Response by the Northern Ireland Council for Ethnic Minorities (NICEM) to the Government Equalities Office (GEO) Consultation on the European Commission Proposal for an Equal Treatment Directive

NICEM is an independent non-governmental organisation monitoring racism and racial inequality in Northern Ireland. As an umbrella organisation we represent the interests of black and minority ethnic groups in Northern Ireland. Currently we have 29 affiliated black and minority ethnic groups as our full members; this composition is representative of the majority of black and ethnic minority communities in Northern Ireland.

In this context, NICEM is happy to respond this consultation which covers both Great Britain and Northern Ireland. This response sets out well-established NICEM positions on single equality legislation[1] and concentrates on the issue of harassment of religious minorities outside of employment, particularly in education. **NICEM remains concerned that some key issues on these matters have not been fully ventilated in the GEO's consideration of these matters.**

NICEM has had sight of the submissions of the Equality Commission for Northern Ireland (ECNI) with which it is in broad agreement.

In particular, NICEM wishes to respond to the questions on page 16 of the Consultation Document:-

"1) What recent evidence do you have of harassment that would be prohibited by virtue of the Directive that would not currently be prohibited by UK discrimination law on the grounds of a) religion or belief and b) sexual orientation?

---

[1] *NICEM Submission on the Consultation Paper: Single Equality Bill for Northern Ireland,* November 2004.

2) Do you support the proposal in the Directive to extend protection against harassment on the grounds of a) religion or belief and b) sexual orientation? Please explain why.
3) Do you have concerns about the proposal? Please explain why."

We first wish to make some preliminary remarks about the background to this controversy over the inclusion of harassment provisions in relation to religion or belief and sexual orientation outside the fields of employment and training.

The Northern Ireland context

NICEM considers that issues of racial discrimination and harassment are, in some cases inextricably bound up with issues of religious discrimination and harassment. The relevant Northern Ireland (NI) legislation is the Race Relations (NI) Order 1997 (RRO), as amended, and the Fair Employment and Treatment (NI) Order 1998 (FETO), as amended. In the latter case, the statutory provisions cover discrimination on grounds of religious belief and political opinion. Although these grounds have frequently been used a 'surrogate' for 'community background, NICEM is concerned that they should also be appropriate to protect the considerable influx of religious minorities into NI over the past few years, along with some religious minority communities in NI which are well settled but have suffered increasing discrimination and harassment in recent years.

Although NICEM at present has proposals to reform the RRO, it is also concerned that FETO be reformed to reflect the growth in discrimination against and harassment of religious minorities in NI.

Certainly, in an extensive consultation period in NI on a single equality bill, there was never any expression of interest in excluding a harassment provision from the non-employment

fields of any bill. NICEM is deeply concerned that a controversy in Great Britain, which NICEM considers could have been handled in a range of more productive ways, might adversely influence the future course of European Community (EC) equality law.

The European Community context

Growing concern across the EC at the adequacy of using direct discrimination as a vehicle for harassment cases lead to the Commission Recommendation 92/131/EEC of 27 November 1991, on the protection of the dignity of men and women at work and Council Declaration of December 1991, on the implementation of the Commission Recommendation on the protection of dignity of men and women at work including a Code of Practice to combat sexual harassment [1992] C27/01. It is hardly surprising that two British equality experts, Evelyn Collins, seconded to the European Commission from the (then) Equal Opportunities Commission for NI, and Michael Rubenstein, Editor of Industrial Relations Law Reports, were deeply involved in the production of the Code of Practice as it was in the courts and tribunals of the United Kingdom that it had proved possible to 'construct' sexual harassment cases out of the direct discrimination definition.

However, it is abundantly clear from the unanimous enactment of the Race and Ethnic Origin Directive 2000 (REOD) that reliance on a direct discrimination provision, even backed up by a Code of Practice, was an inadequate basis upon which to protect racial and ethnic minorities across Europe from harassment not only in employment but also across a wide range of non-employment fields. NICEM participated fully in the Starting Line Group which provided a platform for NGOs to lobby for an effective Race Directive. It was felt at the time that a separate harassment provision applying across both employment and non-employment was an essential element in EC equality law.

It therefore followed, without contention, that harassment provisions should apply to the Framework Employment Equality Directive 2000 (FEED) and to both the amended Equal Treatment Directive and the Gender (Goods and Services) Directive. Although there has been discussion in the European Parliament of amendments to and qualifications of the harassment provision in Article 2.3 of the Commission's proposed Directive, it is not been suggested that the harassment provision should not apply to religion or belief and sexual orientation.

NICEM considers that there would have to be overwhelming reasons to deny religious minorities the same protection from harassment already provided to racial and ethnic minorities. As outlined below, NICEM is of the view that there are overwhelming reasons why harassment provisions should protect religious minorities outside employment.

The GB legislative background

NICEM considers it worthwhile to outline briefly the series of events which have lead the GEO into the extraordinary position of seeking to deny protection from harassment to highly vulnerable religious minorities. Originally, a harassment provision was included in the Equality Bill 2005 in relation to non-employment fields but was removed by way of amendment in the House of Lords. This event was preceded by controversy over the s29A, Public Order Act 1986 (amended by Racial and Religious Hatred Act 2006) which originally covered "threatening, abusive or insulting words or behaviour" but was amended in the House of Commons to exclude "abusive or insulting words or behaviour". It was therefore felt necessary to protect freedom of speech by amending the definition to include only the most serious forms of hate crime. It therefore appears that controversy over a 'right not to be insulted' in relation to

religious hate crime law became a controversy over a 'right not to be offended' in relation to religious harassment law.

Incidentally NI hate crime law has included "threatening, abusive or insulting words or behaviour" in relation to both racial and religious hate crime in the Public Order (NI) Order without any controversy. Nonetheless, while the religious hate crime law was amended, the religious harassment provision was jettisoned entirely without any attempt to reconsider it.

The Equality Act (Sexual Orientation) Regulations 2007 reciprocated precisely the terms of the religious discrimination provisions of the Equality Act but the Equality Act (Sexual Orientation) Regulations (NI) 2006 were modelled on the RRO, hence including a harassment provision. This in turn was struck out by the NI High Court. In *An Application for Judicial Review by The Christian Institute and others*,[2] the Court concluded that there had been a procedural irregularity in the enactment of the Regulations through lack of consultation on the harassment provision. However the Court did go on to conclude that the provision was 'too wide' relying in part on a similar conclusion by the Joint Committee on Human Rights (JCHR).[3] It is clear from the JCHR's deliberations that it was perceived to be too easy for rights to freedom of speech and freedom of thought, conscience and religion to be infringed through findings of violations of dignity or the creation of an offensive environment.

1) What recent evidence do you have of harassment that would be prohibited by virtue of the Directive that would not currently be prohibited by UK discrimination law on the grounds of a) religion or

---

[2] [2007] NIQB 66, judgment delivered 11/09/2007.

[3] Sixth report of Session 2006-07 on Legislative Scrutiny: Sexual Orientation Regulations, which was ordered to be printed on 26 February 2007, paras 57 & 58>

belief and b) sexual orientation?

It is clear from the history of EC equality law that a specific harassment provision applying across the European Union is considered necessary to combat harassment.

In particular, the Government appears to be denying that this harassment provision, or its UK transposition, applies to relationships other than that of employer and employee and provider and recipient of services. For example, in the afternoon session of the Equality Bill Committee on 18 June 2009, the Solicitor-General made the following remarks:-

"Turning to the hon. Gentleman's significant concern about bullying and harassment in school, and whether these proposals are a way to tackle that, we really do not think there would be any practical benefit. We think that—not exclusively—most bullying at schools is pupil to pupil, and what we need to focus on is bullying action plans to stop that occurring, *because the relationship between one child and another is not caught by discrimination law*. Therefore, introducing that protection would not help anyone to take action against that kind of bullying."[4] (emphasis added)

Fortunately, this is not the case. An educational provider of services can be liable for 'pupil-on-pupil' racial harassment under the 'related to' harassment provision in Article 2.3.

Reference has already been made to the EOC judicial review judgment, which was decided partly on the meaning of the 'related to' harassment definition. **It must be emphasised that the Government did not seek to have these questions referred to the European Court of Justice and also that it accepted the judgment and decided not to appeal it.**

At paragraph 37 of the EOC judgment, the Government's own analysis of 'third party *liability*' is set out by David (now Lord) Pannick QC as follows:-

---

[4] Column number 321.

> "Adopting this approach [that employers cannot be subject to 'third party liability'] does not necessarily exclude the possibility that an employer could be held liable on appropriate facts for the conduct of, for example, a supplier or customer (or, more accurately, held liable for the violation of dignity or unwelcome working environment brought about by such conduct). It might be the case that an employer could be held liable for failing to take action where there is a continuing course of offensive conduct, which the employer knows of but does nothing to safeguard against. The employer could be responsible for failing to act, albeit not responsible for the third party's actions in themselves. By contrast, fixing an employer with liability arising from a single act by a third party could go too far."

In consequence, the Administrative Court, at paragraph 40 of the judgment, dealt specifically with 'Bernard Manning' situations and indicated how the 'related to' harassment definition can catch these situations, without applying 'third party liability' in its own right:-

"So long as s4A is to be framed in terms of unwanted conduct engaged in *on the ground of her sex* by the employer, it seems difficult, if not impossible, to see how an employer could be held liable simply for even knowing failure to take steps to prevent harassment by others. If, by reference to the disapproved authority of **De Vere Hotels** [the 'Bernard Manning case'], it could have been shown that the employers knew of continuing and/or regular objectionable conduct by Mr Manning,[5] and failed to take any steps to prevent it, it could be said that they were thereby themselves indulging in unwanted conduct (including omission) in relation to sex, with the consequent upsetting effect on the claimant

[5] It should be noted that the pattern of behaviour is attributable to the potential source of the harassment, in this case, a notorious comedian, rather than the 'three strikes and you're out' approach in Clause 26, whereby the employee must have been subject to a consistent pattern of harassment, even by a number of different 'third parties' and known to the employer.

waitress. However, it would seem very difficult to be able to say that such knowing failure on their part would amount to unwanted conduct by the employers *on the ground of her sex*. However, the result of adopting the associative rather than causative approach to harassment, either by a purposive and transliterative construction such as is urged by Mr Pannick or by its replacement by wording more compatible with Article 1.2.2 [ie the 'related to' harassment definition], as urged by Miss Rose, *would resolve the problem* [ie liability in 'Bernard Manning' scenarios] (emphasis added)."

A further point which must be emphasised is that this analysis must apply equally in employment and non-employment fields. This is certainly the case in relation to racial harassment outside of employment as the 'related to' definition in the Race Directive applies outside of employment, eg in education. Hence, whatever its other intentions, the Government must, in the Equality Bill, apply the 'related to' harassment definition in the Race Directive to non-employment fields within the scope of the Race Directive.

There is a dearth of evidence on harassment and bullying of religious minorities but it is the duty of responsible Government to carry out such research rather than deny the evidence. In relation to the United Kingdom as a whole, NICEM is relying on the NASUWT Report, *tackling prejudice-related bullying*, 2007.[6] It is worth quoting from page 5 of the Report, on 'faith-based bullying:-

"Faith-based bullying is directed against individuals and groups because of their religious belief or affiliation. It may also include bullying behaviour directed against individuals who are of no faith. The problem of faith-based bullying in schools and colleges has intensified in recent years, particularly in the case of Islamophobia. The term 'Islamophobia' refers to anti-Muslim prejudice and racism, based upon an unfounded

---

[6] On lack of data, the NASUWT Report states at p7, "The NASUWT is campaigning for the establishment of a national database to quantify and monitor the incidence of prejudice-related bullying against staff and pupils in schools and colleges. A database of this type is necessary to allow the extent and nature of the problem to be gauged, for any identifiable patterns to emerge and for solutions, advice and guidance to be developed and targeted."

hostility towards Islam. It is an issue for all schools and colleges, regardless of the number of Muslim students or staff within the establishment. Many Black or minority ethnic children will have been caught up in the rise in Islamophobia seen since the events of September 2001 and July 2005 regardless of their actual faith. The prejudice is not confined to the perceptions of being Muslim, and children within faith schools particularly can be singled out for not being part of or being different from the predominant groupings within a school. The rise in the number of actual and aspiring faith-based schools and the widely held public perception that this sort of education is better than the secular alternative may well lead to a rise in bullying based on faith.

Hence the NASUWT is convinced of widespread faith-based harassment.

NICEM also has extensive anecdotal evidence from our Member Groups of widespread racial but also religious harassment, particularly in the NI education system.

In this context, the Government's 'no evidence' approach is unsustainable.

2) Do you support the proposal in the Directive to extend protection against harassment on the grounds of a) religion or belief and b) sexual orientation? Please explain why.

NICEM strongly supports the inclusion of a provision to protect religious minorities across Europe from harassment outside of employment.

First, it is clear that reliance on a direct discrimination definition is inadequate, not just in relation to the creation of an environment in which '3rd party harassment' may occur but also more generally. This is why a harassment definition was enacted in the Race Directive and then replicated across all the equality Directives.

Indeed, this conclusion is supported within the case law of the Employment Appeal Tribunal. In *Richmond Pharmacology* v *Dhaliwal*,[7] the President of the Tribunal, Underhill J, stated, at paragraph 13 of his judgment:-

"First, such case-law as there was in relation to "harassment" as a variety of discrimination prior to the implementation of the Directive is unlikely to be helpful. We do not say there may not be some general observations to be found in that case-law which are equally applicable to claims under the new legislation. But the old law was constructed, somewhat uncomfortably, out of the general statutory definitions of discrimination. The new law, by contrast, derives from discrete statutory provisions with a completely different provenance, and reading across from one to the other is likely to hinder more than it helps." (emphasis added)

In NICEM's view, statutory provisions on such a sensitive issue should be absolutely clear. A rights-based approach to equality demands that the law sets down the 'ground rules' for behaviour, irrespective of how often, or whether at all, cases emerge from the courts and tribunals. While there is a synergy between promotion and enforcement, there is also a synergy between promotion and enactment. In NICEM's view, although promotion, exhortation, 'name and shame' etc, are important weapons in the defeat of racism, **a deliberate decision not to legislate to protect highly vulnerable young people is a clear message that they are not deserving of protection and that their mistreatment is not a serious matter.**

Secondly, NICEM maintains, on policy grounds, that it must be the case that providers of services can be liable, in some circumstances, for 'third party harassment', particularly in environments such as care homes and schools, where the

---

[7] [2009] UKEAT 0458_08_1202 (12 February 2009).

'recipient of services' may well be highly vulnerable. The result of the analysis above is that a black adult teacher is protected from racial harassment by fellow adult teachers and administrative staff and is also protected, in some circumstances, from racial harassment by pupils. Hence the school must control its pupils to protect the adult black teacher. So also highly vulnerable black pupils are protected from harassment by their adult teachers but, according to the Government, these highly vulnerable black pupils are not protected from harassment by other pupils, even though black adult teachers are protected from such harassment.[8] Indeed, given that the Government accepts that the Framework Directive applies to institutions of further and higher education, it appears that young adult black students in these institutions are better protected than more vulnerable black pupils in schools.

This cannot be the case in relation to racial harassment but **the Government appears to want a situation at both national and EC levels where pupils from religious minorities are not protected from harassment by fellow pupils and are not adequately protected from harassment by teachers and school administrators.**

Thirdly, NICEM considers it to be essential that the protection given to ethnic minorities across EC equality law must be replicated in the protection given to religious minorities. Explanatory Note 65 in the Equality Bill sets out examples of religions:-

"The Bahaíi faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism are all religions for the purposes of this provision."

---

[8] It also appears to be the case that, on an equivalent reading of Clause 86(3)(a), a institution of further and higher education could, in certain circumstances, be liable for student-on-student harassment related to religion or belief, although pupil-on-pupil harassment (or even teacher-on-pupil harassment) in schools will not be covered.

Most of these religious minorities are considered to be 'ethnic minority' communities, although not technically within the present definition of 'racial grounds'. In NICEM's view, it is essential that rights to protection from religion-based harassment complement protection from racial harassment.

It is clear from the EOC judicial review that a party, for example a school, can be liable for creating, or, by omission, permitting to be created, "an intimidating, hostile, degrading, humiliating or offensive environment". NICEM considers it unacceptable that the creation of such an environment for ethnic minorities can be harassment under the Bill but that the creation of such an environment for religious minorities cannot be harassment.

There is evidence to suggest that many in these communities suffer discrimination and harassment on grounds of *both* race and religion.[9] There is also evidence from within our own member groups of these forms of multiple discrimination and harassment.[10]

And yet, although the Government appears to be contemplating multiple discrimination cases, it refuses to provide complementary provisions on religious harassment outside of employment to those governing racial harassment outside of employment.

In relation to cases of harassment of members of religious

---

[9] European Union Agency for Fundamental Rights (FRA), European Union Minorities and Discrimination Survey (EU-MIDIS 02), *Muslims*, p 5. In an EU wide survey, an average of 30% of Muslims thought they had suffered discrimination in the previous 12 months, of which 43% considered the discrimination to be on grounds of both ethnic origin and religion.

[10] The NAS-UWT Report goes on to state, "Sectarian divisions in schools and colleges also exacerbate prejudice-related bullying on the grounds of religion. Centred on schools in Northern Ireland, and to a lesser extent Scotland, divisions between the Catholic and Protestant faiths can lead to bullying amongst pupils. *There is some blurring of the lines between bullying on the grounds of faith and race."* (emphasis added)

minorities related to race and/or religion, this startling omission treats members of religious minorities as 'second class' citizens unworthy of complementary protection at a time of growing evidence of alienation amongst some members of religious minorities on this very issue.[11]

NICEM is concerned that the rights of religious minorities to be protected from harassment in fields outside of employment are being sacrificed because of concerns about the sensitivity of faith-based rights and possible clashes between faith-based rights, sexual orientation rights and rights to free speech.

At a time of serious attacks on and harassment of racial and religious minorities in NI and across the UK, it is essential that the law on harassment in NI, in GB and across the EU sends a clear signal that both racial and religious minorities will be effectively protected.

3) Do you have concerns about the proposal? Please explain why.

NICEM fully accepts that sensitive issues are involved. In NICEM's view, equality legislation at the EC level must be clear and uncluttered. Only minimum standards are being set. NICEM would wish to see the well-established harassment definition apply to religion or belief.

One option would be to include a provision with reference to freedom of speech and/or freedom of thought, conscience or religion in the harassment definition.

---

[11] See, for example, 'UK Muslims split on Taliban fight', BBC News website, 25 June 2009, "Almost a third of respondents said they thought the police, government and British society were anti-Muslim. A majority of respondents said they did not think that was the case." (http://news.bbc.co.uk/1/hi/uk/8119273.stm)

A second, arguably better, option would be to allow Member States to make exceptions in clearly defined circumstances such as enunciation of magisterial doctrine or defence of equality rights.

Thirdly, if the definition of harassment is 'too wide', it may be that this is partly due to its transposition into UK law in a disjunctive fashion, either a 'violation of dignity' or an 'unacceptable' environment. But the EC approach has always been conjunctive which may allow for only the more serious cases of harassment to be covered.

Fourthly, to the extent that the definition is 'too wide', which NICEM doubts, it might be open to individual Member States, with good reason given the circumstances in that State, to narrow the scope of the harassment definition, in relation to clearly defined situations.

Given that the EC harassment definition applies without great controversy in workplaces, it should also apply in other 'controlled environments' in which the 'controller' ought to be responsible for any harassment which occurs. Hence Member States could be allowed to limit its scope to such controlled environments, such as schools, care homes etc.

So also it is plain that much of the concern surrounds what is or is not an 'offensive' environment. It may be that Member States, again with good reason given the circumstances in that State, could be able to apply the definition to "degrading and humiliating environments" in some situations, so that, in the same way in which GB religious hate crime law was adapted to apply to the most serious cases of hate crime, so also Member States could have some discretion to apply the EC harassment definition to the most serious cases of religious harassment.

What ought not to happen is the removal of the harassment provision from the scope of EC religious discrimination law. To

do so would be to deny the continuing development of effective EC equality law. In NICEM's view, this important, albeit sensitive, issue has not been well-handled in terms of domestic legislative processes. **A responsible Government ought to have the sensitivity and ingenuity to come up with a carefully drafted legislative provision which protects highly vulnerable members of our society without setting off a series of 'unintended consequences'.**

However to export this lack of legislative will to the EC level would be a betrayal of religious minorities across Europe who suffer significant racial and religious discrimination and harassment outside of employment.