

## **NICEM PAPER ON**

### **THE FORMAL REVIEW OF THE RACE RELATIONS (NI) ORDER 1997**

#### **1. Introduction**

The direct rule administration introduced legislative measures to outlaw racial discrimination under the Race Relations (NI) Order 1997 ["RRO"]. This was the result of successful campaigning from 1991 onwards both at the regional level (Northern Ireland) and the international level (the United Nations) from ethnic minority community groups. Other groups involved in the campaigning included the Committee on the Administration of Justice, trade unions, and a broad range of other groups from within the voluntary and statutory sector, namely the Irish Congress of Trade Union, Standing Advisory Commission on Human Rights, Fair Employment Commission and Equal Opportunity Commission. The RRO mirrors the equivalent Race Relations Act 1976 in Great Britain, except for the planning law provision which is not applicable in Northern Ireland.

In 2000 the British government introduced the Race Relations (Amendment) Act 2000 in response to the Stephen Lawrence Inquiry Report. One of the key elements of the Amendment Act is to put the entire criminal justice system under the race legislation as the result of the House of Lords decision in *Amin*. Under the *Amin* principle, for services that are solely the provision of government with no private equivalent, equality legislation shall not apply. Since we do not have the equivalent Amendment Act in Northern Ireland, we are bound by the *Amin* judgement. In practice this allows immigration officers, police officers, prison officers, probation officers, tax officers, planning officers and court staff to discriminate against ethnic minorities without any legal redress. The *Amin* principle applies to all existing equality legislation in Northern Ireland.

In 2003 the British government introduced the Race Relations Act 1976 (Amendment) Regulations 2003 as part of the obligations under the Racial Equality Directive 2000 (Council Directive 2000/43/EC). The direct rule administration introduced the equivalent Race Relations Order (Amendment) Regulations 2003 to N.I.. Under direct rule OFMDFM followed the Whitehall example of transposing the EU Directives despite their concerns on "colour" and "nationality", as well as the definition of "indirect discrimination". Regarding "colour" and "nationality". This interpretation creates a two tiered system in which "colour" and "nationality" have less protection significantly in areas such as the shift of the burden of proof shift to the respondent, as well as new definitions of direct and indirect discrimination, harassment and victimisation, etc.

The key argument of this minimalistic approach by the British government is that the European Community Act 1973 is used to transpose 'Community obligations' and 'related matters'. The Directive does not mention 'colour', in addition to this, 'nationality' is excluded from the Directive, therefore it will not be contained within the Race Regulations. It is surprisingly the OFMDFM did not use the same approach to transpose the Framework Directive on Employment in 2006. The Framework Directive does not include 'political opinion' and 'religious

belief' (it covers religion or belief), but the FETO (Amendment) Regulations included both terminology. NICEM believes this illustrates the hierarchy of rights in Northern Ireland and therefore is inherently discriminatory towards ethnic minorities.

In June 2007 the European Commission started the infringement proceedings against Member States who failed to fully implement the Racial Equality Directive, this group included the UK. The UK government failed to implement correctly the definition of "indirect discrimination" and "instruction to discriminate", their definitions were deemed too restrictive by the Commission. The British government introduced the Race Relations (Amendment) Regulations 2008 in November 2008 to change the definition of 'indirect discrimination' as required by the European Commission, but did not introduce a new definition on 'instruction to discriminate'. In contrast with GB, in Northern Ireland the government did not introduce any new Regulations to rectify the problems as required by the European Commission.

## **2. Formal Review of the Race Relations (NI) Order 1997**

The former Commission for Racial Equality for Northern Ireland started to consult "Recommendations for Change to the Race Relations (NI) Order 1997" in September 1999. In 2002 the Equality Commission officially published the "Recommendations for Changes to the Race Relations (NI) Order 1997".

The Equality Commission recommended the following changes to the 1997 Order:

1. Applicability of the Legislation
  - (i) The legislation should apply to all Government activities (Amin principle, planning law, etc.);
  - (ii) Duty on public bodies (list a number of options to implement the RRA (Amendment) Act 2000 in Northern Ireland);
  - (iii) Race relations legislation should be accorded priority over discriminatory legislation due to the doctrine of Parliamentary Sovereignty; and
  - (iv) There should be a requirement for ethnic monitoring in employment.
2. Effective enforcement by the Commission
  - (i) The Equality Commission should have the power to issue additional Code of Practices (Article 45);
  - (ii) The scope of Formal Investigation should be extended as the result of case law development (Article 46-50);
  - (iii) The scope for non-discrimination notice should be extended (Article 55);
  - (iv) The Commission's power to bring evidence of discrimination should be extended;

- (v) Undertakings based on equality of opportunity should be legally binding (Article 62 is not legally binding but Article 12 and 13 of FETO is legally binding);
  - (vi) The Tribunal's remedial powers should be increased (Article 53) to include power to obtain recommendations in relation to affirmative action or alternatively, orders in relation to action which is not linked exclusively to an individual's redress;
  - (vii) Time limits should be harmonised (6 months to both employment and goods, facilities and services);
  - (viii) Industrial Tribunal should handle complaints by Members of the Armed Forces;
  - (ix) Legislative protection should be available to volunteers, contractors and office holders; and
  - (x) The categories for a genuine occupational qualification should be repealed.
3. Fair and effective adjudication of cases
- (i) Establish a Discrimination Division to deal with all discrimination cases within one single court system;
  - (ii) Tribunal should be required to draw inferences from the failure to respond to a Questionnaire rather than "may draw an inference..." (Article 63(2)(b))
4. Other Matters
- (i) Remove barrier for civil claims under County Court (NI) Order 1980 for case appeal to the House of Lords.

Due to the transposition of the Racial Equality Directive in 2003 and the Single Equality Bill process (Green Paper with options which was produced in 2004), the Formal Review of the RRO to rectify the legislative shortcomings was not on the government's agenda. NICEM completely agrees that the Commission's Recommendations would be better dealt with under the Single Equality Bill process. As a matter of fact the Green Paper with the option to tackle most of the issues is, on the whole, agreed by majority of the civil society.

The OFMDFM published their document entitled "Single Equality Bill: Response to Consultation" in March 2005. Since then the Single Equality Bill has completely disappeared from the government's agenda. It is outside the priorities of the current Executive. There is nothing mentioned on the Single Equality Bill in the Programme for Government 2008-2011. For this reason NICEM would like to request a Formal Review of the Race Relations (NI) Order 1997.

### **3. Recommendations for Changes to the current Race Relations (NI) Order 1997**

NICEM commissioned a paper "The Race Relations Order – what we've got and what we want" by Professor Barry Fitzpatrick in February 2009 to identify key

areas need to change and review the case law development in that particular area. Professor Fitzpatrick's paper provides a framework for NICEM's recommendations whilst at the same time taking into account the outstanding issues identified by the Equality Commission in its 2002 Recommendations, particularly in relation to effective enforcement relevant to the current climate.

- 1. The Race Relations Order should include provisions on discrimination and harassment on grounds of "colour" and "nationality" across its scope to rectify the problems created in the Race Relations (amendment) NI Regulations 2003;**
- 2. The Race Relations Order should include a similar provision of Section 19B of the Race Relations (Amendment) Act 1976 which are follows:**

**19B. Discrimination by public authorities.**

- (1) It is unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination.**
  - (2) In this section "public authority"- includes any person certain of whose functions are functions of a public nature; but does not include any person mentioned in subsection (3).**
  - (3) The persons mentioned in this subsection are  
either House of Parliament;  
a person exercising functions in connection with proceedings in Parliament;  
the Security Service;  
the Secret Intelligence Service;  
the Government Communications Headquarters; and  
any unit or part of a unit of any of the naval, military or air forces of the Crown which is for the time required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.**
  - (4) In relation to a particular act, a person is not a public authority by virtue only of subsection 2(a) if the nature of the act is private;**
  - (5) This section is subject to Section 19C and 19F.**
  - (6) Nothing in this section makes unlawful any act of discrimination which – is made unlawful by virtue of any other provision of this Act; or would be so made but for any provision made by or under this Act.**
- 3. The Race Relations Order should apply to Planning Authority in Northern Ireland (the equivalent Section 19A (1) of the Race Relations Act 1976 "19A (1) It is unlawful for a planning authority to discriminate against a person in carrying out their planning functions.").**
  - 4. The definition of "Indirect Discrimination" and "Instruct to discriminate" should be amended in accordance to the European Commission's requirement.**

5. The definition of harassment is amended in line with the latest case law development and also across the Race Relations Order so that harassment of workers, but also customers, students, patients etc. can be based on the wider 'related to' test and that the Race Relations Order should, for the avoidance of doubt, provide that employers, providers of services and public bodies can be liable for third party harassment'.
6. 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 to public authority in Northern Ireland to replace the current Article 67 of the RRO. We propose the following key provision in light of Section 71 of the RRA:

**PART IX  
SUPPLEMENTAL**

**Racial Equality Duty to public authorities in Northern Ireland**

67. Without prejudice to its obligation to comply with any other provision of this Order and Section 75 of the Northern Ireland Act 1998, it shall be the duty of a public authority in Northern Ireland when carrying out its functions, have due regard to the need -

- to eliminate racism, unlawful racial discrimination and racial inequality;
- to promote equality of opportunity and good relations between persons of different racial groups;
- to promote positive attitudes towards persons of different racial groups;
- to encourage participation by persons of different racial groups in public life;
- to have a duty to produce an outcome focus action plans to tackle racial inequality in Northern Ireland based on robust ethnic monitoring

Similar enforcement provision for the Equality Commission is introduced as outlines in Section 71 of the Amendment Act 2000.

7. The Equality Commission should have the power to issue additional Code of Practices (Article 45);
8. The scope of Formal Investigation should be extended as the result of case law development (Article 46-50);
9. The Tribunal's remedial powers should be increased (Article 53) to include power to obtain recommendations in relation to affirmative action or alternatively, orders in relation to action which is not linked exclusively to an individual's redress;

- 10. Time limits should be harmonised (6 months to both employment and goods, facilities and services);**
- 11. Tribunal should be required to draw inferences from the failure to respond to a Questionnaire rather than “may draw an inference...” (Article 63(2)(b)); and**
- 12. Remove barrier for civil claims under County Court (NI) Order 1980 for case appeal to the House of Lords.**