

**NICEM Submission to the  
Initial Consultation by the  
Office of the First Minister  
and Deputy First Minister  
on  
A Single Equality Bill  
For Northern Ireland**

**22 August 2001**

## **I. INTRODUCTION**

NICEM welcomes the publication of the Consultation Paper on a Single Equality Bill for Northern Ireland. It is an exciting time to see a lot of developments in the field of equality at the European and the UK level (paragraph 2.2-2.7). Now we see our government shows such commitment on equality, in line with the Good Friday Agreement, by introducing a Single Equality Act for Northern Ireland.

Since the transposition of the Race Directive and Framework Directive, it requires our domestic legislation, presumably the Single Equality Act, to conform the minimum standard set by the two Directives by 2003. The horizontal effect of the Article 13 of the Amsterdam Treaty will compliment with the vertical effect of the Protocol 12 of the European Convention of Human Rights and Fundamental Freedom. Even though the British government does not sign the Protocol yet, we should not lose sight to undertake the international standards to improve the existing legal standard.

NICEM supports the introduction of the Single Equality Act in Northern Ireland. The Act will, in effect, harmonise and simplify of existing anti-discrimination legislation in which should be done prior to the amalgamation of the Equality Commission.

The followings are key comments on the principle, concept of equality and process of the Single Equality Act:

1. Due to very tight legislative time-table that deal with complex issues such as recognition of differences and needs of different group rights, the Single Equality Act should be supplemented by regulations and by regularly up-dated codes of practice on specific subjects. NICEM agrees with the use of secondary legislation as the transitional period to deal with complex issues such as extension of the provision of good, facilities and services to all other groups than the existing legislation (including exception and exemption), positive action, contract compliance and grant aids programmes, etc.
2. The Single Equality Act and other documents, such as regulations and codes of practice, should be written in plain language (a good lesson that we should learn from the Republic of Ireland in relation to the technical drafting of the Equal Employment Act and the Equal Status Act) so as to facilitate comprehension and participation, and should be available in forms and other languages which take into account the needs of disabled people and minority ethnic people.
3. The Single Equality Act should have clear legal standing and legal provision to tackle the issues of multiple-discrimination, in particular racial and gender related multiple-discrimination (Para.14 of the Race Directive and Para. 3 of the Framework Directive on Employment stated that “In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination).

4. The new legal framework under the Single Equality Act should be based on the five principles as recommended on 2 (2.13-2.20) of the Hepple's Review<sup>1</sup>:

- The goal of legislation and other measures is to eliminate unlawful discrimination and to promote equality regardless of sex, race, colour...or other status;
- There must be clear consistent and easily intelligible standards;
- The regulatory framework must be effective, efficient, and equitable, aimed at encouraging personal responsibility and self-generating efforts to promote equality;
- There must be opportunities for those directly affected to participate, through information, consultation and engagement in the process of change;
- Individuals should be free to seek redress for the harm they have suffered as a result of unlawful discrimination, through procedures which are fair, inexpensive and expeditious, and the remedies should be effective.

## 5. CONCEPT OF EQUALITY

5.1 Definition of Equality is required if the name of the Bill is "Single Equality Act" for the following reasons:

- The existing regime is anti-discrimination legislation on a specific ground. It does not touch the whole concept of equality. The Single Equality Act should scope the concept into a legal provision in order to reflect both the positive and negative aspect of equality in accordance to international human rights standard such as Article 26 of the International Covenant on Civil and Political Rights (ICCPR) and Protocol 12 of the European Convention on Human Rights (refer to Article 14 of the ECHR on non-discrimination).
- The international human right instruments have two complimentary notions of Equality:
  1. The principle of non-discrimination, which is a negative aspect of equality designed to prohibit differentiation on irrelevant, arbitrary treatment on unreasonable grounds. This principle reflects at Article 26 of ICCPR "All persons are equal before the law."
  2. The principle of protection or special measures designed to achieve positive equality. This second principle is sometimes termed reversed, positive discrimination, or any other positive action, measures, etc. This principle reflects at Article 26 of ICCPR "All persons are entitled without discrimination to equal protection of the law."
- The definition of equality in the Single Equal Act may give a clear scope and parameter of equality into the political context in Northern Ireland. Other good example about the concept of equality is:

Equality = equality of opportunity in terms of putting  
everyone under the same equal footing without

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<sup>1</sup> Bob Hepple, QC, Mary Coussey, Tufyal Choudhury, "Equality: A new Framework- Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation", Hart Publishing, Oxford- Portland Oregon, 2000.

recognition the differences and needs among different groups on the one hand, without tackling power structure and disadvantage position of different groups in our society on the others; or

Equality = equality of outcome in terms of fair participation and fair access in both employment and general service provisions

These two approaches (equality of opportunity and equality of outcome) have been debated over decades from activists, academic, private sector and government. From NICEM point of view, the Single Equality Act should move from equality of opportunity to equality of outcome, and in particular link the Equality Outcome through Positive Action and/or Affirmative Action to Section 75 process and Targeting Social Need (TSN), in order to address the issues of power structure and disadvantage position of different groups in our society.

Therefore, we propose to incorporate Article 26 of ICCPR into the Act, which is as follow:

“This Act makes all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, this Act shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, sex, religion,..... or other status.”

6. The EU Race and Framework Directive (Article 6 and Article 8) lay down the minimum requirements clause for Member State. As a result, the Single Equality Act may introduce or maintain provisions, which are more favourable to the protection than the two Directives. It shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded in the field of anti-discrimination legislation in Northern Ireland.

7. NGOs should be consulted in the drafting process, rather than consulted at the end-product of the draft legislation. The early the involvement, the better the end-product with less amendment. This suggestion is line with the spirit of Section 75.

## **II. SCOPE OF PROTECTION (paragraph 4.1-5.12)**

### **1. Who should be protected in the Single Equality Act?**

We welcome the consultation paper to consider nine groups under Section 75. It is wise to use this golden opportunity to extend the existing legislation and future obligations (such as the approved EU Race Directive and Framework Directive on Employment, the equality clause under the consideration of the proposed Bill of Rights for Northern Ireland and the possibility of Protocol 12 of the European

Convention on Human Rights if the British Government agreed to ratify it.) in line with the nine groups protected by Section 75 for three main reasons:

1. The public sector (all public authorities that define under Section 75), who is the largest employer, as well as the largest services provider, should be the champion of equality in our society.
2. The equality duty through equality mainstreaming process should move gradually from public sector towards private sector through contract compliance on the one hand, through grant aids programmes on the others as the long-term strategy of good governance and good practice in our society.
3. The EU Race and Framework Directive are the minimum standard which does not preclude the Member State to put a higher standard including cover more grounds of discrimination and protection.

For the reasons above, NICEM requests the Single Equality Act should cover the nine groupings under Section 75 is the minimal. We suggest wider than nine with the following new groups: language, social origin, birth, property or other status. It is important that the grounds cover by the Single Equality Act should not be an exhaustive list. Therefore “other status” allows the court to interpret and develop new group that should cover by the law according to the change of our society.

The Single Equality Act should also reflect the protection of both natural person (s) as well as legal person (s) as stated in Article 3(1) of both the EU Race and Framework Directive, and in particular Para. 16 of the Race Directive states clear that “It is important to protect all natural persons against discrimination on grounds of racial or ethnic origin. 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 provision shall give NICEM or other minority ethnic groups who are incorporated a kind of protection against discrimination on the one hand, a clear legal standing to sue on its own name or sue on behalf of other individual victim if it has sufficient interests.

## **2. Which areas should be protected in the Single Equality Act?**

The current existing legislation (religion and belief, political opinion, gender, race and disability) covers both the areas of employment and the provision of goods, facilities and services (except married women (cover employment only) and gender reassignment (cover both employment and training) and the disposal and management of property. The EU Framework Directive covers employment only (religion and belief, age, sexual orientation, race and disability), where as the Race Directive cover both employment and the provisions of goods, facilities and services. The same position is the Gender Directive which covers employment only.

NICEM requests the Single Equality Act should cover both the areas of employment and the provision of goods, facilities and services and the disposal and management of property, as well as new areas from the Race Directive such as health and social advantages.

Due to the fact that new groupings are extended to the protection and the tight legislative timetable, NICEM suggests that the provision of goods, facilities and services and the disposal and management of property should use secondary legislation and/or legal code of practice to deal with new grounds as transitional period (within 12 months of the enactment of the Single Equality Act).

Therefore, we should have sufficient time frame to deal with complex exception and exemption on the new grounds. But we maintain the basic principle is that exception and exemption should be reasonable, specific and proportionate (Article 4 of both the Framework and Race Directive). Both the Framework Directive and Race Directive set the maximum standard of exception and exemption. NICEM rejects any blanket exception and exemption.

Therefore, the current Bill should focus on the upward improvement of the current provision as recommended by the Equality Commission in relation to the review of the gender and race legislation; and the recommendations by the Disability Task Force.

### **3. To whom the law should apply?**

NICEM requests that the Single Equality Act should apply to all public authorities (in line with the Race Relations Amendment Act 2000), including those GB Departments and NDPB who are operating in Northern Ireland and those organisations that have performed public functions in Northern Ireland. NICEM agrees that certain circumstance should be exempted from public sector function. But maintains the basic principle is that exemptions for public sector functions should be reasonable, specific and proportionate. NICEM objects the blanket exemptions of the EU Framework Directive in relation to Northern Ireland education system in recruitment of school teachers. We suggest use this opportunity to review current practice and the extent of exemptions in light of previous SACHR recommendations.

## **III. CONCEPT OF DISCRIMINATION (paragraph 6.1-6.6)**

1. The Single Equality Act shall harmonise direct and indirect discrimination, harassment, victimisation, discriminatory advertisement and incitement on all grounds of discrimination. Since both the EU Race and Framework Directive have laid down the definition which is better than the existing legislation. We will expect change accordingly.

2. Regarding the definition of indirect discrimination under the Burden of Proof Directive and the proposed amended Gender Directive, it should treat in line with the definition of the Framework and Race Directive. Our understanding is that the European Commission is happy to change their original proposal on amended Gender Directive in line with the Framework and Race Directive. We will expect the Council of Minister adopting the amended Gender Directive under the Belgium Presidency.

3. On the issue of discriminatory advertisement it should be dealt with in a common approach across all grounds of discrimination. Regarding instructing and pressurising someone to discriminate, both the Framework Directive and Race Directive (Article 2(4) in both case) treat it as discrimination.

#### **IV. POSITIVE ACTION (paragraph 7.1.1 to 7.6.4)**

1. We will use the concept of Positive Action which was laid down in both the EU Race and Framework Directive, rather than using the concept of “Under-representation”. Under-representation always gives a wrong impression that it is about employment. In fact the existing positive action clauses under four pieces of anti-discrimination legislations have both employment and general service provision.

2. The Positive Action clause (Article 5 and Article 7) in both the Race and Framework Directive stated that “With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any member state from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds.”

3. Moreover, paragraph 17 and 26 of the Race and Framework Directive further stated that “The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular ground and such measures may permit organisations of persons of a particular ground where their main object is the promotion of the special needs of those persons.”

4. The Positive Action clause has two major concepts, which we need to change the existing legislation. The first concept is full equality in practice. It is about the substantive equality, not equality of opportunity. Second, it moves from the traditional group rights to the concept of disadvantage in which positive action is to prevent or compensate for disadvantages on different grounds of discrimination. And paragraph 17 and 26 of the recitals of the two Directives give more details on the implementation, in particular the roles of NGOs.

5. The limitation of the Directive is that it is under the discretion of the Member State to introduce positive action clause. Since we do have the provision under the existing law. The only issue is that it never use.

6. From NICEM perspective Positive Action, in relation the public services and public policies, should link to the Section 75 process because public sector is both the largest employer and service provider. We propose that if impact assessment proves differential impact on any one of the groups that protected by the Single Equality Act, positive action must, automatically, be invoked. The measures of positive action (non-exhaust list) shall include quota system for under-representation in employment with targets and timetable and the Targeting Social Need in the public service provision.

7. In relation to duties on employers under FETO, the Single Equality Act should extend to all grounds, in accordance to the existing practice. We foresee additional burden to the existing employer. The extent of burden will not necessarily too big

since it need to extend the new groups to the existing system. Moreover, the impact of equality outcome in our society will outweigh the burden of the extension to new groups. We also anticipate difficulty to monitor the sexual orientation group. It is suggested to listen to the view of such groups on their recommendations of monitoring data.

8. The Single Equality Act should provide a more flexible approach, in light of the spirit and principle of the Framework and Race Directive, to encourage employer to use positive action to tackle under-representation from certain groups within the workforce. The government should consider certain incentive to employer in order to promote diversity workforce, in particular women, ethnic minorities and disable persons.

9. Regarding Contract Compliance, we disagree to deal with it under DFP. Contract compliance is an important tool to tackle equality and diversity. It is a standard setting to promote good practice by introducing equality duties on contract compliance. We suggest the Single Equality Act has a specific provision to impose equality duties for those they receive public money to perform duties and services, as well as public contract and public tendering.

## **V. STRUCTURES (8.1-8.4)**

### **1. Roles of social partners and NGOs**

1.1 Article 11 & 12 and Article 13 & 14 of the Race and Framework Directive provide a clear role for both social partners and NGOs on consultation (the Directives use the language of Social Dialogue and Dialogue). The Single Equality Act should translate the Directive into the provision that highlights the importance of consultation with both social partners and NGOs by public authorities, including the Equality Commission.

1.2. Moreover, under Defence of rights of Article 7(2) and Article 9(2) of the Race and Framework Directive, social partners and NGOs, who have legal standings, can sue on behalf of the victim if he/she gives the consent. The right to sue for interest organisations was incorporated into Dutch law on July 1994. The Act gives rights of action to legal persons representing the interest of other individuals.

1.3 Article 305a Book 3 Civil Code provides for an association (vereniging) or foundation (stichting) to take legal action in civil suits to protect the interests of other persons, as far as these interests are in accordance with the association's or foundation's articles of incorporation. No such right exists where the interests are too incongruous or if, considering the circumstances, the plaintiff has not conferred sufficiently with the defendant prior to starting the lawsuit. The Dutch provisions do not allow plaintiff association/foundation to seek monetary damages.

1.4 NICEM suggests that we should look into the Dutch model and incorporates the same law to Northern Ireland in order to discharge the duty under the two Directives.



1.5 NICEM raises serious concerns on resourcing NGOs to participate in the equality framework. NGOs who represent those disadvantage community have a crucial role to promote great equality and diversity in our society. The good example is the input of NGOs in the entire Section 75 process, as well as those who assist victims of discrimination. Thus, a firm commitment to equality by the Northern Ireland Executive must also include recognising the duty to provide adequate resources for NGOs who contribute their expertise and knowledge in the field of equality and diversity.

## **2.Equality Commission**

2.1 The Commission's powers and functions should be harmonised and upward improved as recommended by the Equality Commission and Equal Opportunity Commission on the Review of the Race Relations (NI) Order, Sex Discrimination (NI) Order; and the Race Relations (Amendment) Act 2000.

2.2 The Commission should also have an equality duty, the equivalent Section 75 duties, in the Single Equality Act. As a result, they must working in partnership and in consultation with the NGO sectors. They should also have power to grant aids those NGOs who promote equality objectives of the Commission (the same provision under the Race Relations (NI) Order, but not other legislation).

2.3 The Commission should retain the current Racial Equality Directorate as the direct response to the Race Directive in setting up a national body for the promotion of Equal Treatment on racial round, whereas the Framework Directive does not provide the same to other ground of discrimination.

2.4 NICEM maintains that there should be the equivalent Equality Commission to look over all ground of discrimination, but at the same time, the level of discrimination, in particular the experience of multiple-discrimination facing by minority ethnic groups strengthening our argument to retain the Racial Equality Directorate within the Equality Commission.

2.5 Paragraph 24 of the preamble of the Race Directive provides a details guidance and argument. It states that "Protection against discrimination based on racial or ethnic origin would itself be strengthened by the existence of a body or bodies in each member state, with competence to analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims."

## **3. Judicial system under the Single Equality Act**

3.1 The key issue of any equality legislation is that how best and how effective for the victim to bring the case into justice. Under the current system, it is under a formal legal process of the Tribunal system with the assistance from the Equality Commission if the case has merit. It is an expensive, time-consuming and intimidating process (adversarial court process with most likely cross-examined by the Counsel or QC) from the experience of the victim.

3.2 The Single Equality Act should look into the model- the Office of the Director of Equality- that developed in the Republic of Ireland or the Dutch model under Equal

Treatment Commission in relation to the investigations of equality complaints. The role of the Office of the Director of Equality Investigation is to investigate any complaints arising from the equality legislation (both the Equal Employment Act and Equal Status Act). One of the key objectives of the Office is to contribute to the achievement of equality through its decisions. The decision is legally binding. The service is free and representation is not required. The Office also provides an alternative to the investigation through mediation (on voluntary basis). The office also helps the prevention of future discrimination through its decision.

3.3 NICEM suggests the same investigation system, which is easy accessible, cheap, quick, efficient and effective, should set up in Northern Ireland to replace the existing Tribunal system. One of the beauties of the investigation system is that it can accept voluntary conciliation and arbitration.

3.4 Any appeal against the decision of the Investigation Office should go straight to the Equality Tribunal (the equivalent Labour Court in the Republic of Ireland). Any appeal against the decision of the Equality Tribunal should go straight to the Court of Appeal on point of law.

3.5 NICEM agrees to harmonise into one single Equality Tribunal to hear all discrimination and employment law related cases. This includes cases in the area of the provision of goods, facilities and services. The single Equality Tribunal not only does it provide an expert tribunal, it will harmonise the decision and practice in the field.

3.6 NICEM raises the concern of under-representation of minority ethnic people, women, disable people and other disadvantage groups in the bench of the existing FET and Industrial Tribunals. Our personal experience as employer in which we lost the case in the Industrial Tribunal and subsequently won the Court of Appeal case (W. Gill v NICEM), the judges of the Tribunal have no understanding on the racial issues. It is the usual attitude of one formula to fit all, no matter what legislation before them. We suggest review the existing practice, including training, and appointment process in light of the future single Equality Tribunal. If the Single Equality Act is to promote greater equality and diversity, then the judicial system should be the champion of it in both its composition and judicial process, rather than it is the barrier of the victims.

## **VI. Investigation, remedies and enforcement (paragraph 9.1-9.8)**

1. In line with both the Framework and Race Directive, we use the term defence of right in response to your section under investigation, complaints and enforcement. The EU Directives provide the minimum standard in this important area in which guarantee of access to a judicial and/or administrative remedy for victims of discrimination (Article 9(1) of Framework Directive and Article 7(1) of the Race Directive).

3. NICEM concerns lack of legal aid to support victims of discrimination. NICEM maintains the view that the existing systems are too costly to both parties on one hand and intimidate the victims on the others. We reiterate the establishing an investigation office to all discrimination cases, which is more cheap, efficient and effective.

Therefore, legal aid should be available, either through the Equality Commission or the existing legal aid scheme, for the victims in the appeal process (either in response to the appeal or appeal the decision), of course subject to merit test.

4. Formal investigation is always seen as a costly and time-consuming process, but it is effective. NICEM supports the formal investigation power of the Commission. In order to be more effective, it needs the following changes:

- The equality and investigation bodies should be empowered to make a finding of discrimination based on their investigation.
- The reasonable belief requirement, which requires a reasonable belief that discrimination is occurring before investigation can commence, should be dispensed with. There is no reasonable belief requirement under FETO and this should be harmonised for investigations across all covered grounds.
- The Commission should be empowered to initiate investigations for any purpose connected with carrying out their duties.

5. Time Limits are always the enemy of the victims of discrimination who have very little knowledge about the legislation. It becomes more complex if the discrimination act and practice are on-going that only lawyer can provide the answer on time limits. As the result, the Single Equality Act should have a more flexible approach to remedy this situation. We suggest that the time limits for filing a complaint on employment cases should be extended to six months from the last occurrence of the alleged discrimination, in line with the time limits on cases of the provision of goods, facilities, and services.

6. In relation to complaint case against school establishment on alleged racial discrimination, the notification process to the Department of Education is a barrier and time consuming to the victims. The victims should have rights to file a complaint right after the alleged discrimination taken place.

7. Codes of Practice should be harmonised across all grounds in the Single Equality Act. Codes of Practice are an important tool of standard setting. NGOs and social partners should be encouraged to participate during the drafting process. We also suggest that all Codes of Practice under the Single Equality Act is legal binding in which the Investigation Office and the Equality Tribunal require to take the Codes of Practice into account.

8. Regarding the effective remedies, we suggest to have a complete review of the remedies available under the existing legislation. Both EU Directives allow for a broad set of remedies, while the European Court of Justice has concluded that remedies for anti-discrimination must have a real deterrent effect. That is, remedies should not only provide redress for the immediate claim, but also provisions for effective deterrence and prevention of discriminatory practices in the future.

9. The Single Equality Act should provide for a broad range of practical and flexible remedies ranging from retrospective remedies, such as sufficient financial compensation, to prospective remedies, such as injunctions and mandatory review of equality policies. In addition, as suggested by the former EOC(NI), tribunals decisions should be treated as binding precedent. This would allow other employers to benefit from tribunal decisions while facilitating the adjudication of similar anti-

discrimination claims. The expansion of remedy provisions will bring the powers of the Investigation Office, Equality Tribunal and Courts and the Equality Commission under the Single Equality Act in line with the EU standards.

**For further information and questions about this submission, please contact the following person:**

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Dear Sir

I enclose our submission to the Single Equality Bill for Northern Ireland and the monitoring form for your information. Should you have any questions arising from our submission, please do not hesitate to contact me for details.

Yours sincerely

Patrick Yu  
Executive Director