

THE EQUALITY BILL FOR GREAT BRITAIN: IMPLICATIONS FOR NORTHERN IRELAND

Introduction: Equality legislation in Northern Ireland – Future Prospects?

1 Introduction

This conference has been convened to consider the prospects for reform of equality law in Northern Ireland (NI). This paper starts with the Single Equality Bill (SEB) debate in NI, sets out legislative developments since then, refers to the Equality Bill's progress in Great Britain (GB) and considers two recent initiatives in NI, first, proposals on equality law reform by the Equality Commission for NI (ECNI) made to the Office of the First Minister and Deputy First Minister (OFMDFM) and secondly, a widely supported Assembly motion on a review of the Race Relations Order (RRO).

2 OFMDFM consultation

In 2004, the OFMDFM conducted a wide-ranging consultation, *A Single Equality Bill for Northern Ireland*. A wide range of organisations responded, including NICEM and the ECNI and also the Discrimination Law Association. Except for a collation of all responses produced by the OFMDFM in 2005,¹ there has been no further public activity on the subject.

3 Further NI legislative developments

Legislative developments since then has focused on further implementation into NI law of EU obligations and also one initiative to bring NI equality law into line with the law in GB. First, the Employment Equality (Sex Discrimination) Regulations (Northern Ireland) 2005 were passed, bringing into effect reforms required by the Revised Equal Treatment Directive in relation to equal treatment between women and men in employment and training. Secondly, the Employment Equality (Age) Regulations (NI) 2006 were passed as the final act in implementing the Framework Employment Equality Directive 2000. Thirdly, the Sex Discrimination (Amendment of Legislation) Regulations (NI) 2008

¹ OFMDFM, *Single Equality Bill Responses To Consultation*, March 2005.

were enacted to implement the Gender (Goods & Services) Directive 2004, applying EU sex discrimination law to the provision of goods and services.² Fourthly, developments in GB disability discrimination law were reflected in the Disability Discrimination (Northern Ireland) Order 2005. Finally, in response to the Equality Act 2006 in GB, the Equality Act (Sexual Orientation) Regulations 2006 apply sexual orientation discrimination law to non-employment fields.

4 The development of the Equality Bill in Great Britain

Paradoxically, the NI debate formed the basis for consideration of a single equality act in GB.³ The Government in GB launched the Discrimination Law Review in 2005, leading to the publication of *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* in 2007, considering a wide range of options for the harmonisation of equality law in GB. In July 2008, the Government Equalities Office (GEO) issued *The Equality Bill – Government response to the Consultation*, setting out its proposals for an Equality Bill, which was introduced in the House of Commons on 24 April 2009. The Bill has now completed its Committee Stage in the House of Commons. Barbara Cohen, in her presentation, will examine the Bill in more detail. Reference in this paper to the contents of the Bill will also be made in the context of a renewed debate in NI about equality law reform.

5 The renewed debate in Northern Ireland: The ECNI proposals

The ECNI announced in May 2009⁴ that it had made a series of proposals to the OFMDFM, *Proposals for legislative reform*, in February 2009. Roisin Mallon, Director-Equality Legislation, ECNI, is participating in the first afternoon panel discussion. Bob Collins described the proposals as “specific changes in a number of individual measures where we believe such change to be urgently needed.” The ECNI’s proposals are as follows:-

² The EU has also enacted the Recast Gender Equality Directive 2006, which brings all the gender equality measures into one directive, although no measures have been taken in the UK to make amendments to sex discrimination law in GB or NI.

³ It should also be mentioned that the Odysseus Trust issues a draft Equality Bill, prepared by Professor Bob Hepple and Lord Lester of Hill Herne, in 2002.

⁴ Bob Collins, *View from the Chair, Changes to Equality Law - May 2009*.

Proposal 1: The Commission recommends the extension of age discrimination legislation to non-employment areas.

Proposal 2: The Commission recommends that the Race Relations Order (NI) 1997 ('RRO 1997') is amended to ensure that the protection from discrimination and harassment on the grounds of colour and nationality is afforded the same level of protection as other racial grounds, across the scope of the RRO 1997.

Proposal 3: The Commission recommends that the Sex Discrimination Order (NI) 1976 ('SDO 1976') is amended to prohibit unlawful discrimination and harassment by public authorities on the grounds of sex in the exercise of their public functions.

Proposal 4: The Commission recommends amendments to the Disability Discrimination Act 1995 ('DDA 1995') and the Special Educational Needs and Disability (Northern Ireland) Order 2005 ('SENDO 2005') in order to secure greater protection for disabled people against unlawful discrimination and harassment; to include the following:-

- the concept of disability- related discrimination is amended in light of the recent House of Lord's decision in Mayor and Burgesses of the London Borough of Lewisham v Malcolm;
- direct discrimination is prohibited across the scope of the disability legislation;
- the justification defence for a failure to make a reasonable adjustment is removed across the scope of the disability legislation;
- harmonisation of the threshold for the point at which the duty to make reasonable adjustments is triggered;
- a duty is placed on landlords under the DDA 1995 to make reasonable adjustments to the physical features of the common parts of premises.

Proposal 5: The Commission recommends the extension of monitoring requirements under the fair employment legislation to the grounds of nationality and ethnic origin, and the introduction of other changes in order to ensure the continuing effectiveness of the monitoring Regulations.

Proposal 6: The Commission recommends the removal of the exception in the employment provisions of Fair Employment and Treatment (NI) Order 1998 ('FETO 1998'), as regards the recruitment of teachers in secondary level schools, and early consideration as to whether the exception should also be removed as regards primary level schools.

6 The renewed debate in Northern Ireland: Review of the RRO

NICEM has been campaigning for reform of the RRO since it became apparent that the process of delivering a single equality act for NI was stalled. In March 2006, the now Deputy Director of NICEM produced a paper addressing a series of NICEM's concerns.

In June 2008, NICEM helped to establish the All Party Assembly Group for Ethnic Minority Communities (APAG), to which NICEM provides the secretariat. The now Deputy Director was asked to produce a further paper, "The Race Relations Order - what we've got and what we want", in February 2009. This was adopted by the APAG at its meeting in March 2009.

In May 2009, an Assembly motion proposing a review of the RRO was supported by all the Assembly parties and received support from the Junior Minister for Equality.

Fitzpatrick focused on four reforms in the RRO, two deficiencies in the Order and two reforms to enhance its provisions. The **first reform** is the issue picked up by the ECNI in its 'urgent' proposals, namely **'It is essential that the RRO includes provisions on discrimination and harassment on grounds of 'colour' and 'nationality' across its scope.'**

The Race and Ethnic Origin Directive 2000 provides an EU wide basis for race equality law. However it only covers 'racial and ethnic origin'. 'Racial grounds' in the RRO covers five grounds, 'colour', 'race', 'nationality' or 'ethnic or national origins'. Government in GB and NI insist on bringing most EU directives into effect through regulations passed under the European Communities Act 1972. Due to what NICEM considers to be a perverse reading of this Act, GB&NI implementing laws cover the minimum required to meet the perceived requirements of the Directive.

In this case, the Government in GB, followed by the OFMDFM, decided that 'race' and 'ethnic or national origins' should be covered in extensive reforms to the RRO in the 2003 Regulations but that 'colour' and 'nationality' should not.

In the GB Equality Bill, this anomaly is removed across the race equality provisions.

The **second reform** concerns provisions in the RRO on discrimination in performance of public functions. The second reform of the RRO is:-

It is essential that the RRO includes provisions on discrimination and harassment across the performance of the full scope of public functions.

Two reforms were made in the Race Relations Act (RRA) in GB as a result of the Macpherson Inquiry into the murder of Stephen Lawrence. The first is a public sector race duty on public authorities, partly modelled on section 75 in the Northern Ireland Act 1998 (discussed below). The second reform attempted to clear up a significant gap in race equality law as a result of a case in the House of Lords, *R v Entry Clearance Officer ex parte Amin*.⁵ As a result of this decision, GFS provisions in the RRA did not apply to performance of public functions which could only be performed by public bodies, such as the police.

Section 19B of the RRA, enacted through the Race Relations (Amendment) Act 2000, prohibits discrimination by public authorities across the full range of their public functions. There has been resistance in NI to bringing this important reform into the RRO. However it was accepted that implementation of the Race Directive through the Amendment Regulations 2003 would require some provision on discrimination by public authorities in performance of their public functions.

However, in the spirit of ‘minimalism’ which we have already seen in implementation of EU directives, Article 20A of the RRO only covers:-

*“(i) any form of social security;
(ii) healthcare;
(iii) any other form of social protection, or
(iv) any form of social advantage,
which does not fall within Article 21 [provision of GFS].”*⁶

⁵ [1983] 2 AC 818.

⁶ In relation to harassment both Article 20A, RRO and section 19B, RRA, only cover these specific areas.

We are therefore left in the position that many aspects of NI's criminal justice system and other public functions are not covered by discrimination and harassment provisions, even though the GB provision was originally introduced in response to concerns that the RRA did not adequately cover policing.

As the RRA already covers all public functions, the GB Equality Bill extends this approach across all the equality grounds in the Bill.

The **third reform** concerns what is already a superior aspect of the RRO but one which needs further reform.

It is proposed that the definition of harassment is amended across the RRO so that harassment of workers, but also of customers, students, patients etc can be based on the wider 'related to' test and that the RRO should, for the avoidance of doubt, provide that employers, providers of services and public bodies can be liable for 'third party harassment'.

It is important to appreciate that the harassment provisions in the RRO are wider than in most other equality statutes. This is because harassment provisions in GB&NI law come from EU Directives. The Race Directive applies to employment, GFS and other fields including some public functions. The Gender (Goods and Services) Directive covers GFS. The Framework Directive only covers employment and training.

However it is now clear that the GB&NI definition of harassment is narrower than the one in the Race Directive. Article 4A(1) provides:-

"A person ("A") subjects another person ("B") to harassment in any circumstances relevant for the purposes of any provision referred to in Article 3(1B) where, on grounds of race or ethnic or national origins, A engages in unwanted conduct which has the purpose or effect of -

(a) violating B's dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B." (emphasis added)

On one point, the 'harassment' provision in the Race Directive is wider. Article 2.3 of the Directive provides:-

"Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to

racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.”
(emphasis added)

This deficiency was established in a successful judicial review application by the EOCGB against the DTI⁷ on the harassment definition in the SDA after the Revised Equal Treatment Directive 2002 was transposed into the SDA in 2005.

The EOC judicial review has established that the ‘related to’ test in the Race Directive is wider than the ‘on grounds of’ test in the RRO and the RRA. The EOC wanted to establish that what have become known as ‘Bernard Manning’ cases are covered by harassment provisions. The Bernard Manning case⁸ involved the liability of a hotel for the comedian’s sexist and racist comments directed at a black waitress. The Court in the EOC judicial review accepted the Government view that the Race Directive’s test did not automatically create liability on employers for all actions of ‘third parties’, that is, those who come into the workplace other than employees.

But the Government accepted that an employer could be liable in some circumstances for allowing an offensive environment to be created by a third party and the Court stated that harassment in a Bernard Manning case could be caught by the ‘related to’ approach.

NICEM therefore considers the RRO is in urgent need of reform to bring the harassment provisions, in both employment and non-employment, into line with the Race Directive definition. Since employers can be liable for allowing an offensive environment to be created for their workers, it naturally follows that a provider of services can be liable for allowing harassment of its customers, clients etc by ‘third parties’, for example other customers and clients.

⁷ *EOC v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin)(Burton J)(judgment of 12 March 2007 (on the GB equivalent of the Employment Equality (Sex Discrimination) Regulations (NI) 2005).

⁸ *Burton v De Vere Hotels Ltd* [1997] ICR 1 (EAT).

This is an important development in employment but also in non-employment fields. There is a range of environments outside the workplace in which a high degree of control is exercised, for example, schools, care homes and prisons. It is therefore essential that there is responsibility by those who control these environments for all racial harassment against pupils, patients and prisoners.

The GB Equality Bill applies the 'related to' harassment definition across all grounds in relation to employment and training and in relation to non-employment fields on some grounds, including race, but not others, including religion or belief and sexual orientation.

The SDA has already been amended to cover certain examples of 'third party harassment' in employment. An employer is liable for harassment of a worker by a 'third party' if there have been two previous acts of harassment against that worker. However the Bill does not include provisions for 'third party harassment' outside of employment.

NICEM has concerns over this approach to religious harassment outside of employment. There is evidence in GB and NI of harassment of religious minorities, in effect both racial and religious harassment. NICEM accepts that there is controversy in GB over laws which allow individuals to take cases where they have been 'offended' in relation to religious or sexual orientation harassment in theatrical performances and in schools. Indeed, the harassment provisions in the Equality Act (Sexual Orientation) Regulations (NI) 2006 were struck out in the High Court,⁹ partly on the basis that they were 'too wide' in these circumstances. Nonetheless, NICEM considers that some form of harassment provisions must protect religious minorities outside of employment.

The **fourth reform** concerns a little known provision in the RRO, Article 67. Article 67 RRO states:-

"Without prejudice to its obligation to comply with any other provision of this Order, it shall be the duty of a district council to make appropriate arrangements with a view to securing that its various functions are carried out with due regard to the need—

⁹ *An application for judicial review by the Christian Institute and others*, [2007] NIQB 66 (Weatherup J (judgment of 11 September 2007)).

- (a) to eliminate unlawful racial discrimination; and*
- (b) to promote equality of opportunity, and good relations, between persons of different racial groups.”*

NICEM has detailed proposals on Article 67 but they can set out as follows:-

The Race Relations Order should include a similar provision under Section 71 of the Race Relations (Amendment) Act 2000 to impose a specific racial equality duty on local authorities in Northern Ireland to replace the current Article 67 of the RRO. This duty would oblige local authorities to produce outcome focus action plans to tackle racial inequality in Northern Ireland based on robust ethnic monitoring

There are no specific enforcement provisions in relation to Article 67. To some extent, it has been overtaken in NI by section 75 of the Northern Ireland Act 1998. It can now be seen that the race duty in section 71 of the RRA can advantages over Article 67 and indeed section 75.

Article 71 states:-

“71. - (1) Every body or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need-

- (a) to eliminate unlawful racial discrimination; and*
- (b) to promote equality of opportunity and good relations between persons of different racial groups.”*

Article 71 also involves ‘specific duties’ on public authorities. The Race Relations Act 1976 (Statutory Duties) Order 2001 places ‘specific duties’ on certain public authorities, including local authorities. These include a duty to prepare an equality scheme and to monitor their workforces by racial group.

In recent years, there have been successful challenges in the GB courts to the failure of public authorities to take the race duty seriously. One high profile case on section 71 is *R (Kaur & Shah) v London Borough of Ealing* (the Southall Black Sisters (SBS) case).¹⁰ The Council had withdrawn funding from SBS, a black women’s centre for victims of domestic violence, as it wanted cross-community provision of support and assistance to victims of

¹⁰ [2008] EWHC 2062 (Admin).

domestic violence in a gender/race neutral way. The Council had carried out an 'initial equality impact assessment' (EQIA) but a full EQIA was not carried out until after the legal proceedings had commenced. It is worth identifying a range of issues raised in the Court's judgment:-

- EQIA must be “an integral part of the formation of a proposed policy, not justification for its adoption”
- EQIA is not satisfied “by ticking boxes” It must be undertaken “as a matter of substance and with rigour”;
- LBE had failed to carry out a full EQIA at the appropriate time
- It had failed to take the adverse impact of its decision-making process on BME women, in particular its requirement of a single-service provider;
- ‘Community cohesion’ as a criterion could not ‘trump’ the race duty.

These are powerful conclusions. It does not seem possible to achieve this kind of outcome from ‘enforcement’ of either Article 67 or section 75. NICEM therefore wishes to see serious consideration given to the reform of Article 67 on the lines of section 71 of the RRA.

The GEO has been consulting on the public sector duties in GB. Broadly speaking, the existing race, disability and gender duties will be extended to other equality grounds.

7 Conclusion

NICEM considers that this is an opportune time to consider the prospects of legislative reform in NI. A further element in the situation is that the EU is considering a draft Framework Goods and Services Directive, applying EU equality law to religion or belief, disability, sexual orientation and age outside of employment.

We have brought together a wide range of contributors to give their perspectives on the implications of the GB Equality Bill, the publication by the ECNI of its ‘urgent reforms’ to the OFMDFM and the widely supported Assembly motion on a review of the RRO.