NICEM
Submission to
The OFMDFM
in response to the Draft
Race Regulations
in implementing EU
equality obligations
in Northern Ireland

31 March 2003

1. INTRODUCTION

1.1 NICEM is a voluntary sector, membership-based umbrella organisation representative of minority ethnic groups and their supportive organisations in Northern Ireland. Currently we have 24 affiliated black and ethnic minority organisations as members, which includes Chinese, Asian, African-Caribbean, Irish Travellers, Filipino, Muslim, mixed-marriage groups, etc.

1.2 NICEM welcomes the government's commitment to ensuring that the EU Race Directive is fully implemented in Northern Ireland law by the Directive deadline of 19 July 2003. We support the implementation of the new standards and definitions in the EU Race Directive and Framework Directive on Employment.

1.3 We are disappointing for three reasons. First, the decision to implement the Directive through a statutory instrument of Regulations, not primary legislation, has a very damaging impact on the integrity and coherence of the Race Relations (NI) Order 1997. Second, the draft Regulations adopts a minimalist and restrictive approaches to compliance with the Directive. Thirdly, certain key provisions of the Directive are either missing or misinterpret the principle that laid down in the Community Law.

1.4 As the First Minister and Deputy First Minister stated, in the forward of the consultation document "Promoting Equality of Opportunity: A Single Equality Bill for Northern Ireland", that **"The Single Equality Bill will not involve a reduction in protection offered by current laws. Rather, it is designed to build on existing equality legislation in preventing discrimination and promoting equality of opportunity for all in our society. The Bill will enable us to harmonise our anti-discrimination laws as far as practicable and to consider the extension of protection to new categories. It will also enable us to implement new European Directives on equality and to consider important developments in Great Britain, as well as in the Republic."**

1.5 This exciting message is inconsistence to the minimalist and restrictive approach in the transposition of the two EU Directives. Article 6 of the Race Directive and Article 8 of the Framework Directive have the same provision of the minimum requirement of the two Directives. It states **"Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive."** (Article 6(1) and Article 8(1)) **It further provides in paragraph 2 that there should have no regression of the existing protection in implementing the two Directives.** These are the standards that laid down the principle of the transposition of the two Directives. We are kindly to obtain and gives the consent to use the Counsel Opinion (Robin Allen, QC) for the Justice and Counsel Opinion (Tim Eicke) for the Commission for Racial Equality in this area for your information (annex 1 and annex 2)

1.6 The impact of the decision, **by using statutory instrument to implement the Race Directive and Framework Directive on Employment** (the Irish government through our advice to the official adopting primary legislation despite limited time frame**), will be to create more complex and confusing legislation for individuals,**

employers, business and the public sector, either as victim or respondent of the proceedings. It will lead to further anomalies and inconsistencies within the discrimination legislation.

1.7 This will inevitably result in increased litigation to clarify the law with financial consequences for business, advocacy organisations such as Equality Commission and trade unions who provide legal assistance to potential testing and other cases, the courts and the tribunals. **The costs of litigation have not been taken into account in the government's regulatory impact assessment, which is included in the consultation document.**

1.8 We raise the serious concerns that the key provisions (such as the indirect discrimination, harassment, victimisation, etc.) **of the draft Regulations** (race, religion, disability, sexual orientation, etc.), under the restrictive approach to interpret Section 2(2) of the European Community Act 1972, which is contradictory to the principle of the minimum requirement as argued in paragraph 1.4 above, **not only pre-empt the drafting of the Single Equality Bill, it will undermine the benchmarking of the Single Equality Bill.**

1.9 Furthermore, why do we just copy the GB Regulations without acknowledge the political context in Northern Ireland in which under Good Friday Agreement it places human rights and equality as the cornerstone for the peace settlement. It also has no clarity on the relationship between all draft Regulations and the Single Equality Bill.

1.10 NICEM will consider, very seriously, any course of action against our government as the result of non-compliance of the Race Directive, including formal complaint to the European Commission.

2. GENERAL OVERVIEW: CREATING A TWO-TIER FRAMEWORK

2.1 Colour

2.1.1 The government proposes to make two fundamental divisions within the Race Relations (NI) Order 1997. First, **a distinction is being created between discrimination on grounds of colour and nationality, and discrimination on grounds of race, national or ethnic origins.** The new provisions included in the Regulations will only apply to the latter grounds, whereas the existing Race Relations (NI) Order 1997 will continue to operate in respect of the former. **This is an unacceptable approach that creates a hierarchy of legal protection from different forms of racism. It deviates from the principles in developing the Single Equality Bill for Northern Ireland.**

2.1.2 With regard to colour discrimination, its exclusion is not compatible with the Directive. Whilst the Directive only refers throughout to discriminate on grounds of "racial or ethnic origin", its underlying purpose is "the fight against racism and xenophobia"(para. 7 of the Preamble of the Race Directive) in general. The government seems to base its argument on a narrow, literal reading of the Directive's

provisions, however, this conflict with the approach to legislative interpretation consistently adopted by the European Court of Justice.

2.1.3 Section 2(2)(b) of the European Communities Act 1972 gives some discretion to the government to reply on regulations "for the purpose of dealing with matters arising out of or related to any such (Treaty) obligation or rights…" **as has been seen with EU sex equality law, the Court takes a broad purposive approach and it will examine the spirit and underlying objectives of the measure.**

2.1.4 The government has clearly accepted this logic in relation to discrimination based on "national origin". This is not mentioned in the Directive, but nonetheless it has been included in the draft Regulations. It is far more difficult to understand "political opinion", which is not in the Framework Directive on Employment (clearly it will be in breach of Section 76 of the Northern Ireland Act 1998 as to create the hierarchy of legal protection between religion and political belief that makes the law void), but nonetheless it covers under the religion or belief. No reason is given as to why "colour discrimination" cannot be similarly treated. Moreover, Article 6(1) can provide the justification to cover "colour discrimination".

2.1.5 Therefore, it is illogical to implement the principle of equal treatment by providing for greater protection from discrimination on grounds of race and ethnic or national origin but not colour. **The principal trigger for racially discriminatory behaviour is frequently colour: discriminators will seldom know the victim's ethnic or national origin and sometimes not the racial group but "colour" is a visibly different characteristic.**

2.2 Nationality

2.2.1 The exclusion of nationality discrimination is not contrary to the Directive. Nevertheless, it is deeply damaging to the integrity of the Race Relations (NI) Order 1997 to separate this aspect of racial discrimination from the other grounds. Moreover, Article 6(1) can provide the same justification to cover nationality discrimination, as well as "political opinion" as argued in paragraph 2.1.3 and 2.1.4 above. Protection against nationality discrimination is likely to be particularly relevant to more recent migrants to Northern Ireland (a number of recent TV series in both BBC and UTV spotlight programmes highlights the problems), such as new workers, refugees and asylum seekers. **Given the very sensitive public debate surrounding immigration, it is crucial that the government sends out a clear signal that discrimination on grounds of nationality is one dimension of racism and that this is unacceptable as any other forms of racism. However, the new legal framework implies that nationality discrimination is more acceptable than other forms of racism.**

2.2.2 In addition to these problems, the draft Regulations will only apply to those matters falling within the material scope of the Directive- namely, employment (including self-employment) education, healthcare, social security, social advantages, social protection, goods, services and housing. **Other matters, such as policing and immigration, will not be affected by the Regulations**. This is very disappointing, because it undermines some of the progress made through the Race Relations (Amendment) Act 2000 in GB, which is not extended to Northern Ireland. At the

same time the House of Lords decision on re Amin remains good law is in doubt as the result of these changes, as well as the statutory duty to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998. **By permitting the maintenance of a lower standard of protection, the government is implying that discrimination in areas outside the scope of the Directive is less problematic. It also creates confusion and inconsistencies of the section 75 duties to promote racial equality.**

2.3 It is also highly likely that the Race Directive will be read in light of Article 21 of the EU Charter of Fundamental Rights, which prohibits discrimination on grounds of "race, colour, ethnic and social origin…….membership of national minorities" and in paragraph 2, on grounds of "nationality".

2.4 Inevitably, the proposed framework will give rise to considerable litigation concerning the boundaries between the two sets of legal provisions. For example, often it may be difficult to determine whether the discrimination was on grounds of colour or on grounds of ethnic or national origin. This will be confusing for individuals, employers and service providers. Moreover, it will be difficult for the tribunals and courts to apply.

2.5 The compatibility of these arrangements with the Human Rights Act 1998 also must be considered. Article 14 of the European Convention of Human Rights (ECHR) provides that there shall be no discrimination in the enjoyment of the rights and freedoms set forth in the Convention on a variety of grounds, including colour. Article 6(1) provides a right to a fair trial, including for the "determination of civil rights and obligations". The European Court of Human Rights has already held that laws governing discrimination in the labour market fall within the scope of Article 6(1).

2.6 Under the proposed arrangements, a victim of colour discrimination could argue that they have been subject to less favourable treatment in judicial proceedings to challenge discrimination, because unlike a victim of ethnic discrimination they would not be entitled to invoke the shift in the burden of proof provisions. It is difficult to see what legitimate aim could be invoke to justify this difference in treatment. **We raise the serious doubt whether the two tiers system is compatible with Article 6 and Article 14 of the ECHR. The consequence will be that the draft Regulations will be void and we are prepared to challenge on that ground. (See also the Counsel Opinion of the Commission for Racial Equality in its submission to the draft Race Regulations at pp.6)**

2.7 Recommendations:

1. **Colour and nationality discrimination should be included in the Regulations.**
2. **The standards within the Race Directive should be extended to all areas of the Race Relations Order 1997.**

3. SPECIFIC COMMENTS ON THE DRAFT RACE REGULATIONS

3.1 Material Scope

3.1.1 Traveller as a racial group

3.1.1.1 It is defined by the Race Relations (NI) Order 1997, but it will afford no legal protection in the draft Regulations unless it defines the same as in the 1997 Order. **NICEM has a very clear position in this matter we will not accept any draft Regulations if Traveller group, which is the most vulnerable, disadvantaged and social excluded group in our society, is not protected under the draft Race Regulations.**

3.1.1.2 NICEM recommends "Traveller as a racial group" should be included in the Regulations.

3.1.2 Legal Personality protection

3.1.2.1 Article 3(1) of the Race Directive states "….this Directive shall apply to all persons,…." And the paragraph 16 of the Preamble further elaborates that "….Member states should also provide, where appropriate and in accordance with their national traditions and practice , protection for legal persons where they suffer discrimination on grounds of the racial or ethnic origin of their members. This particular clause is critical to the protection of the black and ethnic minority groups, who incorporated to the legal personality, against discrimination by public authorities, as well as by other voluntary and community sectors in access to public services. This group protection is very significant and very effective to the member of the Travelling community, as well as other minority ethnic community, who has language barrier to get access to public services. We would like to urge our government to include a new clause to protect black and ethnic minority groups to that effect, otherwise it deems to be non-compliance of the Race Directive.

3.1.2.2 NICEM recommends legal personality protection should be included in the Regulations.

3.1.3 Self-employment

3.1.3.1 We have no reason why the key provision under Article 3(1)(a) such as "self-employment", which is the new area that introduced by the European Commission in both Race Directive and Framework Directive on employment, is missing in all draft Regulations. Without the entrenchment of this key provision, it amounts to non-compliance of the Directive within the meaning of the Community Law.

NICEM recommends a new clause on "self-employment" should be included in all the Regulations.

3.1.4 Occupation

3.1.4.1 It is not clear to what extent "political office-holder", "public appointments", "volunteers" fall within the ambit of the Article 3(1)((a) (….self-employment to occupation). NICEM recommends the government should include "political office-holder", "public appointments" and volunteers in the material scope of all Regulations.

3.1.5 Social Protection and Social Advantage

3.1.5.1 The key provision of "social protection" (Article 3(1)(e)) and "social advantages" (Article 3(1)(f)) are missing in the draft Regulations. In particular the term "social advantages" encompasses all advantages granted to one group, whose extension to others seems likely to facilitate social inclusion.

3.1.5.2 On the Proposal for a Council Directive: implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (December 1999), the European Commission set out the parameter in the area of "social advantages": "Regulation (EEC) No 1612/68 on freedom of movement for migrant workers, requires Member States to grant social advantages without regard to nationality. In this context, social advantages have been defined by the European Court of Justice as benefits of an economic or cultural nature which are granted within the Member States either by public authorities or private organisations. The concept is applied here. Examples include concessionary travel on public transport, reduced prices for access to cultural or other events and subsidised meals in schools for children from low income families." (Article 3(4), at p.7)

3.1.5.3 The EC law gives a wide definition to social advantage ranging from tax regimes to death grants to education benefits: see Peter De Vos v. Stadt Bielefield Case C-315/95. And in the case of Mutsch [1985] ECR 2681 the term social disadvantage was held to encompass the right to have criminal proceedings conducted in a language other than that normally used. Without the entrenchment of the provision of "social protection and social advantage", it amounts to non-compliance within the meaning of the Community Law.

3.1.5.4 NICEM recommends two new clauses to be included, one on "social protection" and one on "social advantages". The government should draft the clauses in conjunction with the case law developed in the whole area, that covers both public and private sphere. For a discussion of the width of the concept on "social advantages" see Robin Allen, "Equal Treatment, Social Advantages and Obstacles: In Search of Coherence in Freedom and Dignity" in "The Legal Framework and Social Consequences of Free Movement of Persons in the European Union" ed. Guild E., Kluwer publication, The Hague, 1999.

3.2 Concept of discrimination

3.2.1 "Indirect discrimination"

3.2.1.1 The new definition of indirect discrimination proposed in the Regulations is an advance on the restrictive definition currently found within the Race Relations (NI) Order 1997. However, it is not entirely compatible with the definition provide in the Race Directive. In particular, the proposed Article 3(1A)(b) of the draft Regulations requires the litigant to demonstrate that the measure being challenged puts them individually at a disadvantage. In contrast, Article 2(2)(b) of the Race Directive only requires the litigant to establish that the provision, criterion or practice would put "persons of a racial or ethnic origin at a particular disadvantage compared with other persons." **The substantive difference between the texts is that whereas the Race Directive permits anticipatory actions (where the individual is not yet disadvantaged by the practice, but might be in the future), the definition**

proposed for the Regulations is entirely reactive – the individual must show that already they have been placed at a disadvantage.

3.2.1.2 Moreover, the proposed Article 3(1A)(c) of the draft Regulations allows indirect discrimination to be justified where the respondent can show that the measure is "a proportionate means of achieving a legitimate aim". This seems more flexible than the Directive's requirement that measures be "objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary". The text of the Directive should be adopted here in order to be certain of compliance.

3.2.1.3 NICEM recommends that (1) delete Article 3(1A)(b) and (2) replace Article 3(1A)(c) with: "which he cannot show to be objectively justified by a legitimate aims and the means of achieving that aim are appropriate and necessary".

3.2.2 Harassment

3.2.2.1 It is welcome that the government has proposed a definition of harassment closely linked to that found in the Directive. However, this progress is then weakened by the addition of Article 4A(2). The explanatory note describes this as "a test of reasonableness, taking into account the views of the person being harassed and the motives of the alleged perpetrator". The government has not provided any evidence that the absence of this reasonableness test in the existing Race Relations (NI) Order 1997 has given rise to problematic case-law. Moreover, the Race Directive does not require this qualification. There is a real risk that tribunals will assess reasonableness by reference to their personal life experiences. Tribunals may find it difficult to understand the perception of harassment within minority ethnic communities. If this Article is to be retained in the Regulations, it should be adjusted to ensure that the primary consideration for tribunals should be the perception of the victim.

3.2.2.2 Furthermore, Article 4A(3)(b) will create a blanket "walk free" clause for perpetrator of racial harassment. Racial discrimination, in most case, is very subtle. The classical example is that "I don't like you that is why I harass you. It does not related to your colour, racial, ethnic or your nationality!" The exception situation is well protected under Article 4A(3)(a). The additional clause on Article 4A(3)(b) is, from our view, is totally unnecessary.

3.2.2.3 NICEM recommends the following change in the Harassment clause:

1. **replace Article 4A(2) with: "for the purpose of paragraph (1), conduct shall be regarded as having the effect specified in sub-paragraph (a) and (b) of the paragraph if, having regard to all the circumstances, and primarily the perception of that other, it should reasonably be considered as having that effect".**
2. **delete Article 4A(3)(b).**

3.3 Exception for genuine occupational requirement

3.3.1 NICEM considers that the draft Regulations is not incorporated accurately the genuine occupational requirement definition in the Race Directive. In particular, the Regulation 6 does not include a requirement that the genuine occupational requirement be used to achieve a "the objective is legitimate"(Article 4 of the Race Directive).

3.3.2 We consider that the requirement to show a legitimate aim is a necessary test since the genuine occupational requirement provision is an exception to the prohibition of discrimination in employment. **NICEM recommends to amend the proposed 7A(2)(b) by adding "the objective is legitimate and" before the sentence.**

3.4 Discrimination or harassment after relationship has ended

3.4.1 The extension of protection to situations where a relationship has ended is welcome and NICEM is pleased that the protection applies to all activities regulated by the Race Directive. **However, we are concerned by the requirement that the act of discrimination or harassment be "closely connected" to the relevant relationship. This seems to impose an additional and unnecessary requirement which may be difficult for complainants to satisfy.**

3.4.2 NICEM recognises that the needs to be a causal link between the act of discrimination and harassment and the relevant relationship but we consider that the words "arises out of" is sufficient to show this link. If the government's fear is of claims being brought several months, if not years, after the relationship has ended then the rules of evidence alone will determine whether the standard or quality of evidence is sufficient to show a causal link.

3.4.3 Our concern is that if the words "closely connected to" are interpreted narrowly, for example as "closely connect in time" then this requirement may operate to prevent meritorious claims of discrimination, including victimisation or harassment, from being brought.

3.5 Instruction to discriminate

3.5.1 Article 2(4) of the Race Directive provides that an instruction to discriminate on any of the prohibited grounds constitute direct or indirect discrimination. Article 30 of the 1997 Order makes it unlawful to instruct a person to discriminate on racial grounds. Only the Equality Commission (as the result of the section 74 of the Northern Ireland Act 1998) to bring legal proceedings against a person who acts in breach of Article 30: there is no right of individual complaint.

3.5.2 NICEM recommends that the Equality Commission should retain the power to enforce Article 30 as it is a particularly useful power where there is no direct victim or conversely where there are many. However, we consider that the Race Directive creates a right for a individual complaint in accordance with Article 7(1), the failure to include such a provision in the Regulations shall constitute non-compliance of the Directive within the meaning of the Community Law.

3.5.3 NICEM therefore recommends the Regulation should include a provision to provide an individual right to bring proceedings where he or she is a victim of an instruction to discriminate to comply with the Race Directive.

3.6 Victimisation

3.6.1 The definition of victimisation in Article 9 of the Race Directive does not require a comparator: it refers to "adverse treatment or adverse consequence as a reaction to a complaint or to proceedings." As Article 9 appears to define more clearly the conduct that should be prohibited, NICEM recommends that the Regulations should include a provision to apply the approach in the Directive, while retaining the fuller list of protected acts as in Article 4(2)(a) and (b) of the 1997 Order.

3.7 Sanctions

3.7.1 The Race Directive requires sanctions for breach of national laws adopted pursuant to the Directive to be "effective, proportionate and dissuasive"(Article 15). The government considers that the remedies, which are currently available for unlawful racial discrimination, are sufficiently "effective, proportionate and dissuasive."

3.7.2 NICEM does not consider that current sanctions are effective or dissuasive. In the Commission for Racial Equality's Third Review of the Race Relations Act 1976**, it recommends that the Act be amended to enable employment tribunals to make recommendations in relations to the future conduct of a respondent in order to prevent further acts of discrimination. In particular, tribunals should have the power to make recommendations to revise or modify procedures which the tribunal has found be intrinsically discriminatory or to provide protection from victimisation for the complainant whether he or she remains in employment.**

3.7.3 Another option is for tribunals to be given an additional power to order remedies to correct the wrong that has been perpetrated. For example, if the complainant is the best candidate, but because of discrimination did not get the job, then the tribunal should order if appropriate that the candidates be offered the next available appropriate job**. In addition, financial sanctions could be strengthened to remove the now wholly anomalous exclusion of compensation for unintentional indirect racial discrimination.**

3.8 Defence of Rights

3.8.1 Article 7(2) of the Race Directive provides that:

> "Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive."

This provision permits Member States to provide for proceedings to be brought in the name of an organisation with a legitimate interest, for example the Equality

Commission, a trade union or NICEM. In its Third Review of the 1976 Act the CRE had recommended that **the 1976 Act be amended to enable the CRE to bring proceedings in its own name, without a complainant, where there is evidence of discrimination at a particular establishment and to enable a court or tribunal to consider a complaint where the discrimination affects a number of people who wish to bring a group complaint, without the need for each person to bring separate proceedings (class actions).**

3.8.2 NICEM recognises that proceedings by the Equality Commission and other organisation in their own name and class actions may operate as cost effective ways to conduct litigation. In viewing the financial difficulties of the Equality Commission, it is the best option. Also importantly, they allow the Equality Commission and others to act strategically and proactively; in some cases such actions may require fewer resources than a formal investigation but be as effective. As a method of law enforcement, representative and class actions may operate as a type of dissuasive sanction, within the meaning of Article 15 of the Race Directive, if respondents faced the threat of proceedings from a group of complainants or the Equality Commission itself, rather than an individual who for reasons of fear, cost and pressure may decide not to proceed.

3.8.3 Moreover, as argued above, in the absence of a directly affected victim it will not be possible to challenge an indirectly discriminatory policy, criterion or practice unless there exists the power for expert organisations to bring "own name" proceedings. If the government refuses to make such provision then it is arguable that it is non-compliance within the meaning of the Directive. NICEM will consider for such a challenge.

4. RACE SPECIFIC ISSUES

4.1 Employment and training for those not ordinarily resident in Northern Ireland

4.1.1 The consultation paper asks if this exception should be repealed insofar as it relates to discrimination on grounds of race or ethnic or national origins. As a matter of principle the law should provide for and give effect to the principle of equal treatment as the starting point (the purpose and objective of the Race Directive). Exceptions to this general principle of equality law must be limited and must pursue a legitimate aim.

4.1.2 NICEM considers that this exception may be used to achieve a beneficial outcome, for example the provision of skills training for persons from developing countries or English language classes for employees employed under a work permit scheme, where the positive action measures in the Race Relations (NI) Order 1997 are inappropriate because they are based on a test of under-representation.

4.1.3 We are not wholly convinced that such schemes detract from the principle of equal treatment under the 1997 Order and the Race Directive since they apply only to non-GB nationals and do not disadvantage any particular racial group in Northern Ireland. However, since such acts of discrimination are more likely to be on grounds of nationality, we can see no reason for retaining the statutory

exception insofar as it relates to discrimination on grounds of race or ethnic or national origins. We therefore support its repeal.

4.2 Seamen recruited abroad

4.2.1 NICEM agreed that Article 11 of the 1997 Order, which provides **an exception for seamen recruited outside Northern Ireland, should be repealed so far as it relates to the grounds covered by the Race Directive.**

4.3 Charities as providers of goods and services

4.3.1 The consultation paper asks to repeal the blanket exception in the 1997 Order insofar as it allows charities to target benefits or services at people of particular racial or ethnic origins. It is also suggested that charities would be able to rely on positive action provisions to allow them to continue to provide support where appropriate.

4.3.2 Article 34(3) disapplies all of Part II to IV to charities which confer benefits on persons of a "class defined otherwise than by reference to colour". This includes a class defined by racial or ethnic or national origin but also a class defined by place of residence or birth, connection with a country or origin or religion. For example, the Chinese Welfare Association or other Chinese charities, are often established to benefit only Chinese (both mainland China and Hong Kong) and many such charities would not come within the positive action exception in Article 35 (meeting special needs). This is in contrasts to Article 25 which apply to associations which benefit persons of a particular racial group.

4.3.3 In addition, there are some important service providers which are registered charities, such as the Belfast Improved Housing which provides a new sheltered housing running exclusive to the Chinese group. There is also the possibility as it is common in Great Britain to have some housing associations, where the provision of benefits and services solely to one racial group, eg Asian or Chinese tenants could have detrimental effects on community cohesion policies.

4.3.4 NICEM recognises that the exception for charities is extremely wide; but we also support the need for charities, especially ethnic minority charities, to be able to target benefits or services at persons from a particular racial group. It may not always be possible to rely on the positive action provisions where the overriding need is to provide a particular service or facility in a culturally supportive and secure environment.

4.3.5 Where the class of persons is defined otherwise than by reference to a racial group, e.g. place of residence then it might be argued that it should be for the charity to demonstrate an objective justification for what might constitute an indirectly discriminatory provision criterion or practice.

4.3.6 Therefore, in viewing the above arguments we do not agree to repeal the blanket exception for charities. We also agree that a new provision on "Positive Action" must be included in the Regulations in which it must follow the close wording of the Article 5 and paragraph 17 of the preamble of the Race Directive. The reason behind the new provision is that the new concept of positive action is different in both of the scope and concept under the 1997 Order (Article 35-37).

4.4 Disposal and management of small dwellings

4.4.1 Article 23 of the 1997 Order permits landlords who do not share facilities with their tenants to discriminate. This law will be in conflict with the Race Directive insofar as the legitimate aims and means are inappropriate and out of proportion. NICEM recommends repeal Article 23 of the 1997 Order.

5. ADDITIONAL RECOMMENDATIONS

5.1 Acts done under statutory authority

5.1.1 NICEM supports the repeal of Article 40 of the 1997 Order. This is consistent with the recommendations for reform of the Race Relations Act 1976 as set out by the Commission for Racial Equality in its Third Review of the 1976 Act. We consider that there are few statutes which expressly permit discrimination on grounds of race, colour, ethnic, national origin and nationality; where such legislation exists it is to meet the special needs of particular racial groups, e.g. Travellers' children and education and so would be consistent with Article 35 of the 1997 Order.

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