

**Submission to the Home Secretary
for consideration of the
Commission for Racial Equality's
“Reform of the Race Relations
Act 1976”**

16 December 1998

INTRODUCTION

NICEM is a voluntary sector, membership-based umbrella organisation representative of minority ethnic groups and their supportive organisations in Northern Ireland. The membership includes the following minority ethnic communities : Chinese, Asian, African-Caribbean, Irish Travellers, Filipino, Muslim, etc. The Council is committed to collective action informed by people's experience and analysis of their circumstances. In pursuit of equality of opportunity and equity of treatment, NICEM works for social change in relation to racism and in particular to the elimination of racial discrimination.

NICEM is the lead body co-ordinating the campaign to have race relations legislation in Northern Ireland, including the protection of the Irish travellers and a separate Commission for Racial Equality in Northern Ireland. Currently our Executive Director is the Deputy Chair of the Commission for Racial Equality for Northern Ireland (CRENI), two Council members and two Advisory Committee members who are also the Commissioner of the CRENI.

BACKGROUND

NICEM endorses the CRE's Third Review : Reform of the Race Relations Act 1976. It is a long awaited struggle since the previous government refused to implement two volumes of review by the CRE in both 1986 and 1992. Their omission reflects the prejudice of our society, as well as the daily experience of institutional racism of black and ethnic minorities in the UK and in Northern Ireland.

The existing race legislation is no longer accommodate the dramatic changes of our society in the last two decades. A new legislative framework which is now outlined by the CRE's Third Review, is creating a new agenda on race equality in the next millennium. Justice delay means justice denial. It is the time now for the Labour government to think the unthinkable in order to secure a real multi-cultural society for the UK and Northern Ireland.

The British Government has ratified both the UN Convention for the Elimination of all forms of Racial Discrimination (CERD) and the Council of Europe's Framework Convention for the Protection of National Minority (Framework Convention) which create a positive duty for the British Government to implement its obligation under the international law, including domestic law measures to eliminate racial discrimination, affirmative action and positive rights arising civil, political, economic social, and cultural spheres.

We welcome the British Government to enact the Human Rights Act 1998 which incorporates the European Convention of Human Rights and Fundamental Freedom (ECHR) into domestic law. It will provides a fast track domestic litigation rather than a lengthy and time consuming litigation at the European Court of Human Rights . The new Human Rights Act will have significant impact on black and ethnic minorities in order to protect their basic rights.

The only limitation of the ECHR is that Article 14 has limited protection on discrimination. It can only apply against the State in exercising the Convention rights. It does not extend beyond the horizontal application, i.e. individual against individual on the civil litigation. And now the Committee of Ministers of the Council of Europe in March 1998, mandated the Steering Committee for Human Rights to elaborate, “before 31 December 1999, a draft additional protocol or protocols to the ECHR broadening, in a general fashion, the field of application of Article 14 of the ECHR, which would contain a non-exhaustive list of discrimination grounds.” (ECRI letter on 16 April 1998)

We also welcome the British Government to enact the Northern Ireland Act which provides a good legal framework and practice for all public authorities to implement their statutory duty to promote equality of opportunity. The Equality Scheme, as enacted under Schedule 9, which includes impact assessment for policies adopted or proposed to be adopted by the authority, monitoring any adverse impact of policies adopted by the public authority, assessing public access to information and to services provided by public authority, publishing results of impact assessment, including mitigation and alternative policies, etc., “would require significant culture change in the Northern Ireland public sector” (Para. 4.11 “Partnership for Equality” White Paper). It also provides a model of good practice for the rest of the UK.

Moreover, under Article 13 of the Amsterdam Treaty of the European Union marks the first time in history that racial and religious discrimination have been recognised. The opportunity to adopt, once the Amsterdam Treaty has been ratified, legislative and other measures at the European level on racial and religious discrimination. NICEM is aware that the European Commission will propose a Council Directive on racial discrimination next June as part of the Commission’s Action Plan Fighting Against Racism (COM(1998)183 final).

The above background provides an ample opportunity to mainstreaming racial equality into a new agenda in the next millennium. And the future UK and Northern Ireland legislative framework must have a new vision to go beyond these changes. Therefore, it is now the Labour Government’s political wisdom and courage to provide a powerful legislative framework (Article 2 of CERD) and to enact positive rights (Article 5 of CERD) which includes preferential treatment following the European Court of Justice’s judgement on Marschall (ECJ 11/10/1997-Case C 409/95).

1. Racial Equality as a permanent priority and obligation for government and all public bodies

(a) Priority for discrimination legislation

NICEM endorses the proposal that new legislation should be certified consistent with the Race Relations Act (“RRA”), whether it is under the existing one or the future RRA, by the Minister. Where such a certification is not possible, an explanatory memorandum should be attached to any bill setting out why the new measures ought to be adopted notwithstanding the conflict with the RRA. Any justification for

enacting such legislation ought to be objectively established and must carry out an impact assessment report, including mitigation, alternative legislation and monitoring any adverse impact arising from the legislation.

This proposal will compile with Article 2(1)(c) of the CERD which states that “each States Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”

(b) The Race Relations Act should apply to all aspects of the activities of Government and public bodies.

NICEM endorses the proposals to establish a positive rights not to be discriminated against on racial grounds with corresponding prohibition on public authorities as defined under section 6(3) of the Human Rights Act 1998, from discrimination in carrying out their statutory functions. This proposal is in line with British Government’s obligation under Article 2 of CERD and Article 4 of the Framework Convention.

To overcome a potential problem identified by the Court of Appeal in Farah case, amendment should make chief constables / commissioners of police and comparable directors within the police services vicariously liable for acts of discrimination committed by officers under their control.

(c) Government and all public bodies should have new racial equality duties

NICEM endorses the proposals that public authorities (not only public bodies) have new and positive equality duties, in particular in relation to the provision of an “impact statement” by public authorities explaining to the public changes to policies or actions will encourage transparency and accountability. Moreover, the issue of “contract compliance” between public authorities and external and outside contractors is important to encourage good practice. We also endorse a mandatory ethnic monitoring and compliance with relevant codes of practice.

The Northern Ireland Act 1998 provides a good model of practice in this area. Thus, NICEM proposes the following clauses which mirrors the 1998 Act, on statutory duties of public authorities :

1. A public authority shall in carrying out its functions have due regard to the need to prohibit any forms of racial discrimination and to promote racial equality.
2. (1) It shall be unlawful for a public authority carrying out functions to discriminate, or to aid or incite another person to discriminate, against a person or class of person on racial ground.
(2) An act which contravenes this section is actionable at the instance of any person adversely affected by it; and the court may -
 - (a) grant damages;
 - (b) subject to (3), grant an injunction restraining the defendant from committing, causing or permitting further contravention’s of this section.
- (3) Without prejudice to any other power to grant an injunction, a court may grant an injunction under subsection (2) only if satisfied that the defendant -
 - (a) contravened this section on the occasion complained of and on more than one previous occasion; and

(b) is likely to contravene this section again unless restrained by an injunction.

The details of the scheme to implement racial equality duty can draw the reference of the Schedule 9 of the Northern Ireland Act 1998.

Moreover, it is essential that race equality indicators are expressly included as a factor to be assessed for the purposes of evaluating “best value” for all public authorities.

2. SCOPE OF THE RACE REALTIONS ACT AND DEFINITION

(a) Positive right to be free from discrimination

NICEM endorses the affirmation of a positive right to be free from any forms of racial discrimination. (Article 2 of CERD and Article 4 of Framework Convention)

(b) Conformity with EC Law

NICEM endorses the proposals for conformity with the principle of EC law and the amendment of the Act by Order of the Secretary of State where necessary. This is a necessary to change in order to follow the best practice on the one hand, a positive step to prepare in advance for the new Directive on racial discrimination on the others.

(c) New Definition of Indirect Discrimination

The definition of indirect discrimination within the RRA is clearly unsatisfactory and requires fundamental change. The CRE’s recommended definition remains unwieldy. However, the principles upon which that definition is based should be strongly endorsed. These are that any definition ought to enable indirect discrimination to be proved where the number of people from a particular racial group who are disadvantaged is numerically small; and, that it is sufficient to establish liability, in that the condition, provision, practice or policy complained of may operate to the detriment of a particular racial group rather than operating as an absolute bar. (Perera -v- Civil Service Commission)

Moreover, there is no justification for failing to pay compensation in cases of “unintentional” indirect discrimination. The proper place for consideration of intention is in relation to the level of any award of compensation.

(d) Discrimination by way of victimisation should be wider in scope

Again, the definition of discrimination by way of victimisation is unwieldy and requires revisiting. Clearly, the scope of the Act should be extended to prohibit victimisation of former employees; and to permit a complaint of victimisation where an initial complaint made in good faith is held not to constitute a “complaint” or proceedings under the Act.

e. Discrimination in education

NICEM endorses the proposal to education should be codified to ensure that all bodies with responsibilities in the field of education are covered by the Act in respect of all of their education-related functions. Further, the requirement to refer both individual complaints and non-discrimination notices to the Secretary of should be

removed. This requirement inevitably introduces delay in challenging discrimination within the field of education and in bringing to an end discriminatory practices.

f. Discriminatory Advertisements

The recommendations in relation the provisions of the Act which relate to discriminatory advertisement is endorsed.

3. New areas for inclusion in the Act

a. Procurement - tendering and awards contracts

NICEM endorses the proposal that discrimination on racial grounds in any of the stages of procurement process be unlawful where the contract exceeds a de minimis exception.

We also agreed to have a wider consultation in relation to adopt positive action measures which requires within the Act.

NICEM also endorses recommendations on volunteering, office holder and former employees.

4. Exception to the Act

NICEM endorses the proposal as to the removal and narrowing of exceptions to the Act are welcomed. In relation to section5, genuine occupational qualification, any employer ought to be able to demonstrate that the racial group of the jobholder is, in practice, an essential defining feature of the particular job.

The s.75(5) exception relating to employment in the public service ought to be removed.

5. Positive Action

Article 2(2) and 5 of the CERD and Article 4(2) & (3) of the Framework Convention provide a sound base for any future legislative framework on positive action. The government should provide a comprehensive positive action programme in the following areas, such as education and training, housing and accommodation, health, employment, in particular government should introduce preferential treatment which base on the ECJ judgement on Marschall, on public sector employment and promotion to remedy the problems of over-represented at the bottom of the workforce, under-represented at the middle ranking of the workforce and no representation at the top level of the workforce.

The current provisions on discriminatory training by certain bodies i.e. “positive action”, lack of clarity and are consequently ineffectual. Clarifying these provisions is a task which must be undertaken with sensitivity in order to ensure that comprehensive and workable provisions with a broad base of support are produced.

The provisions of s.37 should make explicit that the positive action permitted by the Act includes both exclusive training and reserved places on courses irrespective of whether the under representation of a particular racial group is national or local. On the job training ought to be included. The notions that such training ought, for these purposes, to be subject to a maximum period and that selection for training is a guarantee of subsequent employment, are also endorsed.

6. Ethnic monitoring

NICEM endorses the proposal to have compulsory ethnic monitoring of the workforce where it exceeds 250, and publication of relevant data and reviews. We also support to permit independent, recognised trade unions to request ethnic monitoring data and reviews of results from an employer in certain circumstances.

7. Powers of the Commission

At the moment the Commission is wholly unable to carry out effectively what were envisaged to be its central enforcement functions. Individual complainants and those who support them bear the burden of challenging unlawful discrimination which may be systemic in the only way open to them, i.e. individual complaints or issuing proceedings in our courts and tribunals. The specificity of the Act, which stresses individual individual rather than collective rights, means that it is an essentially inappropriate mechanism for promoting aims such as the elimination of discrimination in employment. The outcome of such litigation, which is not only costly in personal and financial terms, is often unsatisfactory to both parties and leaves many central concerns unaddressed.

Accordingly, the proposals at sub-paragraph a to d are strongly endorsed. These seek to state and/or clarify the Commission's ability to carry out a formal investigation; issue on non-discriminatory notice which require the Respondent to effect specified changes in practice or procedure within a designated time-scale; enter into legally enforceable undertakings with Respondents who admit or acknowledge evidence of unlawful discrimination; and to issue codes of practice on any areas regulated by the Act giving such practical guidance as it thinks fit without the need for parliamentary amendment of the Act.

8. Enforcing the Act

a. complaints and formal investigation concerning discrimination in education

The notification of the Secretary of State in education cases is unnecessary and should be removed.

b. Burden of proof

The principles set out in King -v- Great Britain China Centre and Zafar -v- Glasgow City Council should be given statutory form and the principles cited therein should be extended to include comparisons with the hypothetical man as well. It is also desirable that the RRA be amended in the event that the EC Burden of Proof Directive requires amendment of the Sex Discrimination Act.

The Commission urges consideration be given to permitting a court or tribunal to draw an inference of discrimination by an employer where there is evidence of unreasonable treatment contrary to employment legislation and codes of practice, and no evidence of the employer having taken reasonable steps to prevent discrimination of the kind alleged. However, a court or tribunal is already able to draw an adverse inference in such circumstances. To enshrine such a provision in legislation may go too far. It is likely to provoke widespread concern and to militate against public understanding and acceptance of the principles of non discrimination and equality of opportunity.

c. & d. Direct access to Industrial Tribunals for serving members of the armed forces and Remedies available to Industrial Tribunals

NICEM strongly endorses proposals at sub-paragraph c and d.

e. Time limits

In relation to the extension of time limits for lodging complaints of discrimination in employment cases there is a concern that yet more matters which occurred significantly before a complaint was duly presented will be rehearsed in evidence further lengthening proceedings. There may also be a correlative response from the tribunal which leads them to exercise their discretion to extend time much more restrictively.

f. Litigation affecting a class or group of individuals

The availability of a class or group action is long overdue. Amendment of the legislation ought to include a specific interlocutory procedure where a definition of the relevant class or group is arrived at. There would also need to be express provision that the result of any such case would be binding on all members of the class or group so identified save in certain very narrow and expressly identified circumstances.

g. Responses to s.65 Questionnaires

In relation to replies to questionnaires, employment tribunals ought to be obliged to consider making an award of costs against the Respondent in cases where the tribunal adjudge that there have been unsatisfactory or equivocal replies.

h. Race Relations Act cases should be heard by fully constituted tribunals

NICEM strongly endorsed the proposal, in particular the obligation under Article 6 of CERD which states that “.....to seek from such tribunals just and adequate reparation or satisfaction for any damages suffered as a result of such discrimination.”

Other concern from NICEM

1. The definition of racial group

Although the case law development has been widening the interpretation of the House of Lords decision under *Mandla -v- Lee*, we welcome that development. NICEM suggest that the government should follow the Race Relations (N.I.) Order 1997 which names Irish Traveller community as a racial group, to include those groups recognised by case law, as well as other groups such as Muslim, Rastafarianism, etc. These identified groups are under the obligation of both CERD and the Framework Convention for the protection.

2. Training for tribunal panel and judges

Panel members of the tribunal would receive detailed training in relation to equality issues and relevant legislation. Such an approach might reduce concerns which are expressed by parties to proceedings as to the degree of understanding of the issues and law exhibited by some employment tribunal members and judges. Such concerns are particularly acute in relation to County Court proceedings where cases are relatively few. Such an approach may also help to tackle another often cited consideration in discrimination cases, namely that they tend to be longer and therefore more costly than other kinds of claims.

For further information about this submission, please contact :

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16 December 1998

Dear Secretary of State

Re : Third Review of the CRE : The reform of the Race Relations Act 1976

I enclose a copy of our submission to the above Review. Should you request further information, please do not hesitate to contact me for details.

Yours sincerely

Patrick Yu
Executive Director