

## **Comments by the Northern Ireland Human Rights Commission on the Initial Consultation concerning the Single Equality Bill**

### **1. INTRODUCTION**

- 1.1 The Belfast (Good Friday) Agreement 1998 specifically requires the Human Rights Commission to consider "a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors". It also makes clear the commitment of all the parties to equality by referring to equal opportunity and equal treatment. Implicit in the commitment to the right to equal opportunity, to freedom from sectarian harassment and to the right to full and equal participation (as specifically enumerated for women in the Agreement) is the duty on the state actively to work towards the abolition of inequality of treatment before and under the law.
- 1.2 The Commission will be launching the draft Bill of Rights (in the form of preliminary advice to the Secretary of State) on 4 September 2001 and will be commenting more extensively therein on matters relevant to the issue of equality. An embargoed copy of the consultation document is enclosed: see in particular Chapter 4.
- 1.3 The Commission's submission at this stage is limited and addresses in general terms some broad principles which it considers should underpin the thrust of the SEB. It does not therefore respond in detail to many of the questions asked in the Consultative Document.

### **2. SCOPE AND THRUST OF SEB**

- 2.1 The citizen currently seeking to invoke the protection of or to comply with obligations under anti-discrimination law faces a complex patchwork of legal provisions and measures and legal uncertainty. There is a plethora of primary and secondary legislation, regulations, rules, codes, amendments and guidance. There are national and international obligations, some of which conflict. In addition, the relationship of anti-discrimination provisions with employment rights makes this a particularly complex and often inaccessible area of law.
- 2.2 In those circumstances, it is submitted that the scope and thrust of the SEB should aim to ensure in so far as is possible that rights and obligations in respect of equality are governed by one over-arching statutory instrument containing harmonised provisions (where possible) and applying the highest of existing differential standards (i.e., levelling up).

Thus, if premised on the principles as outlined, first, it would be inadequate for the SEB merely to harmonise existing provisions governing sex discrimination, fair employment, disability and race discrimination given, for example, pending EU legal obligations which will require further legislation in 2003 and 2006. It would therefore appear sensible that, at minimum, the scope of the SEB should cover developments which will become law in due course by virtue of membership of the European Union and other international standards to which the Government is a signatory. Failure to incorporate such measures will only perpetuate the current patchwork of legal provisions and legal uncertainty.

- 2.3 Second, having determined the scope of the SEB, the second basic principle for the draft should be harmonisation of provisions unless there is an objective reason for maintaining a distinction. This would provide clarity in rights, obligations and procedures in so far as is possible in one document. For example, the SEB should include provisions relating to goods, facilities and services in the area of sexual orientation unless there is an objective reason not to do so and the Bill should ensure that the treatment of statutory office holders is consistent across protected groups unless it can provide an objective reason not to do so. The SEB should assume harmonisation unless there is a good reason for an inconsistency in provisions.
- 2.4 Third, it is arguable that levelling up as the basis for harmonisation in the SEB would mean the application of a proactive approach as set out in fair employment legislation. Indeed, this is already perceived as the standard required by virtue of section 75 of the Northern Ireland Act 1998. Proactive measures such as fair participation reviews by reference to race and gender are already undertaken by many organisations.
- 2.5 In its own consultation on the Bill of Rights, the Commission has noted broad public support for the right to equality and to positive action as well as for the prohibition of direct and indirect discrimination. The Commission would therefore suggest that the drafting of any Single Equality Bill should take account of Chapter 4 of the draft Bill of Rights Consultation Document and the proposals made therein.

### 3. CONCEPTS OF DISCRIMINATION

- 3.1 The fundamental basis for determining the appropriate definitions of discrimination should be as outlined above. The formulation of any definitions of discrimination in the Single Equality Bill should take account of relevant European Union Directives, namely the Burden of Proof Directive, the Framework Directive, the Equal Treatment Directive and the Race Discrimination Directive, in addition to the caselaw nationally. Regard should also be had to the content of the European Union Charter of Fundamental Rights.
- 3.2 The formulation of any definitions of discrimination in the SEB should also take account of relevant international human rights standards, namely:
- The United Nations Convention for the Elimination of all forms of Racial Discrimination
  - The United Nations Convention on the Elimination of Discrimination Against Women
  - The United Nations Convention on the Rights of the Child; and
  - The United Nations International Covenant on Civil and Political Rights.
- 3.3 Best international practice also highlights an approach to equality rights which uses both equality and non-discrimination provisions.

The Commission would propose that the Government draws particularly on the Canadian Charter of Fundamental Rights and Freedoms and the Bill of Rights chapter in the South African Constitution.

- 3.4 In principle, the Commission is of the view that the Single Equality Bill should adopt a proactive approach to equality as opposed to merely outlawing discrimination and proposes strong positive action clauses.
- 3.5 Where possible, concepts of direct discrimination, indirect discrimination, justifiable direct discrimination, victimisation and positive action should all be considered from the perspective of harmonising at the highest standard possible to provide protection or clarifying why it is not possible to harmonise where legitimate reasons exist.

Subsequent consultation should identify clearly reasons for not harmonising definitions where this is proposed. A recent example of a failure to provide any rational explanation for lack of harmonisation arises from the proposed implementation of the Burden of Proof Directive. The Government has not provided a sound basis for the distinction between the definition of indirect discrimination in the provisions on employment and those on goods, facilities and services.

Furthermore, a situation currently exists in relation to victimisation whereby post-employment victimisation on grounds of sex is unlawful but not on grounds of race.

- 3.6 With regard to general scope and definitions, the Commission's draft Bill of Rights consultation document to be launched on 4 September 2001 will propose the following:

a Non-discrimination

*Everyone has the right to be protected against any direct or indirect discrimination whatsoever on any ground (or combination of grounds) such as race or ethnic origin, nationality, colour, gender, marital or family status, residence, language, religion or belief, political or other opinion, possession of a criminal conviction, national or social origin, birth, disability, age, parentage, sexual orientation, status as a victim or any other status.*

b. Direct Discrimination

*Direct discrimination shall be taken to occur when a person has suffered, will suffer or would suffer disadvantage on the basis of any of the grounds in [the non-discrimination clause].*

c. Indirect Discrimination

*Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put any persons at a disadvantage by virtue of their status, as defined by [the non-discrimination clause above] and as limited by [the exceptions clause, see 4.2 below].*

d. Harassment

*Harassment or bullying shall be deemed to be a form of discrimination when unwanted conduct related to any of the grounds referred to in [the non-discrimination clause] takes place with the*

*purpose or effect of violating the physical integrity or dignity of a person, or of creating an intimidating, hostile, degrading, humiliating or offensive environment.*

e. Positive action

*Laws, policies, programmes or activities aimed at achieving and sustaining full and effective equality, in particular by reducing inequalities affecting groups disadvantaged on the grounds specified in [the non-discrimination clause] or on socio-economic grounds, and which may include specific measures for individuals from such groups, shall be required [or may be adopted]. Such laws, policies, programmes or activities shall not constitute unlawful discrimination.*

It will be seen that these draft clauses substantially expand on the existing protection from discrimination, and allow scope for further development.

#### 4. EXEMPTIONS AND COVERAGE IN ANY SINGLE EQUALITY BILL

4.1 The consultative document asks a series of very specific questions in relation to the scope of a Single Equality Bill in sections 4 and 5. In the Commission's view, these are complex questions and require detailed analysis of the existing provisions and caselaw. The basis for determining the approach to exemptions and coverage has been set out above. The extent to which coverage, exclusions, and exemptions cannot be harmonised across protected groups should be explained and further consultation should be provided.

4.2 However, in the context of the proposals for a Bill of Rights, an approach to exemptions which the Commission considers appropriate is that it should meet the following standard:

*A difference of treatment which is based on a characteristic related to any of the grounds referred to in the non-discrimination clause. . . shall not constitute discrimination where, by reason of the nature of the particular activities concerned, or of the context in which they are carried out, such a characteristic constitutes a genuine and determining requirement, provided that the objective is legitimate and the requirement is proportionate.*

4.3 Other issues of particular merit or concern which the Commission would wish to highlight were referred to in the Chief Commissioner's letter of 19 June 2001 to Ms Stella McArdle, Clerk to the Committee of the Centre, Northern Ireland Assembly, and relate to:

- the applicability of existing anti-discrimination legislation in the education section;
- the investigation powers of the Equality Commission and the Human Rights Commission with regard to different forms of discrimination; and
- the need to introduce anti discrimination legislation to protect persons who have, or who are associated with persons who have, a criminal conviction.

#### 5. ENFORCEMENT OF INDIVIDUAL COMPLAINTS

5.1 In light of the contents of section 2 above, it is clear that procedures in relation to the enforcement of equality should be readily capable of harmonisation. For example, it

is no longer sustainable to retain a distinction between the treatment of fair employment claims and any other discrimination complaints in the tribunal system. (The Bill of Rights proposals specifically envisage the prohibition of discrimination on combined grounds, so that a single action could arise from discrimination on grounds of (for example) religion and sex, or race and political opinion.) Equally, it is unnecessary to duplicate Codes of Practices, statutory questionnaires, Originating Applications and Notices of Appearance.

- 5.2 The Commission considers that it would be appropriate to consult on the question of the need for an anti-discrimination wing of the tribunal system or an alternative mechanism which would ensure the retention of expert adjudication.
- 5.3 It may also be timely to reconsider the appropriate venue for the limited number of complaints concerning goods, facilities, services and education.

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