NICEM
Submission to
The Cabinet Office
on

Consultation document
Towards Equality and Diversity
implementing the Employment and Race Directive

March 2002

Introduction

NICEM is a voluntary sector, membership-based umbrella organisation representative of minority ethnic groups and their supportive organisations in Northern Ireland. Currently we have 23 affiliated black and ethnic minority groups as members, which represent the Chinese, Asian, African-Caribbean, Irish Travellers, Filipino and Muslim community, etc.

NICEM has been involved a lot of work and energy in lobbying the European level of legislation to outlaw racial and religious discrimination through the key role in The Starting Line Group (The Executive Director of NICEM was the Chair from 1998-2001) at the European level. At home, NICEM is also the Steering Group member of the UK Race European Network (UKREN) in which campaigns the same at national and regional level on Article 13.

NICEM welcomes the opportunity to contribute to the public debate on the reform of British anti-discrimination law. In this response, first, we will make a number of general observations concerning the government's proposed approach, as outlined in the consultation document, and then we will address the specific questions the government has posed.[1]

1. General evaluation

The Race Relations Act (RRA) has now been in place for over 25 years. Without doubt, it has provided concrete assistance to many individuals in the protection of their right to equal treatment and in the provision of a potential remedy where discrimination has nonetheless occurred. The Race Relations (Amendment) Act 2000 extends these benefits into all aspects of public service provision. Notwithstanding the positive contribution made by the RRA to date, there remains consistent evidence of entrenched ethnic inequality in the labour market. For example, research conducted by the TUC in 2002 reveals that the unemployment rate for black and Asian workers remains more than double that of white workers. In the West Midlands, 15% of black and Asian workers are unemployed and only 5% of white workers.[2]

The current legislation is primarily enforced through individual litigation before Employment Tribunals. Whilst this may be an effective remedy in cases where there is clear evidence of racial discrimination in respect of a specific individual, it has not proven effective in confronting structural and institutional forms of discrimination. These types of discrimination are, by their nature, not targeted at identifiable individuals, but situations where the culture, processes and practices of an organisation result in the perpetuation of ethnic disadvantage and exclusion. For example, if an employer's workforce consists entirely of white people and the employer recruits only through informal mechanisms – such as the family and friends of the existing workforce, or by word-of-mouth – it is considerably less likely that members of minority ethnic

[1] The relevant questions are indicated in the text.
[2] Available at: http://www.tuc.org.uk/equality/tuc-4314-f0.cfm

communities will ever become aware of vacancies. The subtle nature of the exclusionary process operates to make it improbable that such practices will be addressed by individual litigation through the Employment Tribunal system.

As a consequence, NICEM firmly believes that this consultation must be the occasion for a thorough review of all aspects of the RRA, with particular emphasis on enforcement and remedies. In this respect, it is extremely disappointing that the government seeks to confine itself to 'relatively minor and technical' changes to the RRA.[3] There are two key areas where the consultation document unjustifiably excludes wider debate: sanctions and positive action.

(a) Sanctions

Paragraph 2.15 concludes that the existing tribunal system already complies with the requirement in the Race and Employment Directives for 'effective, proportionate and dissuasive' remedies. Yet, the evidence of persistent ethnic inequality in the labour market strongly suggests that the existing remedies are not proving sufficiently effective. Within the confines of the existing tribunal system, there are a number of changes that should be made immediately.

(i) Tribunals should be given the power to make legally-binding recommendations to employers to require changes to any aspect of their existing employment practices that may give rise to unlawful discrimination.

Currently, tribunals are only entitled to make recommendations to the respondent in respect of the effects of unlawful discrimination on the complainant.[4] However, if legal proceedings uncover wider patterns of discrimination and an absence of equality of opportunity, it is more effective to address these issues immediately, rather than await further litigation. Moreover, if the discrimination uncovered is institutional in nature, its effects are likely to have impacted on a much greater number of persons than the individual bringing the case. An example for this approach can already be found in the Fair Employment and Treatment Order 1998, which permits the Northern Ireland Fair Employment Tribunal to make recommendations that the 'respondent take within a specified period action appearing to the Tribunal to be practicable for the purpose of obviating or reducing the adverse effect on a person *other than the complainant* of any unlawful discrimination to which the complaint relates' (emphasis added).[5]

(ii) Independent legal standing to bring complaints should be conferred on any organisation or association with a legitimate interest in the promotion of equal treatment.

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[3] Department of Trade and Industry, *Towards Equality and Diversity – Implementing the Employment and Race Directives*, (London: HMSO, 2001) para 2.22.

[4] Under s 56(c) RRA, Tribunals can make 'a recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect *on the complainant* of any act of discrimination to which the complaint relates' (Emphasis added).

[5] Art 39(d).

The consultation document does not address the requirement in the Race and Employment Directives to extend legal standing to relevant organisations to bring complaints in support or on behalf of an individual, with his or her consent.[6] Whilst this may be implicit in current legal practice, it is essential for reasons of legal clarity and transparency that this right is specifically stated in the legislation. Moreover, NICEM urges the government to go beyond the minimum required by the Directives and to afford legal standing to such groups even in the absence of an identified individual litigant. We believe this would prove more effective in combating institutional forms of discrimination.

(iii) A fundamental review of the tribunal system should be undertaken with a view to considering alternative models of enforcing equality laws.

One of the main barriers experienced by individuals in enforcing the legislation is the financial cost involved in tribunal proceedings. In contrast, other jurisdictions have established more accessible enforcement mechanisms that are simple and cheap for individuals. For example, in the Netherlands, the Equal Treatment Commission is available to receive complaints of unlawful discrimination. The Commission will investigate and produce a non-binding determination. Where its recommendations are not accepted, individuals remain free to pursue Court action against the discriminator.[7] Alternatively, in Ireland, the Office of the Director of Equality Investigations provides a forum to which individuals can submit complaints of discrimination. An Equality Officer investigates and produces a legally-binding decision.[8] NICEM believes it is essential that the tribunal system be reconsidered in order to provide a cheaper and more accessible alternative.

(b) Positive action

Improvements in the current enforcement system must be combined with proactive measures designed to tackle institutional discrimination. Paragraph 10.5 states the government's intention not to change the existing legislative provision for positive action. NICEM disagrees with this approach. We believe a renewed emphasis on positive action is essential to improving the effectiveness of the RRA. Experience in Northern Ireland provides a range of examples of positive action measures that can and should be taken.

- First, employers with more than 10 workers should be required to monitor the ethnic composition of their applicants, existing employees, persons being promoted and leavers. This is a necessary precondition to the identification of the areas of the labour market where inequality is most profound.
- Second, these employers should be required to take positive action where ethnic monitoring reveals an under-representation of a particular ethnic group. Employers should be obliged to establish goals and timetables for the elimination of under-representation.

[6] Race Directive, Art 7(2); Employment Directive, Art 9(2).
[7] See further: http://www.cgb.nl
[8] See further: http://www.odei.ie

- Third, employers should be obliged to conduct an 'equality audit' of all their employment practices at least once every three years.

In addition, the government should introduce a scheme of contract compliance for the award of all public contracts. Any company tendering for a public contract should be obliged to demonstrate that it promotes equality of opportunity for all workers and service-users.

2. Response to specific questions: the definition of discrimination

(a) direct discrimination (Question 5)

NICEM agrees with the government's intention to continue with the current definition of direct discrimination in the RRA.

(b) indirect discrimination (Question 6)

NICEM believes the new definition of indirect discrimination in the Race Directive is clearer and stronger than the existing definition in the RRA. It is particularly important to move away from the current emphasis on statistical comparisons and towards the broader standard of 'particular disadvantage' in the Directive. We would also note that choosing to keep a definition of indirect discrimination that is different from the text of the Directive contains the potential for difficulties if future decisions by the Court of Justice interpret the Directive in a manner inconsistent with the approach in the RRA. This could then require legislative amendment, whereas following the text of the Directive avoids this risk. Consequently, NICEM supports Option 1 in paragraph 5.10.

(b) Harassment (Questions 7 and 8)

NICEM disagrees with the interpretation of the Race Directive's harassment provision in the consultation document. The government argues that the Race Directive defines harassment more narrowly than the current practice of tribunals under the RRA. This argument (in paragraph 6.6) is apparently based on the need to show both that the person responsible intended to violate the dignity of the victim, as well as proving that they intended to create an intimidating, hostile, degrading, humiliating or offensive environment. NICEM finds it difficult to foresee situations where an individual's dignity is violated, but this does not give rise to a hostile environment. Therefore, we do not believe the Directive is considerably different from the RRA in this respect.

In contrast, the Directive contains the positive advantage of eschewing a definition of harassment based purely on a comparison of how the perpetrator treats individuals of different ethnic origins. For example, under the current framework, an employer who harassed all employees on grounds of their ethnic origins (irrespective of their nature) would not commit unlawful discrimination. Although all employees in this scenario would be treated badly, none is treated less favourably than another. The approach of the

Directive focuses on the effect of the harassment on the individual, and not on a comparison with the treatment of any other employee.

Moreover, NICEM believes it is vital for the transparency of the law that a specific and clear definition of harassment is enshrined in the legislation. Employers, service-providers and individuals should be able to see clearly their rights and obligations. Adopting the definition provided in the Directive would be the best solution.

Consistent with NICEM's commitment to a proactive reform of equality law, we believe the government should also go beyond the Directive and impose a positive duty on employers and service-providers to prevent and combat all forms of harassment in the workplace. Employers and service-providers already need to take reasonable steps to prevent harassment occurring if they are to avoid liability for the actions of employees or third parties under section 32.[9] This responsibility should be made more transparent to employers, service-providers and individuals through the creation of a positive duty.

Question 8: The government also suggests specifying that 'tribunals should assess whether "a reasonable person" would have regarded the conduct in question as harassment'.[10] NICEM is concerned that tribunals will not be sufficiently sensitive to the perspective of minority ethnic communities. Given the under-representation of minority ethnic communities in the judiciary, there is a risk that the assessment will become that of the reasonable white person. Instead, it should be made clear that what constitutes a violation of the individual's dignity should be determined by reference to a 'reasonable person possessing the characteristics of the victim'. As a minimum, this should take into account the gender, ethnic origin, religion, age, disability and sexual orientation of the victim.

(d) Victimisation

The government does not propose any change to the definition of victimisation in the RRA.[11] NICEM believes there are good reasons to replace the existing legislative provision with a text based on the Race Directive.

The RRA currently defines victimisation by reference to a comparative standard. Therefore, an individual must show that they were treated less favourably 'by reason that', *inter alia*, they brought proceedings under the Act.[12] This comparative standard has given rise to numerous difficulties in the case-law. For example, in *Aziz*,[13] the complainant secretly tape-recorded conversations with other taxi-drivers, in order to establish evidence of racial discrimination. He was subsequently removed from the taxi association. This was not held to be victimisation because any other individual who secretly tape-recorded conversations would have been similarly treated. More recent

[9] See *Tower Boot v Jones* [1997] ICR 254 CA; *Burton and Rhule v De Vere Hotels* [1997] ICR 1.
[10] Para 6.14.
[11] Para 2.19.
[12] s 2(1).
[13] *Aziz v Trinity Street Taxis* [1989] QB 463.

judgments have avoided the weaknesses in the decision in *Aziz*, only to give way to further difficulties in applying the current legal provision. In *Khan*,[14] a police officer challenged his denial of promotion as racial discrimination. Whilst those proceedings were pending, he applied for a post at a different police force, but he was refused a reference from his existing employer on the basis that litigation was pending on their original decision to refuse him promotion. The House of Lords agreed that the comparator was any other employee (as opposed to any other employee who had brought legal proceedings), but then held that the refusal to provide a reference was a legitimate step to safeguard the employer's legal interests and not 'by reason that' he had brought proceedings.

Both *Aziz* and *Khan* demonstrate the inherent problems with the current definition of victimisation and the limited protection it confers on individuals. NICEM believes it would be better to replace this with a provision based on the definition of victimisation in the Race Directive.[15] This might be as follows:

> 'Any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment shall be unlawful discrimination.
>
> This provision applies to any person making a complaint or bringing litigation, or any other person where the victimisation is linked to a complaint of unlawful discrimination by another person.'

(e) Burden of Proof

NICEM welcomes the government's commitment to insert a provision on the burden of proof in the RRA.[16]

3. Exceptions

(a) Genuine Occupational Requirements (Question 12)

The government proposes to delete the current list of genuine occupational requirements in the RRA and to replace this with an open-ended provision, with the obligation on employers to justify recourse to this exception. By exchanging a specific list of exceptions with an open-ended possibility for justification, NICEM believes the government is potentially lowering the level of protection available against racial discrimination. This amounts to a breach of Article 6(2) of the Directive, which states that 'implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States'.

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[14] *Chief Constable of the West Yorkshire Police v Khan* [2001] 1 WLR 1947.

[15] Art 9.

[16] Para 2.17.

The open-ended exception suggested would create uncertainty, possibly prompting considerable litigation to test its boundaries. It leaves much discretion for the courts and tribunals and it does not assist individuals or employers to determine when it will be applicable. In contrast, the existing detailed list of situations that may justify genuine occupational requirements is relatively clear. Therefore, we believe it would be better to keep the existing provisions in the RRA, but to review their necessity.

In particular, it seems clear that the total exception for employment in a private household (s. 4(3)) is incompatible with the Race Directive and this should be deleted. Certain of the other exceptions, such as employment in a dramatic performance, remain valid. For example, casting the lead role in a film on the life of Nelson Mandela. It is, however, necessary to raise the standard of scrutiny in this area to the level required by the Directive. This stipulates that genuine occupational requirements can only be invoked where the 'objective is legitimate and the requirement is proportionate'.[17]

The government is proposing additional genuine occupational requirements in respect of organisations with an ethos based on religion or belief. Moreover, there will be a yet further genuine occupational requirement for religious schools. NICEM is concerned at the potential for these wider exceptions to give rise to indirect discrimination on grounds of racial or ethnic origin. For example, in respect of schools, the overwhelming majority of religious schools in Britain are based on the Christian religion. The potential exclusion of non-Christians from posts within these schools is not balanced by the application of a similar exception in respect of the small number of non-Christian religious schools. The government argues that, in any case, the burden of proof will lie with the employer to justify recourse to the exception.[18] This underestimates the prior obligation on the individual victim to assume the burden of initiating litigation.

NICEM believes a system of prior scrutiny needs to be established before organisations can have recourse to genuine occupational requirements. For example, there could be an obligation to notify the Commission for Racial Equality of an organisation's intent to advertise a post with a restriction based on ethnic origin or religion or belief. This would at least provide a mechanism for monitoring the use of these provisions and preventing potential abuse in this area.

(b) Other exceptions (Questions 14-19)

NICEM agrees with the government's proposals to delete the existing exceptions in the RRA as regards seamen recruited abroad; training for those not ordinarily resident in the UK; charities as employers or as providers of goods and services; partnerships of fewer than six people; and the disposal and management of small dwellings.[19]

In respect of employment in charities, NICEM recommends the government add a genuine occupational requirement provision where the organisation is designed to

[17] Art 4, Race Directive.
[18] Para 13.16.
[19] Paras 11.5-11.10.

promote the interests of persons vulnerable to discrimination based on racial grounds. In respect of charities providing goods and services, we agree with the exception proposed by the government for the activities of organisations designed to promote the interests of persons vulnerable to discrimination based on racial grounds.

In respect of small dwellings, the government suggests retaining an exception for the letting of a room in a private home where the tenant shares facilities with the householder.[20] No policy reason is given in support of retaining this exception; therefore, NICEM rejects this proposal.

There are a number of other exceptions in the RRA that are not reconsidered in the consultation document.[21] NICEM highlights the need, in particular, to delete section 41(1). This provides that:

> 'Nothing in [the RRA] shall render unlawful any act of discrimination done -
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> (a) in pursuance of any enactment or order in Council; or
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> (b) in pursuance of any instrument made under any enactment by a Minister of the Crown; or
>
> (c) in order to comply with any condition or requirement imposed by a Minister of the Crown (whether before or after the passing of this Act) by virtue of any enactment.'

There is no provision in the Race Directive that appears to justify the maintenance of section 41(1). Indeed, it is clear that acts previously rendered lawful by virtue of section 41(1) would now be contrary to the Directive. This is best illustrated by reference to the case of *ex parte Nessa*[22] where section 41(1) was held to justify refusal to grant public assistance with funeral expenses, where the funeral took place outside the UK, because the relevant Regulations required the funeral to occur within the UK.[23] It is very probable that the Race Directive would prohibit the discrimination rendered lawful in this case by section 41(1).[24]

4. Promotion of Equal Treatment

The Race and Employment Directives oblige the government to promote implementation through agreements between the Social Partners (employers and trade unions), and to encourage dialogue with organisations working for the promotion of equal treatment.[25] The consultation document gives the impression that the existence of the Commission for Racial Equality fulfils all the government's obligations as regards promoting equal treatment.[26]

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[20] Para 11.10.
[21] Sections 41 (see above), 42 (national security) and 75 (public sector employment).
[22] The Times, 15 November 1994.
[23] See further, A McColgan, *Discrimination law – text, cases and materials* (Hart Publishing, 2000) 437.
[24] The Court of Justice has already found discrimination in very similar circumstances against EU nationals to be in breach of Art 39 EC and Reg 1612/68: Case C- 237/94 *O'Flynn* [1996] ECR I-2617.
[25] Race Directive, Arts 11 and 12; Employment Directive, Arts 13 and 14.
[26] Paras 7.1-7.5.

NICEM believes a concrete commitment to dialogue and partnership with the representatives of civil society must be made in order to ensure the effective introduction and enforcement of the new legislation. Forums must be established at the local, regional and national level to facilitate the consultation and participation of all relevant organisations in the coming years. NICEM welcomes the opportunity for consultation on this occasion and trusts that the government will demonstrate a willingness to change its approach in the light of the responses received.

In respect of question 9 (posed in paragraph 8.5), NICEM believes it is essential that those organisations working with communities and individuals affected by discrimination be closely involved in the preparation of practical guidance to individuals and businesses on the rights and obligations imposed by the new legislation. We would also remind the government of the need for all such literature to be available in a wide variety of languages and formats.

Conclusion

The Race and Employment Directives will undoubtedly confer important benefits on equality law throughout the European Union. However, the transposition of the Directives' provisions should be also seen as the opportunity to review past experience, to identify the weaknesses in the current legislative framework, and to adopt innovative and imaginative measures to give a fresh impetus to the fight against discrimination. The consultation document is disappointingly minimalist in its approach to implementing the Directives. The government appears to want to exclude debate on key issues such as positive action and enforcement strategies even before the consultation process.

Part of the difficulty lies in the legal constraints imposed by the recourse to the European Communities Act 1972 as the mechanism for adoption of the new standards. NICEM believes primary legislation would be preferable. The process of law reform would be open and transparent and a much wider range of options could be considered. Most significantly, primary legislation would provide the opportunity for the development of a Single Equality Act. The plan outlined by the document will result in separate and different legislation governing discrimination on grounds of sex, race, disability, religion, sexual orientation and age. Such a proliferation of diverse regulatory standards cannot be desirable from either the perspective of employers and service-providers, or individuals. In particular, the current legal framework fails those individuals who experience discrimination on more than one ground. For example, it is unacceptable that a Lebanese man of Muslim faith is protected against discrimination in rented accommodation on the basis of his nationality or ethnic origin, but not as regards his religious belief. Ultimately, the only effective solution to the gaps and inconsistencies in the law as it stands is a Single Equality Act incorporating a harmonised level of protection for all forms of discrimination. We strongly recommend the government follow this route.

Should you have any queries about this submission, please contact
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