



AHRC Research Centre for Law, Gender and Sexuality

**RESPONSE TO  
THE EQUALITIES REVIEW –  
INTERIM REPORT**

**June 2006**

**CentreLGS is the Arts and Humanities Research Council Centre for Law, Gender and Sexuality.**

**The purpose of CentreLGS is to act as a national and international focal point for academics, practitioners and policy-makers who work in the area of gender, sexuality and the law. It consists of about 70 scholars in three institutions: the Universities of Kent, Keele and Westminster.**

**CentreLGS aims to support current research and develop new initiatives in this field through regular policy forums and conferences, the publication of books and articles, exchange and visiting scholar programmes, and the supervision of postgraduate research students.**

## **SUMMARY**

Centre LGS welcomes the Interim Report of the Equalities Review and is strongly sympathetic to the overall goals of the Review to investigate the causes of persistent inequalities in the UK and explore new ways of thinking about how such inequalities may be tackled. However, we have concerns about the analytical framework which the Review has adopted for purposes of identifying and tracking inequalities and their causes. We believe that notwithstanding the goal of the Review to highlight the extent to which inequalities are the result of 'systems, policies and institutions' (p.3) the framework deployed is too individualistic in its focus and too modest in its aspirations adequately to address inequalities which are deeply embedded in the institutional, social and cultural fabric of our society.

## **RECOMMENDATIONS**

Our broad recommendation is that that the Review team reconsider the analytical framework adopted and revise it to take account of the concerns we raise.

Specifically, we recommend that the Review:

- gives greater attention not just to patterns but also to levels of inequality and ensures that a concern with redressing socio-economic inequalities is placed at the heart of an integrated equality policy.
- explores more substantial, normatively richer engagements with the idea of capabilities than that presented in the Interim Report.
- reconsiders the deployment of the 'path paradigm' with its accompanying reliance on notions of 'vulnerability' and 'triggers', and focuses instead on the many ways in which social, cultural, economic and legal processes are implicated in disadvantage *and* privilege.
- grounds the identification of strategic priorities within a broader contextual and theoretical analysis which is attentive to engagements with equality discourse outside the narrow parameters of mainstream social and economic policy. We also recommend that the Review looks more closely at the role of non-state actors, for example, social movements, in devising and embedding equality strategy.

## **CONSULTATION RESPONSE**

The analytical framework adopted by the Review team in its Interim Report rightly acknowledges the complexity of inequality and its multiple, overlapping causes, dimensions and effects. It emphasises that pervasive forms of disadvantage cannot be accounted for in terms of individual prejudice or choice. It argues that measures of inequality often fail to offer an adequate picture both of why particular inequalities arise and how they are experienced between and within groups. The Review also engages in a sustained critique of formulations of inequality in terms of 'strands' or 'domains'.<sup>1</sup> We agree with much of this analysis and welcome the entry of this kind of debate about equality into the public arena. In particular we welcome analyses of inequality which acknowledge and seek to take account of its many complex and intersecting manifestations. However there are aspects of the Review's analysis which concern us.

### ***A. How much (in)equality?***

A core difficulty with the Interim Report is the degree of deference to the idea that some level of inequality is a natural, even a desirable phenomenon. The vision informing much of the Review's analysis is one which accepts an unequal distribution of resources as inevitable and is concerned with the disproportionate representation of different groups at various distributional points. Tackling inequality becomes ensuring that people can move from one distributional location to another without encountering obstacles on the basis of their ethnic or gendered group status: this is a view of equality as relocation within a given distribution; it does not really challenge the initial distribution itself. Indeed, there is little in the Interim Report which raises questions about distributional principles or trends notwithstanding the Review's acknowledgement that socio-economic status is still the most likely 'predictor' of inequality (p.5). The Review appears to subscribe to an essentially meritocratic approach which assumes that, with the right kind of mechanisms in place, 'native ability' and 'commitment to success'

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<sup>1</sup> Similar kinds of characterisation not used by the Review team but pervasive in the literature include 'axes', 'vectors' and 'groups'. For a discussion of the limits of this kind of approach, see in particular, D Cooper, *Challenging Diversity: Rethinking Equality and the Value of Difference* (CUP, 2004) chapter 3.

will result in a fairer, more equal society (p.8).<sup>2</sup> Yet no concrete evidence is offered for this assumption. Moreover, the adoption of such an approach fails adequately to acknowledge that conceptions of merit are heavily culturally imbued, that notions of 'ability' are, to a considerable extent, socially constructed, and that the market mechanisms mediating individual contribution and reward are deeply imbricated in class, gender, race and other social hierarchies.

It is widely acknowledged that, since the last quarter of the twentieth century, there has been a steep rise in income and wealth inequality, both locally and globally. As a result, wealth in particular has become disproportionately concentrated in the hands of a few, social mobility has declined, and poverty has radically increased. Although the current UK government has made tackling poverty a policy priority and has introduced measures observed to have had some effect in this regard, the redistribution of wealth and income upwards, in the context of widening economic insecurity for the underprivileged majority, is now a key feature of Britain under New Labour,<sup>3</sup> contributing to sharp disparities of wealth and power between individuals.<sup>4</sup> Acknowledging, accounting for and integrating these concerns into the general analysis must surely be a key feature of any enquiry into inequality. Otherwise all that can be achieved is the redistribution of people/groups within a broadly unequal socio-economic distributive regime in which the degree of inequality is markedly increasing. **We therefore recommend that the Review gives greater attention not just to patterns but also to levels of inequality and that a concern with redressing socio-economic inequalities be placed at the heart of an integrated equality policy.**

### ***B. Equality of what?***

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<sup>2</sup> i.e., a society in which everyone is 'correctly' located in the distributional hierarchy? Even if it can be demonstrated that 'ability' is, in some sense, naturally skewed, why should resources and power follow such a pattern?

<sup>3</sup> Wealth inequality is widely regarded by expert commentators as being especially important because of wealth's impact on life chances. See further Edward Woolf, *Top Heavy: The Increasing Inequality of Wealth in America and What can be Done about it* (2002).

<sup>4</sup> Much of this upwards distribution is the direct product of legal regulation, for example, in relation to property, tax, income and inheritance. There is nothing 'natural' about it. For further analysis, see P. W. Ireland, 'Property, Private Government and the Myth of Deregulation' in Sarah Worthington (ed), *Commercial Law and Commercial Practice* (2003) 85..

One way in which the Review seeks to ameliorate the problems which arise from a narrow application of the concept of meritocracy is to adopt a 'capabilities' approach to equality, that is, an approach 'which concentrates ... on what people are able to do or be in their lives' (p. 73). This is a version of 'equality of opportunity' (pp. 72-73) which is concerned with ensuring the conditions through which everyone can 'fulfil their potential' (ibid.). This approach is preferred to other conceptions of equality such as 'equality of process' and 'equality of outcome' (p.71). These allusions to competing conceptions of equality are brief and unsatisfying and there is insufficient engagement with the difficulties of formulating a working normative concept of equality.<sup>5</sup> It is not entirely clear, for example, what 'equality of process' is intended to encompass but, considered narrowly, it corresponds with notions of 'formal equality' while, envisaged more broadly (as the Review suggests), it seems to be evoking the notion of 'equality of respect' (p.71). However, this passing allusion does not attend to the many ways in which issues of respect and recognition contribute to the ability of those who experiences inequalities to exercise 'choice'.<sup>6</sup> Nor does it signal the relationship between process and power, with which notions of respect and recognition are deeply bound up.<sup>7</sup> Equality of outcome too is oversimplified. The suggestion is that equality of outcome requires treating everyone in the same way, e.g. by allocating 'equal shares of the cake'. This is seen as unsatisfactory because 'it does not take account of human diversity. Identical treatment is not the same as equal treatment' (ibid.) However, equality of outcome or 'substantive equality' (sometimes used to denote the same or similar set of ideas) does not necessarily require the same treatment. Indeed the focus on equal *outcomes* may well mandate differential treatment in order to redress disadvantage. In the context for example of Canadian and South African constitutional equality law, this is precisely how the concept of 'substantive equality' has evolved.<sup>8</sup>

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<sup>5</sup> For an excellent overview and analysis of the literature on conceptions of equality, see Baker et al, *Equality: From Theory to Action* (2003), chapter 2. Here, the authors opt for 'equality of condition' which they describe as 'the right to choose among alternatives of similar worth' (p. 50).

<sup>6</sup> For example, whilst issues of access for disabled people to buildings can be conceptualised in terms of equality of opportunity, they can also be indicative of a lack of respect for disabled people.

<sup>7</sup> For an exploration of the relationship between recognition and process, see Axel Honneth, *The Morality of Recognition* (2005); on the relationship between recognition and redistribution, see Nancy Fraser and Axel Honneth, *Redistribution or Recognition?* (2003).

<sup>8</sup> Sandra Fredman characterises this approach as 'breaking the cycle of disadvantage', *The Future of Equality* (EOC, 2004) 11. For an overview of the development of substantive equality jurisprudence, see Baker et al, chapter 7.

Relatedly, there is no concerted engagement with the normative content of the capabilities approach beyond its endorsement. The idea of capabilities is sketchily presented (pp.73-74) and is not indicative of the degree of contestation among equality scholars about what capabilities should be included and how they should be identified. And yet the potency of the capabilities approach as an equality strategy is heavily dependent upon the level at which minimum capabilities are set. In this context, too much of the substantive focus of the Interim Report concerns conditions of access to the labour market. Yet ensuring people have minimum capabilities to enable entry to the labour market is of limited value in equality terms unless the conditions under which work is performed are also addressed (including in particular the extent to which market flexibility imperatives are reliant upon a large pool of low-paid and or unemployed workers.)

Thus, even within a labour context, we believe the notion of 'capabilities' could be much more deeply mined to encompass, for example, notions of dignity at work, the importance of work to human flourishing<sup>9</sup> and issues of community, participation and democracy in a workplace context. More generally, we welcome further exploration of the potential effectiveness of the capabilities approach beyond the sphere of education and employment. How might it tackle issues relating to the work/life balance, healthcare, public transport, leisure facilities and amenities or cultural needs? There is obviously a risk here that, conservatively deployed, the idea of capabilities will effect a shift away from a commitment to equality towards ensuring some notion of minimum standards. Such a conception is unlikely to work effectively to dismantle hierarchies, tackle unequal distribution, redress power imbalances or remove structural impediments to equality. The Review team promise to develop a notion of capabilities which is, inter alia, 'well-grounded theoretically' and 'multidimensional'. We strongly endorse this commitment. **In sum, we welcome exploration of more substantial, normatively richer engagements with the idea of capabilities than that presented in the Interim Report.**<sup>10</sup>

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<sup>9</sup> See for example the International Labour Organisation's 'decent work' agenda: 'The goal is not just the creation of jobs, but the creation of jobs of acceptable quality' Report of the Director-General, *Decent Work* (ILO 1999).

<sup>10</sup> The capabilities approach is most closely associated with the work of economist, Amartya Sen and philosopher, Martha Nussbaum and, as the Review team point out, has been widely applied in policy/strategic contexts. However it has also generated considerable debate and critique, particularly in a feminist/gender context. See e.g., Anne Phillips, 'Feminism and Liberalism revisited: Has Martha Nussbaum Got It Right?', *Constellations* 8/2 (2001), 249-

### **C. Vulnerability, triggers and the 'path paradigm'**

We consider the concept of vulnerability to be highly problematic. We understand that it has been adopted by the Review team to dislodge the assumption that disadvantage *necessarily* follows membership of a group. However, the difficulty with the notion of vulnerability is that it carries connotations of victimhood and inherent weakness. Therefore, it locates inequality as a characteristic of groups rather than in structures of power and subordination/oppression.

Relatedly, the idea of inequality 'triggers' confers a quality of randomness or accidentality to occurrences which are the product of particular social relations. This is reinforced by the invocation of the 'path paradigm' to denote the life cycle. This reliance upon life cycle to measure/gauge levels of equality or inequality is, in itself, problematic. Notions of time and the life cycle are not neutral and apolitical; they are value-laden and prescriptive, particularly in a gender and sexuality context where patriarchal and heteronormative assumptions are more likely to shape social expectations and inform judgements.<sup>11</sup> Linking measures of equality and inequality to models of passing time, without being explicit about whose notion of time and whose values and expectations about the life cycle govern, is restrictive and, potentially, quite oppressive.

An added difficulty with the path paradigm is the characterisation of triggers as impediments to individual progress. The vulnerable are more prone to trip and stumble when life's triggers are thrown their way. They are more at risk of falling behind or of deviating from a desirable progressive chronology set by the lives of those who are not 'vulnerable' to 'triggers' and whose strengths become the lens through which the weaknesses of the vulnerable are viewed. Those who benefit from structural inequalities thus become the norm against which the vulnerable are measured, a norm which remains undisturbed by notions of vulnerability and triggers. Inequality becomes located in individual life chances rather than in structures, practices and discourses which situate groups in particular relation to

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266; Jane Lewis and Susanna Giullari, 'The Adult Worker Model Family, Gender Equality and Care: the Search for new Policy Principles and the Possibilities and Problems of a Capabilities Approach', *Economy and Society* 34/1 (2005), 76-104.

<sup>11</sup> We are thinking here of the expectation that one is married or partnered by a particular time; one acquires a mortgage, starts a family. Later there is a presumption of redundancy/retirement, a time when working life should properly cease; in the case of women, this is also interwoven with social expectations about motherhood.



each other. There is no real engagement with concepts such as 'choice' which are assumed to result in unequal outcomes which are unproblematic. Nor is there a focus on those life-cycle 'triggers' conferring advantage as opposed to disadvantage, e.g. inherited wealth or private education. Why not ask how do people get ahead as well as why they fall behind? The assumption is that those who don't 'trip' are not part of an equality focus.

We accept the Review's view that prevailing conceptions of inequality in terms of 'strand' and 'domain' are inadequate and misleading (p.27). In particular, such approaches fail to provide an adequate account of intersectional inequalities, that is, inequalities which are the product of *interlocking* disadvantage and which are, therefore, not easily visible in a strands approach. This failure adequately to acknowledge and address intersectional inequalities may fairly be said to be a key reason for the failure of equality law and policy - which has been predominantly predicated upon a separate strands basis - to eradicate or even seriously to erode persistent inequalities. However, an approach to inequality which posits 'vulnerable' individuals at the mercy of random triggers, and conceives the role of policy to be the better preparation of these individuals to negotiate the triggers is not an approach which gets to grips with the ways in which multiple, interconnected relations or structures of power operate - socially, culturally, politically - to produce both disadvantage and *privilege*. It is imperative, we believe, to develop a policy approach to inequality which starts with the ways in which inequalities are *organised* - albeit loosely - around structures and relations of power which in turn generate regimes or principles of inequality shaping and permeating our value and beliefs, our institutions and practices. Inequality is neither simply group-based nor structurally determined. However, nor is it the accidental result of encounters for which some are less equipped than others. **We recommend that the Review reconsider the path paradigm with its accompanying focus on vulnerability and triggers and focuses instead on the social, political, cultural and legal mechanisms by which disadvantage and privilege are constructed and maintained.**

#### ***D A 'root and branch' investigation?*<sup>12</sup>**

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<sup>12</sup> 'A root and branch review to investigate the causes of persistent discrimination and inequality... was announced by the ... Equality Minister' ('Background information on the equalities review' at [www.theequalitiesreview.org.uk](http://www.theequalitiesreview.org.uk)).

The account of inequality offered by the Review team is not sufficiently placed in a historical or social context. The specificities of disadvantage over time and place are neither acknowledged nor attended to. The role of the state too is sanitised. The state is presented as a neutral benevolent party not implicated in inequality. We would welcome greater critical interrogation of the role of the state with regard to inequality and inclusion of consideration of the role of social movements in furthering equality goals. We recognise that the Review Team wishes to come up with priorities and strategies which are politically practical and acceptable but we do not think that concern should *unduly* restrict their thinking at this point.

For example, the list of 'major challenges' on p. 62 is, we believe, overly focused on issues of education and employment and too reliant upon assumptions about the importance of educational achievement in an equality context which are, at the very least, contestable.<sup>13</sup> Why, for example, does the Interim Report give so much attention to boys' academic performance *vis a vis* girls when it is apparent that their better attainment notwithstanding, women will not progress as quickly or as far in the labour market as their male counterparts? This suggests that educational achievement is not as important to life chances as the Review Team assumes. It also demonstrates the limits of a focus on 'underperformance' as opposed to accounting for 'overperformance'. The Review team needs to distinguish between strategies to tackle symptoms and a sustained diagnosis of cause. Clearly there is a need for both approaches. And there is also a need to track the pathologies of inequality through stages. In what sense, for example, is it meaningful today to talk about the job prospects of women after having children? A generation or two ago it was assumed that women with children did not need job prospects - indeed were considered 'voluntarily' to have relinquished them. Recent social and economic changes have so reconfigured gender/labour/market relations that such a view is no longer tenable. But what is the precise nature of these changes and how do they 'map' onto inequalities today? When does 'choice' become constraint (and constraint become choice?) What changes are currently in process which might reconfigure the inequality landscape of tomorrow? **We recommend that the identification of strategic priorities be located in an analysis of inequality which is more**

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<sup>13</sup> We appreciate that the Review's interim findings are likely to be a reflection/consolidation of existing approaches to analysing and measuring inequality due to reliance on existing data. However we are concerned that over reliance might lead to a continued neglect of issues for which there is little existing data or which do not lend themselves well to established measuring techniques. An obvious area of concern in this context is sexuality-related inequality.

**contextually and theoretically grounded and gives greater consideration to engagements with equality discourse outside the narrow parameters of mainstream social policy. We also recommend that the review looks more closely at the role of non-state actors, for example, social movements in devising and embedding equality strategy.**

## **CONCLUSIONS AND FURTHER RESPONSES TO CONSULTATION QUESTIONS:**

Our main concern is to ensure that the Review team does not forgo this opportunity to bring a richer, more complex and nuanced understanding of inequality to public and political attention. If the Review remains within the parameters of an ideological framework which is itself a reflection of the conceptual, political and legal limits of the past, this will indeed be the case. There is little point to new terms ('triggers', 'vulnerabilities', 'paths'), if they lead us back to ideas and solutions already in place. Yet, despite the Review Team's best intentions, there is very little in the analysis which takes us outside the scope of what is currently being proposed or carried out within the Government's own education and employment policy. There is no interrogation of the ideological underpinnings of a policy approach which presumes that inequality is to a large extent a natural result of choice and innate inability. True, the Review acknowledges difficulties in distinguishing between inequalities which are legitimate, and those which are not, but if it begins with the premise that some inequalities are 'natural' or even desirable, the Review will have integrated a number of assumptions about inequality which significantly narrow the normative and political focus of enquiry.

### ***Responses to specific questions***

1. Has the analysis in the Interim Report addressed the factors that are most important across the life cycle? *See especially section C.*
2. Do you agree with the 'Priorities for Action' identified by the Interim Report? *See especially sections A and C,*
3. Is the framework for defining and measuring equality set out in the Interim Report an appropriate way of thinking about equality? *See especially section B and D.*

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## **CENTRE EXPERTISE**

We list below members of the Centre with relevant expertise in equality issues:

*Equality Theories*

**Professor Davina Cooper** (University of Kent): equality theories; local government; social and cultural diversity; lesbian and gay studies; Jewish studies.

**Professor Didi Herman** (University of Kent): racial representation and law; social movements and law reform; law and religious movements.

**Dr Monica Mookherjee** (University of Keele): multiculturalism; liberal political theories; feminist theory.

**Professor Pnina Werbner** (University of Keele): Muslims in Britain; economies of social exchange and domestic symbolic economies among Pakistani migrants to Britain.

*Equality and Discrimination Law*

**Professor Joanne Conaghan** (University of Kent): labour and employment law; discrimination and equality law; family-friendly working policies.

**Siobhan Hunt** (University of Kent): discrimination law and policy; equal opportunities.

**Dr Susan Millns** (University of Kent): European and comparative public law, particularly constitutional, human rights and civil liberties law.

**Oliver Phillips** (University of Westminster): sexuality and the law, particularly in South Africa and Zimbabwe.

**Harriet Samuels** (University of Westminster): equality laws; women and human rights; sexual harassment.

**Judy Walsh** (research student at University of Keele and Equality Studies Centre, University College Dublin): equality law; human rights law.

**Matthew Weait** (University of Keele): law and HIV/Aids; human rights; civil partnerships; legal regulation of same-sex partnerships.

*Specific "Grounds" of Inequality and Intersectionality*

**Professor Andrew Sharpe** (University of Keele): transgender and the law.

**Suhraiya Jivraj** (University of Kent): intersection of gender, sexuality, race and religion; identity formation.

*Health inequalities*

**Dr Nicky Priaux** (University of Keele): health care law; concepts of harm; feminist legal theory.

**Professor Sally Sheldon** (University of Keele): health care law and ethics; legal regulation of gender with regard to fathers' rights in the context of reproductive decision-making.

**Professor Michael Thomson** (University of Keele): legal regulation of male sexed body; health care law.

**Dr Stephen Wilkinson** (University of Keele): regulation of reproductive technologies.

*Other Areas*

**Rupa Reddy** (University of Westminster): criminal justice and penal reform in relation to gender, race and religion; forced marriage.

**Dr Simone Wong** (University of Kent): cohabitation rights; human rights.

## **FURTHER INFORMATION**

### ***Method of Consultation***

This response is the result of collaboration between Centre members across the three participating institutions in the UK. Members were invited to send their comments on the consultation to the response co-ordinator, Professor Joanne Conaghan (Kent).

The final response was written by Joanne Conaghan with valuable input from:

Professor Davina Cooper (University of Kent, Director CentreLGS)

Professor Didi Herman (University of Kent, Thematic Priority Co-ordinator CentreLGS)

Rosie Harding (PhD student, University of Kent)

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