at least to some extent. It is a foolhardy employer who lets derogatory behaviour slide: a foolhardy landlord who tells the prospective tenants that they had better look elsewhere because he's not sure the neighbours would take to having a lesbian couple next door.

Combined with wider culture change, this has helped put an end to the most visible and egregious forms of prejudice that used to be part and parcel of life.

But of course good-old fashioned discrimination persists: those Acts are still very much in use today and acutely relevant. A glance at the list of equal pay cases waiting to come to tribunal is proof enough of that.

And the success of individual redress has also unveiled a disturbing truth: that conscious, clearly-articulated discrimination, what we might call overt bigotry is far from the only cause of disadvantage and unfairness.

After decades of the Equal Pay Act, for every pound that the average man takes home, the average woman still takes home less than 85p.

After decades of the Race Relations Act, a young black man is far less likely to go to university than the white classmates he grows up with.

Neither of these instances of unfairness is the result solely of individual instances of discrimination. Many employers are broad-minded. Many teachers don't have a prejudiced bone in their body. Sometimes, unfairness can and does occur without a single ungenerous thought passing through anyone's conscious mind.

The fact is that there are complex structural causes of inequality, systemic biases and sometimes cultural factors that subtly tilt the table in favour of some and to the disadvantage of others.

For example, a world where office hours and the school day are out of kilter clearly wasn't designed with the idea in mind that a parent and a full-time worker could be one and the same person.

Similarly, there are assumptions embedded the way public institutions work that leave some people in the margins.

We have a colleague in our London office who was injured in the 7 July bombings. She lost her leg. On top of all of the physical and mental problems that you can imagine, she had an added difficulty: the prosthetic leg that the NHS proposed had only two colours, neither of which she is – black people come in many and varied shades. Now she is very smart and resilient, and she got it sorted. But imagine someone less assured, feeling powerless in the face of a system that simply wasn't equipped to meet their needs.

To use a medical metaphor, an approach to tackling unfairness predicated on individual redress helps tackle the visible symptoms. It doesn't go very far in resolving the underlying causes. If you're unwell, that's exactly what you want your doctor to do.

That's why, at the start of this century, government recognised that it was vital to make new law, designed to provoke fundamental analysis that would uncover and treat those underlying causes.

Institutional reform is the essence of the “public sector duty” at the heart of the Race Relations Amendment Act 2000. For me, the public sector duty must rank among the most significant and far-reaching reform of public services of the past generation. It requires bodies: to consider the implications of their choices and decisions on people of different ethnic backgrounds; to anticipate unfairness, rather than to react to it; to make the running themselves, rather than put the responsibility on the individual who has been wronged to resolve the problem.

This is a fundamental change. In order to gain equal treatment and find justice the individual must be a hero. The ordinary person now stands a chance of being treated decently.

Much like individual redress, the principle of institutional reform has gradually been extended to other characteristics. Today, public duties are also in force relating to disability and gender. In practice, they work something like this:

The NHS Trust has a duty to end discrimination on the basis of gender. It examines the statistics and discovers the majority of GP visits are made by women. Let’s say it concludes that it’s not just about men and women’s differing needs – it suspects that men are reluctant to come to the doctor (and incidentally the national data backs them up: men, especially young men, are also less likely to get NHS help to quit smoking, less likely to ask a pharmacist for advice, and less likely to go to the dentist for a check-up.) As a result men let problems which should be easy to treat get out of hand, so that they take more time and resources to put right. The Primary Care Trust responds to that evidence by advertising at sports events, opening surgeries outside working hours once a week, and working with employers to make it easy to get a check-up at work.

Institutional reform of this kind is complementary to individual redress. Together they form the two core concepts in modern equality law.

But as the equality framework developed, the case for reform of the watchdogs patrolling that framework grew stronger.

In 2000, there were three equality watchdogs – the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission. They had 60 years' accumulated wisdom and experience behind them. Each had a well-earned reputation for advocacy and campaigning.

But as they won the battles of their day, their limitations in addressing the challenges that remained, or that were emerging, became more apparent.

Each had responsibility for a single characteristic. In the real world unfairness doesn't come neatly packaged. Looking at the kinds of discrimination and disadvantage faced by, for example, Asian women, and it's hard to be categoric: is this unfairness due to race, to gender, or a mix of both? Who should take the lead – the CRE, or the EOC?

Moreover, the existing regulators' responsibilities did not extend to characteristics such as age, or religion and belief. None had overall responsibility for policing the Human Rights Act 1998, which underpins and complements the whole of equality law. Too many people risked falling through the gaps.

And while the individual Commissions had proved their ability to fight discrimination, they were not constituted to champion institutional reform. They lacked the broad powers necessary. They were hampered by being three separate bodies: if you come to institutions with three piecemeal requests for reform, you are less likely to achieve the result you want than if you speak to them with one clear voice.

So the Equality and Human Rights Commission took shape. Its remit was set out in the Equality Act 2006, and it opened for business in 2007.

The Commission unites in one body the duty for policing equality law in its whole. With responsibility for human rights, it stands up for the dignity and respect of each individual – all 61 million of them in Great Britain. And it tries to see the whole person, rather than seeing separate characteristics.

To meet its responsibilities, the Commission has a wide range of legal tools at its disposal. We aspire for it to be a modern regulator. By that we mean – drawing on the principles set out by Phillip Hampton, Richard Macrory and others – we seek to use those powers judiciously, the right one in the right place. We base our interventions on evidence and risk, and will concentrate our efforts where they can make the biggest difference.

In the first two years of its existence the Commission already used almost every tool in the bag.

Section 16 of the Equality Act 2006, for example, gives us the power to carry out inquiries into sectors which show evidence of people getting a rough deal.

Take our ongoing inquiry into the financial sector. We were able to require information from companies about pay scales and the differences in earnings between men and women, which underlined that there are serious challenges. There are disparities in basic pay, but there's a particular gap in bonuses. For every pound in bonus earned by a man working in the financial sector, the average woman gets just 20p.

Some of this difference is explained by the choices men and women make in school. Women still tend to opt for arts and humanities in greater numbers than subjects such as maths and economics, which open up the route to the best-paid technical and professional jobs.

But some of the gap is down to more complex, systemic factors, such as the age structure of the industry. The period between the ages of 25 and 40 seems to be the time when financiers make their move for the top. It's also of course a time when significant numbers of women want to start their family. There are a handful of exceptional women who manage to have it all, but for many it's simply too daunting.

The industry's unusual age structure is no-one's fault as such. It is not the result of deliberate malice or ill-will. But if our society is serious in its commitment to equality, aspects of organisational practice such as this should be addressed: not least because any system that happens to exclude or hamper half its workforce from fulfilling their potential at work

is throwing away talent. So we have begun an urgent conversation with the sector about where to go from here.

Then take another of our powers. Section 28 – not to be confused with its infamous counterpart in the Local Government Act of 1988 – gives the Commission the ability to provide legal assistance to individuals pursuing cases that relate to equality and human rights. Section 30 gives us a right to intervene in relevant cases.

We use these powers strategically, seeking to identify those instances which will help clarify points of law, set precedent, and provide potential benefits for significant numbers of people.

That was certainly the case, for example, with Sharon Coleman. Sharon was treated badly by her employers because she cared for her disabled son. She sued them. We supported her case. Sharon won – and in doing so helped establish the principle in law that every one of Britain's 6 million carers has the right to be protected from unfair discrimination at work.

**Or take the case of David Allen, a disabled teenager. He was unable to get into the local branch of his bank in his wheelchair. This resulted in him being asked to discuss his private account on the street. That's just not good enough. David sued the bank and won, and in doing so helped send a clear message to private firms that it's vital to make their premises accessible. I should point out that the bank have been granted leave to appeal.**

Then take section 24 of the Equality Act. This gives us the power to apply to a county court for an injunction where we believe an individual or an organisation is likely to commit an unlawful act. This is a new proactive, pre-emptive power.

This is the power we recently invoked in relation to the British National Party. People ask me three main questions about this case.

The first is, why? The answer is simple. We started this case because we thought that the British National Party was breaking the law. Their membership criteria and constitution did not let anyone who was not white become a member. This is illegal under the Race Relations Act 1976. The law applies to everyone: it is our job as a regulator is to make sure that it is respected.

The second question is, why now? There are two parts to the answer. It's only recently – in fact, in 2007 – that case law established the principle that political parties are membership organisations, and therefore subject to the relevant parts of the Race Relations Act. And secondly, prior to the existence of the EHRC, there was no body competent in law to prosecute the case: the CRE did not have the relevant powers.

The third question people ask is, what do you think the outcome should be? Well, formally, it's simple: the Commission wants the British National Party to stop acting illegally. That's the outcome we are aiming for: that's our interest in this case.

The BNP questions our motivation. Well let me be clear. One part of our statutory job is of course to eliminate racial discrimination as set out in the Race Relations Act. And you could hardly find a more blatant example of an act of direct discrimination than the BNP's own constitution. If they truly believe in the rule of law - of British law - they should be thanking us for doing our job.

But legally, we also have another set of responsibilities to the British public - not least to illuminate and inform people about aspects of good relations - in this case good race and faith relations - for the public benefit. We know that the legal action we have taken will have wider effects that reach far beyond the courtroom.

Principal among these is that we believe that the million or so British people who voted for the BNP should know clearly that they did not vote for a party that sits on the normal political spectrum, only somewhere to the right of UKIP. That's not what matters here. What matters is that this party in its very composition embodies racial exclusivity and, however its message may be modulated, that is its core reason to exist.

Now, changing its constitution may not change its policies; but for the time being we want the British people to clearly understand that this is not just another political party: in truth this is little more than a racial cult.

For the time being, in an order issued at the Central London County Court last week, the BNP agreed to use all reasonable endeavours to revise its constitution so that it does not discriminate, either directly or indirectly. These changes must be carried out as soon as reasonably practicable, and at the latest within three months. We are pleased that the party has conceded the case and agreed to the Commission's requirements. We will be monitoring the party's compliance with the court order.

You will probably all be aware that, as I speak, we are just hours away from the BNP making a first ever appearance on BBC's Question Time. Are we calling for the BNP to be banned from appearing? No. This is a matter outside the Commission's jurisdiction. Editorial decisions are up to the BBC itself: the BBC Trust, among others, may choose to review whether those judgements are in the public interest. But I would say that I think the fact of the BNP's continuing and active discrimination should have weighed more heavily than it appears to have done in the BBC's judgements.

The BNP case is not the only instance in which we have exercised our enforcement powers: on separate occasions we have, for example, reached agreements with employers in sectors as varied as adult care, civil engineering and logistics, committing them to reviewing and improving unfair practices.

These examples show that the Commission is not afraid to employ the harder-edged tools at our disposal where necessary. It illustrates the importance of litigation, compliance action, enforcement and casework in guaranteeing every individual dignity and respect.

And it is because the law matters that the Commission want to help fashion an even stronger framework for the future.

We are working closely with government on the new Equality Bill currently before parliament.

Equalities Minister Harriet Harman has said that the Bill is “a good bill, a timely bill and a strong bill.” On the whole, the Commission agrees. We think that there are areas where the Bill could go further, but its intended spirit and likely effect are just what is needed. (By the way, I am looking forward to the Welsh Assembly’s consideration of its specific duties under the legislation.)

First, the Bill puts 30 years’ accumulated legislation and case law into one place and one clear language, making it easier to access and understand. This will make it easier for people and institutions to understand their rights and responsibilities. There’s even a plain English version available.

Second, the Bill enshrines important new rights.

It “completes the set” of individual right to redress, outlawing age discrimination for the first time.

It develops the theme of institutional reform in two major ways:

First, it expands the scope of public sector duties significantly to include age, religion or belief, and sexual orientation.

Second, it contains a promise that the tests for compliance will increasingly allow for scrutiny of results – what actually happens – rather than good intentions. All regulators are in the business of making change happen, and each works (explicitly or not) to a theory. For OFGEM, for example, it’s a price theory: get the price right and consumers and suppliers will respond. For OFSTED, it’s a competitive theory: give parents information and choice and results will improve.

For too long equality regulators have worked to a “bureaucratic theory of change.” It goes like this: if we make an organisation scrutinise their policies, seeing the evidence of inequality will motivate them to put their house in order. They’ll fill in forms, tick the boxes and feel the guilt.

But in practice it means that organisations have become increasingly expert at writing equality strategies, setting out their good faith and sincere desire to solve the problems. All too often, actually getting on and solving them has taken a back seat.

That clearly won't do. We want to work with government to ensure that the new public sector duties allow us to hold organisations to account for what really matters: practical change for the better.

And on top of this, there are several areas where the bill proposes to take equality law into new territory. I'll outline 2.

The first is **positive action**. Currently, there are employers in different sectors who are worried about the fact that their workforce is drawn from too narrow a pool. Take primary school teachers. One in four primary schools have no men in them whatsoever. Many head teachers are exercised about that: not because men make better teachers, but because schools are there to help prepare people for life in the real world. With one in five children being brought up by a lone mother, you might have kids who go from one week to the next without talking to or hearing from an adult man.

The Equality Bill would allow employers, if they wish, when they have two equally-qualified candidates, to take into account the fact that one of them was from a group currently under-represented in the workforce.

Let's be clear: this isn't an obligation on employers – it's an option they can choose. It isn't a new burden - it's a new freedom. And it isn't about giving unqualified people jobs because they happen to be a man, or black, or lesbian. If and when the Bill becomes law the Commission will give clear advice on where we think the limits will be drawn – for example, on what "equally qualified" means.

The second element of the Bill that represents breaks significant new ground is the Socio-Economic Duty. This would require strategic authorities to take into account how their plans would affect people living in different areas and from different socio-economic backgrounds. In

21<sup>st</sup> century Britain, what we used to call class remains one of the most persistent causes of disadvantage. For all that we may have become a less deferential society, social mobility is still limited. In fact, as Alan Milburn's report examined, some professions have become more exclusive, not less, in recent years – including the one from which I hail myself - journalism.

The Commission thinks that no-one's destiny should be determined by their origins. We warmly welcome the socio-economic duty. It would challenge and encourage public policymakers, first, to be aware of how whatever they are doing – whether it's planning a new bus route, or designing a new health centre – will affect people from different backgrounds: and, second, to be imaginative in examining how to overcome or mitigate any unintended bias.

Take, for example, school selection. In the future, a local authority considering introducing selection procedures in some schools would have to ask and collect the evidence: does this mean that you end up with what are, in effect, sink schools in certain neighbourhoods? Are you enabling primarily middle-class kids to gallop ahead while others struggle? The duty doesn't necessarily provide easy answers to those complex and sensitive questions: but it does put them squarely on the table, where no-one can ignore them or pretend they don't matter.

There's more I could say on what the Bill does – and for that matter what it doesn't do:

The Bill does not, for example take the opportunity to get rid of the mandatory retirement age. A judge recently said that even though he thought a mandatory retirement age was allowable under existing law, the situation was "odd." So this is unfinished business.

There is also more I would say on the Equality Bill as it applies to Wales. The Assembly Government is currently carrying out a "listening exercise," trying to get a feel for what its priorities should be as it draws up a set of specific duties for public bodies in Wales. The Commission will be holding a series of roundtables with stakeholders to help inform that debate.

But I'll draw a line there.

As a regulator we will provide comprehensive guidance on the Bill – both statutory and non-statutory – to help organisations understand their new responsibilities, and make the most of their new flexibilities.

Finally, it was Roy Jenkins himself who said that a sound legislative framework was necessary for a fair and equal society to flourish: but that it was not, in itself, the be-all and end-all. Good law was a “necessary, but not sufficient” condition.

Or to look at it another way: you can demand equality in a court of law, but you want to feel equal outside of it too. We all want to live in a society that is comfortable with its diversity, and confident about its future. The Commission has a role in helping make that happen– that’s for another lecture – but it relies very much on what people think and say and do.

So my last plea goes to all the students here. Your education here can be a passport to many places. This school’s alumni have gone on to fields as varied as business, teaching, journalism, politics and voluntary sector.

Whatever you choose to do, and wherever you go, I hope that you as lawyers will be champions for tolerance, decency and respect. That is your responsibility. Because whether in the law or not, we can all make a difference.

I hope you embrace this opportunity because discharging it to the best of your ability is what will make us a better society.