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Equality Unit

30<sup>th</sup> November 2004

Dear Sir/Madam

**RE: NICEM Response to the Single Equality Bill Consultation**

Please find enclosed NICEM's response to the consultation 'A Single Equality Bill for Northern Ireland'

We would like to thank you for the extension of the deadline, which has enabled our response to be informed by consultations with the Black and Minority Ethnic sector.

Yours Sincerely

Tansy Hutchinson  
Research and Development Officer



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**NICEM**  
**Submission**  
**on the**  
**Consultation**  
**Paper:**  
**Single Equality**  
**Bill for**  
**Northern Ireland**

**November 2004**

## Introduction

NICEM welcomes the publication of the Green Paper on “A Single Equality Bill for Northern Ireland – A Discussion Paper on options for a Bill to harmonise, update and extend, where appropriate, anti-discrimination and equality legislation in Northern Ireland.”

This submission paper will give detailed comment following the chapter structure of the Green Paper.

### Chapter 1: Introduction

- 1.1 NICEM welcomes the inclusion of the Introduction chapter, which outlines the governments’ commitment to the development of equality legislation for Northern Ireland. **We would like to see this commitment translated into strong laws and effective public policies to promote equality of opportunity on the one hand, and tackle unfair discrimination on the other<sup>1</sup>.** We also appreciate the non-regression approach to developing the SEB.
- 1.2 Therefore NICEM suggests that the Single Equality Bill (SEB) needs to **have a stronger focus on equality of outcome in terms of fair participation and fair access in both employment and the provision of goods, facilities and services. This must cut across all grounds and scope. By using this approach we can take into account the differences, needs and disadvantaged position (structural or institutional discrimination) of different groups or constituencies. It will also minimise the hierarchies of inequalities** (in line with the last principles of Chapter two).
- 1.3 **The Single Equality Bill and other related documents**, such as regulations and codes of practice, **should be written in plain English** so that ordinary people (including small business) can understand the legal framework in general and its substance. (We will also address this issue in the Chapter on the Equality Commission for Northern Ireland: Powers and Functions.) It should be available in different formats (not necessarily as a full document) and other languages, which take into account the needs of disabled people and minority ethnic people.

### Chapter 2: Purpose and Principles

- 2.1 NICEM welcomes and agrees with the comprehensive list of principles in the consultation document. This reflects the purpose and principles of the SEB and it is vitally important that these be incorporated in the Bill for future judicial reference. According to the UK legislative drafting tradition, the preamble has no effect in interpreting the law we therefore suggest incorporation of a long title to the Bill, including the purpose and principles of the SEB as a first step. The

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<sup>1</sup> See Forward of the First Minister and Deputy First Minister in the initial consultation paper on the Single Equality Bill for Northern Ireland at p.5.

interpretation clause must also reiterate the purpose and principles in order to give them such an effect.

2.2 We reiterate the need for an **Equality of Outcome focus** for the SEB. This is a **new legal framework to mainstream equality into policy and practice that cuts across all grounds and scope (as such it forms the basis for the future equality agenda for Northern Ireland). It is a common framework to apply to all grounds through common values (the equal dignity and worth of all), concepts of discrimination and equality (positive equality: including, but not necessarily restricted to, exception and how to address under-representation), an effective and efficient enforcement system, as well as an effective sanction system as stated in the EU Race Equality Directive and the Framework Directive on Employment<sup>2</sup>. This framework must take into account the differences, needs and disadvantaged position of different grounds through positive equality such as affirmative action programmes.<sup>3</sup>**

2.3 Professor Michael Mine argued that discrimination law can be compared to a tree<sup>4</sup>:

- **The roots:** representing the values embodied in and defended by the law (human dignity, and everything that it implies);
- **The trunk:** representing applicable rules and issues common to all types of discrimination (the concepts of discrimination and assessment system in particular)
- **The branches:** each one representing a particular area of discrimination (sexual, racial, disability, etc.) each with specific legal, historical and sociological features, with the possibility of transferring legal solutions between branches.

This concept, by using a tree, can provide an easy understanding of the SEB framework and the relationship between roots, trunk and branch, as well as among branches.

2.4 **This approach will provide a common platform for all grounds and scope and, at the same time, taking into account the particular needs of various grounds will minimise the tendency of hierarchies of inequalities to develop and address multiple identities and multiple discrimination issues (see the last principles).**

2.5 **We welcome the principles ensuring compliance with international and regional human rights standards that promote equality and prohibit unfair discrimination.** At the same time, we should also draw up the relationship with

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<sup>2</sup> “Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive” (Preamble Paragraph 26 of the Racial Equality Directive and Paragraph 35 of the Framework Directive on Employment). See also Article 15 of the Race Directive and Article 17 of the Framework Directive.

<sup>3</sup> See Article 5: Positive Action of the Race Directive and Paragraph 17 of the Preamble of the Race Directive.

<sup>4</sup> “Concept of Direct and Indirect Discrimination” presented at the Conference : The Race and Framework Employment Directive, Academy of European Law, Trier March 2003

the equality provisions of the Bill of Rights for Northern Ireland. From our perspective, human rights protection through the non-discrimination principle that is enshrined in international standards, as well as through constitutional guarantees or in the form of the Bill of Rights, is distinct from the domestic or national equality legislation.

The former deals with human rights protection under the principle of non-discrimination that prevents State law, policy and practices that are discriminatory. In most other jurisdictions, the Bill of Rights will require the State to make domestic equality legislation in the spirit of the equality provision of the Bill of Rights, providing details on the protected grounds and scope. The equality legislation deals with substantive breaches in specific circumstances on the agreed grounds and scope and applies to both the State and non-state parties. **We would like to see the Bill of Rights for Northern Ireland and the SEB not only as complimentary to each other, but also developing a double lock protective system through the use of different routes of jurisdictions to tackle unfair discrimination and the promotion of equality.** Therefore, the current proposal by the Human Rights Commission (see the latest report) is too detailed in areas such as direct and indirect discrimination, harassment, victimisation, etc. This level of detail would undermine the SEB. We would like to see consideration at the official level to resolve these issues and problems.

- 2.6 One of the key achievements on mainstreaming equality into government policy and practice in Northern Ireland is the Section 75 duty under the Northern Ireland Act 1998. Although there is still resistance due to limited resources and the bureaucratic tick-box exercise culture, it has transformed the mechanism of consultation and resulted in change through equality impact assessment. The mandatory consultation enables the constituencies of the nine protected grounds to participate in the policy-making process. We would like to translate this positive outcome and experience from the public sector and extend the same equality and good relations duties to employers and service providers in our society.
- 2.7 Although Section 75 is a reserved matter, and therefore cannot be amended by the SEB (nor would we wish it to be), its origin is in the ineffective Article 67 of the Race Relations (NI) Order 1997 (the equivalent Section 71 of the Race Relations Act 1976 in GB) which lacks enforcement power. **Article 67 places a duty on District Councils “to make appropriate arrangements with a view to securing that its various functions are carried out with due regard to the need: 1. to eliminate unlawful racial discrimination and 2. to promote equality of opportunity and good relations between persons of different racial groups.”**
- 2.8 **NICEM suggests using the same Article 67 provision, cutting across all grounds, to apply a duty to all employers and service providers in Northern Ireland. In effect this suggested provision will start a new era of mainstreaming equality in Northern Ireland.**
- 2.9 **NICEM also suggests the use of positive and negative equality concepts (positive promotion and negative prohibition) as the framework to cut-across all chapters of the final report of the consultation paper.**

## Chapter 3: Grounds

### 3.1 Existing Grounds:

**NICEM reiterates our concerns over the two missing grounds, namely “nationality and colour” in the transposition of the Racial Equality Directive through the Race Relations Order (Amendment) N.I. Regulations 2003 (Race Regulations). Therefore, we welcome the inclusion of the two missing grounds in the SEB. If the government has already agreed on the need to include the two missing grounds, it will be unreasonable to wait for another two to three years time to remedy the existing two tier system (race, colour, nationality, ethnic and national origin under Race Relations (NI) Order 1997 and race, ethnic and national origin under the Race Regulations), which creates legal uncertainty and unnecessary litigation. Therefore NICEM urges the government to rectify the omission of the two missing grounds, namely “colour and nationality” as soon as possible through Regulations, rather than waiting for the SEB.**

**We also agree the approach that is proposed in the Green Paper to deal with gender, gender reassignment, married persons and sexual orientation.**

### 3.2 Additional grounds:

**In our initial submission we proposed the nine grounds covered by the Section 75 duty as the minimum. We still maintain that argument today.** Since the transposition of the EU Directives last year, the following grounds are not under the existing legal protection: age, marital, family status and dependants.

We see discrimination occurring, directly and/or in-directly, against those groups that are disadvantaged due to their age, marital or family status, as well those with dependent(s) in the area of employment and training as well as the general provision of goods, facilities and services. Therefore by employing the negative equality concept, which is non-discrimination in nature, it will protect those groups from discrimination. Their disadvantaged position can be remedied by positive equality through affirmative action programmes.

Section 75 defines the groups based on both grounds and people with and without certain disadvantage and hardships. The purpose of equality legislation is to address inequalities within society. For example, while s. 75 refers to those with and without dependants, those with dependants experience the inequality that requires action. Thus the conceptual basis is asymmetrical, focussing attention on certain disadvantage and hardships. Therefore, in line with the concept of grounds, **we propose the following nine based on Section 75: religion, political belief, gender, race (including colour, nationality, ethnic or national origin and Irish Travellers), disability, sexual orientation, age, marital status, family status, and those with dependent(s).**

**3.3 In our initial response to the SEB consultation document, we also proposed other additional grounds in line with Article 14 of the European Convention of Human Rights on the following grounds: language, social origin, birth, property or other status** with the view to the ratification of Protocol 12 of the European Convention of Human Rights and Fundamental Freedom. In line with

our view of the relationship between the SEB and the equality provision of the Bill of Rights for Northern Ireland, we withdraw from the previous position, except on “other status”. In our view the grounds on language, social origin, birth and property are better placed under the non-discrimination principle of the wider human rights protection.

- 3.4 We still maintain that “other status” should be one of the grounds under the SEB. The argument is a simple one: once the SEB has been established it will not be easy to amend or change, except for new laws from the European Union or judgements from both the European Court of Human Rights and the European Court of Justice. Therefore the SEB should have sufficient flexibility to accommodate new grounds, new circumstances and new situations without specifically naming which group and leave it to the courts to determine.**
- 3.5 We agree with the Equality Commission’s analysis that other grounds, such as pregnancy, maternity, past convictions, victims, socio-economic status, language and genetic predisposition, should be under different legislation, instead of the SEB. Pregnancy and maternity can be accommodated through widening the scope of the definition on gender. NICEM proposes that the rest of the grounds are better placed under the Bill of Rights for Northern Ireland and other specific legislation (with non-discrimination provisions) to address their particular issues.**

## **Chapter 4: Scope**

- 4.1 NICEM maintains the view that all grounds must have the same level of protection (the scope) unless there is a strong case against it. This broad approach will, by applying equality principle, both positive and negative, minimise the existing inequality and hierarchies of equality and rights. At the same time we agree that each ground has certain specific needs and that small differences should be allowed and accommodated in the SEB. Therefore we suggest that all grounds should enjoy the same scope of protection under the SEB, with the minor differences between grounds accommodated through the use of exceptions.**

### **4.2 Employment, self-employment, occupation**

**NICEM maintains the view that the SEB should have a broad approach in all definitions under the law in order to provide the maximum protection. Therefore, we agree on the inclusion of relationships, which do not technically constitute a contract as proposed under Option C. As Option C defines employment as “employment under a contract of service or of apprenticeship or a contract or other agreement or arrangement to do any work, including voluntary work, where the work is predominantly performed in person.” On that basis volunteers should be covered under this broad definition of employment. We would like to see volunteers included in the SEB.**

#### **4.3 Social protection, including social security, healthcare and social advantages**

**The current scope of this heading is applied to RRO only. NICEM would wish to see this important area of protection extended to all grounds under the SEB as we argued in paragraph 4.1. We are pleased to see the definition of social advantage includes the private sector, as has been established by the case law developed in the European Court of Justice. We are, therefore, satisfied with the Option B.**

#### **4.4 Education**

**NICEM is convinced that we must bring all sectors of education under the scope of SEB, with specific exceptions where appropriate, such as those currently in force for single-sex schools. Therefore we support Option A.**

#### **4.5 Disposal and management of small premises**

**NICEM would like to see the removal of exceptions for all grounds on the disposal and management of small premises. We also accept that a statutory defence should be available in line with the objective justification test based on the Genuine Occupation Requirement (GOR) and Genuine Service Requirement (GSR) test, applicable across the SEB.**

#### **4.6 Coverage of public functions**

The GB Race Relations (Amendment) Act 2000, in line with the recommendations of the McPherson Report into the murder of Stephen Lawrence and the House of Lords decision in Amin, (which technically exempted the entire criminal justice system from the remit of the race legislation, as well as other equality legislation), developed the new Section 20A to extend the non-discrimination principle to all public authorities in carrying out their public functions. The equivalent Section 20 A was put in place in Northern Ireland through the Race Regulations.

**NICEM would like to see the same Section 20A extended to all grounds under the SEB. Therefore we support Option A.**

#### **4.7 Private clubs / voluntary associations**

**NICEM would like to see the same scope, which currently only protects race and disability, applied to all grounds under the SEB. We also accept that a statutory defence should be available in line with the GOR and GSR test as we argued in paragraph 4.5. Therefore we support Option B.**

### **Chapter 5: Definitions of Discrimination**

#### **5.1 Direct discrimination**

**NICEM agrees with the Equality Commission's argument that "a comparator is evidence of discrimination but not the essence of discrimination. The real rationale for direct discrimination is to prohibit reliance on a discriminatory 'prohibited' factor. It is about outcome and**

**treatment is merely the ‘means’ towards the ‘end’ of the outcome. ”** 5

Therefore we support the Commission’s definition: direct discrimination occurs when a ‘disadvantage is based upon’ a prohibited factor, as now adopted in Option C.

**We also agree with the Commission’s argument that the new definition of direct discrimination in the SEB should accommodate multiple-discrimination based on any combination of grounds.<sup>6</sup>**

## 5.2 Reasonable accommodation

Article 5 of the EU Framework Directive provides that “In order to guarantee compliance with the principle of treatment in relation to persons with disabilities, reasonable accommodation shall be provided.” But in the transposition of the Directive into UK law both GB and Northern Ireland use the concept of “reasonable adjustment” which is limited to the physical environment.

**The failure to provide reasonable accommodation to workers who face obstacles in the labour market is increasingly perceived as a form of employment discrimination. The concept of reasonable accommodation emerged in response to barriers erected by the physical or social environment resulting in an inability to perform a function in a conventional manner. Take for example the fact that we have our employment standards to accommodate the different needs of the young, elderly and pregnant worker.**

In Canada under Canadian human rights legislation (which generally deals with anti-discrimination provisions in employment, housing or other services customarily offered to the public), a positive duty of reasonable accommodation is imposed. First developed in the context of religious discrimination, reasonable accommodation is now applied in various circumstances, including discrimination based on pregnancy, disability or illness, and (somewhat unexpectedly) discrimination based on sex.<sup>7</sup> The three-step test developed by the Supreme Court of Canada is the following:

“.....I propose the following three-steps test for determining whether a prima facie discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:

- (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
- (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

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<sup>5</sup> Working Draft Response to OFMDFM Consultation Paper, ‘A Single Equality Bill for Northern Ireland’, October 2004, p.23

<sup>6</sup> *ibid*, p. 24

<sup>7</sup> In Meiroin, the concept of reasonable accommodation was applied in relation to physical fitness tests that firefighters were required to pass. The tests did not take into account the fact that, owing to physiological differences, most women have lower aerobic capacity than most men. Ms. Meiorin had worked as a forest firefighters for three years but was laid off when she failed to meet the aerobic standard, running the distance in 11 minutes and 49.4 seconds instead of the required 11 minutes.

- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.”<sup>8</sup>

**Based on the above argument and the standard setting in Canada NICEM would like to recommend that the principle of “reasonable accommodation” should be extended from disability to all grounds, including the coverage of employment and training.**

### 5.3 Indirect Discrimination

The concept of indirect discrimination is directly related to the group concept. It consists of neutral criteria, conditions, and/or practice that applies to everyone, but create particular disadvantage for certain groups due to their ethnic, religious, gender, sexual orientation, age, etc. related background. The existing definition is based on the transposition of the two EU Directives under various Regulations. The new definition does not require a statistical approach, instead it uses the concept of ‘particular disadvantage’. The only issue rests on how we establish a more robust ‘legitimate aim’ test to justify these criteria, conditions and practices.

On this issue we agree with the Equality Commission’s analysis based on the ECJ case law. We therefore support the Commission’s proposal that criteria, conditions and practices can be justified by a ‘necessary’ test as opposed to a ‘legitimate’ aim test.

**NICEM recommends adoption of the EU Directive definition of indirect discrimination but with the substitution of a ‘necessary aim’ test for a ‘legitimate aim’ test.**

### 5.4 Harassment

**NICEM welcomes the new definition of harassment based on the EU Directives with the requirement of either a violation of dignity or the creation of a hostile environment. In line with the non-regression principle of the SEB, the new definition has proved to be better than the definition contained in the Directives. Therefore we agree on using the existing definition to apply to all grounds in the SEB.**

**Regarding the issue of comparators NICEM is of the view that blatant acts of harassment should not require a comparator. In line with our argument in 5.1 (Direct Discrimination), the existence of a comparator is a matter of proof and not a matter of necessity in all direct discrimination and in harassment cases. Therefore we propose that comparators should be used as a matter of proof rather than necessity in all harassment cases in line with the same approach on direct discrimination.**

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<sup>8</sup> British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999]3 S.C.R. 3, para. 47-48. Similarly, see the <<Grismer case>> British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 S.C.R. 868 (refusal to issue driver’s permit on the basis of disability.)

## 5.5 Victimisation

The EU Directives do not require a comparator to prove the prima facie case of victimisation. NICEM therefore is not convinced that the use of the comparative situation in the implementing Regulations comes within the terms of the definition in the Directive. We maintain the same argument as in direct discrimination and harassment: comparators should be used as a matter of proof rather than necessity in victimisation cases. We recommend Option B to amend the existing definition in line with the EU requirement.

## Chapter 6: Exceptions

- 6.1 Exception is an important area to address the concept of what is fair and what is unfair discrimination. It is the main area that can reflect the differences, needs and disadvantaged position of different grounds in the SEB (the areas that cannot be harmonised). It goes deep into the whole concept of positive equality, which allows measures to remedy past discrimination, and present inequality, disadvantaged position and social exclusion of particular groups or the members (actual and perceived) of that group. Therefore “it is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.”<sup>9</sup>
- 6.2 Exceptions can also be used to take into account the extra burden to the business sector or service providers by allowing certain specific areas to remain outside the realm of the legislation. The issue is whether the existing 25 years old exceptions, as listed in the appendix to the chapter, are applicable to the modern day. Alternatively should we have a review mechanism in the SEB providing for the review of the exception rules, with participation from those affected, over a period of time?
- 6.3 The two European Directives (the Racial Equality Directive and Framework Directive on Employment) have well crafted the principles necessary to allow exceptions. These include:
- Exceptions must be specific;
  - Legitimate aims and objectives are clear;
  - Proportionality of the means used.
- Moreover, the Directives also provide the concept of Genuine Occupational Requirement (GOR) and Positive Action to remedy group disadvantage. **Therefore, the above principles should be incorporated into the SEB.**
- 6.4 NICEM agrees on the continuation of GOR to reflect the diversity of society. Using the UK experience, including in Northern Ireland, of GOR to extend the concept to Genuine Service Requirement (GSR) is great improvement, which

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<sup>9</sup> Section 14(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 of South Africa.

can take into account both diversity and the needs of different groups. Therefore **NICEM welcomes the inclusion of the new concept (GSR) in line with GOR across the scope of the SEB outside employment and vocational training.**

**6.5 NICEM agrees with the idea to remove all exceptions under the two Directives and instead use both GOR and GSR. We also argue that we should retain some of the exceptions (a short and specific area of exceptions to accommodate diversity and their specific needs based on each ground). This principle should also apply to all the new grounds under the SEB. For the area of race, we suggest the following exceptions to be retained:**

- **Association aimed at a particular racial group, defined other than by colour;**
- **Public Service Employment Rule (on nationality only); and**
- **National Security (not under the current blanket exception, we suggest a defined area under National Security)**

**Therefore we support Option B in 6.2 and Option F in 6.3.**

**6.6 NICEM also agrees with the argument put forward by the Equality Commission on the definition of GOR by adopting “essential” to replace “determining” (“...such a characteristic constitutes a genuine and determining occupational requirement.”). It is more appropriate to use essential than determining.**

**6.7 Regarding whether the exceptions should be under primary or secondary legislation or under the code of practice, NICEM is in favour of using primary legislation, with codes of practice or guidance to supplement it. The key issue is, as we argue in our briefing paper, that the SEB should have a mechanism to update and review the justification of the exceptions. NICEM recommends a statutory review process of exceptions every five years, with participation from representative bodies such as affected groups, employers and service providers to ascertain the limits and extension of the exceptions.**

**6.8 For the inclusion of future exceptions, NICEM is more in favour of using secondary legislation, but taking into account the democratic deficit by using a participative approach. Therefore, we propose that the statutory process also include Assembly Committee debate and that the Committee Report will pass back to the Minister for consideration before laying the secondary legislation before the Assembly.**

## **Chapter 7: Goods, Facilities and Services**

**7.1 Most of the attention of equality legislation is on the area of employment and vocational training. Part of the problem is the sanction systems, in which employment complaint cases are adjudicated by the Tribunal system which bears no costs, unless imposed by the judges due to failure to act or co-operate in the**

hearing, on either party. This is unlike complaints under goods, facilities and services (GFS) that are adjudicated in the County Court where the losing party would incur costs. As a result, very little case law has been established in this area. We will address this issue in more detail in Chapter 10: Tribunals and Courts.

**7.2 Increasingly the source of discrimination in the field of employment and training occurs outside the labour market: for example, discrimination in education, health and housing affect people's ability to perform. It is on this basis that NICEM views the adverse impact of discrimination in goods, facilities and services on members of black and minority ethnic communities on equality of access to employment in Northern Ireland.**

**7.3 Definition:** NICEM is of the view that the current law under the Race Relations Order, and the subsequent Race Regulation should stand. These leave GFS undefined. We also recommend the use of Codes of Practice or Guidance, as we argue in the Exception Chapter, to define the area and give more examples to assist service providers. We also agree with the idea that there should be a presumption that an activity constitutes the provision of GFS unless otherwise demonstrated. Therefore we support Option C.

**7.4 Public Functions:** NICEM is not convinced that there should be a distinction between GFS on a public body and a private party when performing public functions. As the law stands it is about discrimination in the provision of goods, facilities and services. Any discrimination is not acceptable, whether it is provided in public or in private. We have learnt a good lesson at a heavy price when the entire criminal justice system was placed outside the ambit of the race law by the House of Lords decision in the Amin case. This case argued the technical aspects of the definition of 'a section of the public', and has subsequently been remedied. In line with the Race Relations (Amendment) Act 2000, which was also brought to Northern Ireland through the transposition of the Race Directive through Race Regulations, **we recommend following the same line as in the Race Regulation and apply it to all grounds in the SEB. NICEM would also like to see the private provision of public functions included in this measure.**

**7.5 Balancing Obligations:** We support the idea of having a general justification defence under the GSR, which can apply to both direct and indirect discrimination, as well as to all grounds under the SEB. Any exception must follow the principles as we set out under Chapter 6.

**7.6 Implementation:** As we argued in Chapter 4, the scope of the SEB must apply to all grounds in order to prevent a hierarchy of rights and create a common platform for all. Therefore we are not convinced that there are timing issues for the implementation of GFS across all grounds under the SEB.

## **Chapter 8: Addressing under representation in employment**

**8.1 NICEM would like to point out that the FETO model to address under representation in employment is one of many measures under affirmative action or positive action programmes to promote wider equality of opportunity. It is a means not the end in itself. Positive equality goes beyond addressing under representation. It allows measures to remedy past discrimination and inequality, disadvantaged position and social exclusion of particular groups or the member (actual or perceived) of such a group. It aims at the promotion of equality.**

**8.2 Based on the success of FETO in tackling under-representation in employment through compulsory monitoring, we are of the view that the FETO model should be extended to all grounds in the SEB, but with a reformed version based on the consultative model of Section 75. We also firmly believe that the benefits of promoting equality of opportunity significantly outweigh the extra costs of the extension of existing processes in the FETO model across all grounds in the SEB. Therefore we support the Equality Commission's reformed model to extend FETO to all grounds in the SEB.**

**8.3 We welcome the proposal to place a duty on private sector employers to promote equality of opportunity. As we argued for and recommended in Chapter Two, (para. 2.6-2.9) the equivalent of the Article 67 duties of the Race Order should be extended to all employers and service providers on all grounds under the SEB to mainstream equality in Northern Ireland.**

**8.4 NICEM is of the view that government should set equality standard as a condition in all public procurement. It should include both contracts and grant aids. This is the best practice in mainstreaming equality. Therefore we recommend to extend the FETO requirements to all grounds on the SEB.**

## **Chapter 9: Equality Commission for Northern Ireland – Powers and Functions**

### **9.1 General Powers and Duties:**

**We argued and recommended in Chapter Two the extension of good relations duties to all grounds under Article 67 of the Race Relations Order, as well as the extension of affirmative action programmes to all grounds. Therefore, as regards the Equality Commission, in addition to the extension of affirmative action programmes and good relations duties across all the grounds, we recommend the introduction of general duties to work towards the elimination of discrimination, to promote equality of opportunity, to keep the legislation under review, to undertake or assist research and education in relation to these duties and to issue codes of practice. These duties should apply across all the grounds. Additional duties in the RRO, FETO, SDO and the DDA should remain. NICEM would like to go for Option B.**

## **9.2 Code of Practice:**

**NICEM is of the view that the codes of practice should be harmonised across all the grounds in the SEB. The codes of practice under the SEB must be mandatory and should cover employment and vocational training, education, premises, barristers and GFS, as well as exceptions and addressing under representation in employment. The codes of practice should also carry legally binding effect.**

NICEM is not convinced that the production of codes of practice should be on request from OFMDFM allowing the ECNI to draft such a code. The purpose of the codes is to assist different sections of the community in understanding their legal obligations. This is a positive approach aiming to prevent discrimination on the one hand and promote equality on the other. **Therefore the drafting of codes of practice should be a mandatory power of the Equality Commission to draft such a code on their own initiative, including a compulsory consultation process before submission to OFMDFM for approval.**

## **9.3 Powers to support complainants and other organisations:**

**NICEM is of the view that the SEB should place a general duty on the Equality Commission to support complainants through general consultation, advice and conciliation. There should also be a specific duty to provide legal assistance to strategic cases. The strategic cases should include case, which raise both discrimination and human rights issues (under the existing rules the Equality Commission cannot fund any case involving a human rights element and the Human Rights Commission cannot fund any case of discrimination).**

The fundamental question is whether the complainant, if they have no other means of support to pursue his/her legal rights, should fall under the Commission's remit. **NICEM is of the view that legal aid should be available on human rights, employment and discrimination cases (discrimination cases may fall into one of the three or all categories). The Equality Commission should not be a legal aid body or part of the legal aid system. Rather the legal aid system should take into account the rights of complainants under Article 6 of the ECHR (equality of arms) and the requirement of effective sanction under the two Directives.** The current practice is confusing and ineffective: legal aid is only available to those cases that are not supported by either the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission, and is not available at all for employment cases. NICEM would like to see the Equality Commission focus on strategic cases, such as testing cases on new areas of law and creating legal certainty on certain concepts and scope of protection.

**NICEM believes it is essential that the changes to both the legal aid system and the strategic legal support by the Equality Commission happen at the same time.**

**We agree that time limits should apply to all grounds in line with the existing Race Order. We also agree that the Commission should be able to authorise any employee to exercise its functions in relation to the provision of legal**

**assistance. We also agree that recovery of legal expenses under the current EDO, RRO and SDO should extend to all grounds in the SEB.**

**NICEM refutes the argument that Article 43 provision is under-used. The issue is that there are little resources available under Article 43. The Commission closed down Article 43 funding two years ago. The issue is not whether there is such a need, it is that the Commission closed down the Article 43 funding without consultation. NICEM would like to retain Article 43 but with a strategic objective to promote racial equality. This strategic objective funding should also apply to all grounds in the SEB. At the same time NICEM would like to see a transparent and consultative process in determining the strategic objectives of such a funding with a review every three years.**

#### **9.4 Formal Investigation:**

NICEM agrees with the approach taken by FETO to formal investigation, which is less confrontational, resulting in the respondent being more cooperative than with formal investigation under SDO, RRO and EDO. Therefore we recommend extension of the FETO model (investigation, obtaining of information, restrictions and disclosure of information, reports, non-discrimination and action plans, etc.) to all grounds and to all scope with equality of opportunity as the outcome of the process. We also note that the EDO provision in relation to undertakings in lieu of an investigation. We would like to harmonise this provision across all the grounds.

NICEM agrees with the Equality Commission that they should have the power to determine whether the investigation should be in public or private on GFS.

#### **9.5 Enforcement in relation to discriminatory advertisements, pressure to discriminate and instructions to discriminate:**

NICEM agrees on the need to harmonise the existing FETO, SDO, RRO and EDO to empower the ECNI to bring actions seeking restraining injunctions against discriminatory advertisement. This should also extend to all grounds in the SEB. We also note that under FETO a person who commits the unlawful discrimination and the person who persuaded him to do so are liable for that unlawful discrimination. NICEM would like to see the extension of FETO on instructions and pressure to discriminate to all grounds in the SEB.

#### **9.6 Equality Duty of the Equality Commission for Northern Ireland**

The Race Relations (Amendment) Act 2000 imposed the race equality and good relations duty to all public authorities, including the Commission for Racial Equality in England, Wales and Scotland. NICEM would like to see the Equality Commission for Northern Ireland designated under section 75, enabling it to become the champion and role model for the promotion of equality in Northern Ireland. NICEM disagrees with the Commission's proposal of a new duty to promote diversity. Promotion of diversity will not provide a substantive equality agenda, whereas the Section 75 duties, in a full interpretation, may also include the promotion of diversity based on different grounds.

## Chapter 10: Tribunals and Courts

- 10.1 The success of the SEB depends on how good and how effective the enforcement system is for victims of discrimination to bring their case to justice. Under the current system, it is under a formal (although less formal compared with the County Court) Tribunal system. This is expensive (dependant on having the means to employ lawyers), time-consuming (average 2-3 years wait for the case to be heard) and intimidating (adversarial court process with most likely cross-examination by Senior Counsel or QC employed by the respondents). This is a common experience of victims of discrimination, on whichever ground. It is also unique to discrimination cases.
- 10.2 NICEM would like to see the SEB provide for a fast track investigation system (**quick, short and no costs**), prior to the formal Tribunal process. In most cases the victim does not necessarily want financial compensation for the discrimination. They would like to restore their dignity and request an apology but the current system cannot accommodate such a need. Moreover, the prolonged legal process (waiting time average 2-3 years) results in further victimisation and often ends up with the victims either claiming constructive dismissal or being sacked.
- 10.3 NICEM recommends that the officials should look more seriously into the model developed in the Republic of Ireland. The role of the Office of the Director of Equality Investigation is to investigate any complaints arising from the equality legislation (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 legally binding decisions. The service is free and representation is not required. The Office also provides an alternative to investigation through mediation and conciliation (on a voluntary basis). The office also helps prevent future discrimination through its decisions.
- 10.4 In most jurisdictions resources are the determining factor in the effectiveness of sanctions. The Office of the Director of Equality Investigation has also become the victim of its own success, due to unforeseeable investigations. As a result, they now have a large backlog of cases. However, the primary purpose is to make the complaints procedure simpler (with options for mediation and conciliation) and remove the costs, as such NICEM would like to promote this model for Northern Ireland.
- 10.5 NICEM has significant concerns on the cost issues in the County Court which create a double-lock barrier to access to justice for victims of discrimination. Very little case law has been tested or developed as a result. The reality is that the source of discrimination in the employment field relates directly to discrimination in education, health and housing, which affect people's ability to perform in the labour market. NICEM is in favour of merging the jurisdictions of the existing tribunal system and the county court into a Single Equality Tribunal. This would mean a real harmonisation through a Single Commission, a Single Equality Act and a Single Equality Tribunal system. NICEM recommends a Single Equality Tribunal be established to hear all discrimination

and employment cases alongside an equivalent to the GB Employment Appeals Tribunal to hear appeals from the Single Equality Tribunal.

- 10.6 Legal aid should be available in the Equality Tribunal. If we establish an equivalent to the Irish Equality Investigation system which will operate prior to the Single Equality Tribunal, the number of cases going through to the Tribunal system will be minimal. Legal aid should be available to victims who are not satisfied with the decision of the Investigation.
- 10.7 The SEB should provide for a broad range of practical, flexible and effective 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), tribunal decisions should be treated as binding precedent. This would allow other employers or service providers to benefit from the tribunal decisions while facilitating the adjudication of similar anti-discrimination claims.
- 10.8 NICEM raises the serious concern that the transposition of the two Directives in Northern Ireland do not include Article 7(2) of the Race Directive and Article 9(2) of the Framework Directive, in which national bodies (such as the Equality Commission) social partners (trade unions and employers organisations) and NGOs who have legal standing, can sue in their own name on behalf of a victim if the victim gives their consent for representation. This approach will facilitate the bringing of class-action cases which NICEM would like to endorse.
- 10.9 The right to sue for interested organisations was incorporated into Dutch law in July 1994. The Act gives rights of action to legal persons representing the interests of other individuals (victims). 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 article of association. No such right exists where the interests are too incongruous or if, considering the circumstances, the plaintiff has not conferred sufficiently with the defendants prior to starting the lawsuit. The Dutch provisions do not allow plaintiff associations / foundations to seek monetary damages.
- 10.10 NICEM recommends that the SEB should use the Dutch experience and incorporate the same law into Northern Ireland in order to discharge the legal duty under the two Directives.

## **Chapter 11: Alternative Dispute Resolution**

- 11.1 NICEM does not see the merit of the ADR system if we introduce a fast track investigation system that would operate prior to the Single Equality Tribunal as we argued for above. One of the dangers of ADR is it does not provide equality of arms (the essential principle under the Article 6 ECHR fair trial rights), as employers or service providers are in a much better and dominant position to negotiate. Moreover, ADR will by-pass the equality test even in clear case of discrimination. Therefore NICEM will not support the ADR system.

**If you have any question about this submission paper, please contact Mr. Patrick Yu, Executive Director or Ms. Tansy Hutchinson, Policy and Research Officer at the following address:**

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