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Northern Ireland Council for Voluntary Action

# **Response to OFMDFM'S A SINGLE EQUALITY BILL FOR NORTHERN IRELAND**

**18 November 2004**

**CONS 327**

# NICVA's Response to a Single Equality Bill for Northern Ireland

## **1. Introduction**

- 1.1 The Northern Ireland Council for Voluntary Action (NICVA) welcomes the opportunity to respond to the OFMDFM consultation paper 'A Single Equality Bill for Northern Ireland'. Our comments are informed by NICVA's role as the representative body for the voluntary and community sector and by a vision of society where all citizens are treated fairly, where sectarianism and discrimination are not tolerated and where respect for human rights and equality is regarded as the norm.  
Since many organisations will be better placed to offer advice on their areas of expertise, NICVA will focus on more general comments.
- 1.2 We commend OFMDFM for the quality of its consultation process, including the attention paid to the needs of the voluntary and community sector and the willingness to adopt a partnership approach in workshops. NICVA commented on earlier proposals and we believe that many of our views, along with those of others who responded, have been taken into account when framing the latest proposals.
- 1.3 NICVA welcomes the commitment to non-regression from existing standards of protection and we would like the SEA to focus on the achievement of full and effective equality through the positive approach to the promotion of equality of opportunity as well as the harmonization of existing legislation and the non-discrimination approach.

## **2. Purpose and Principles**

- 2.1 We support the set of principles enumerated at the beginning of the document. We are committed to the overarching international human rights standards and a Bill of Rights for Northern Ireland. Therefore, there may be merit in mentioning the proposed Bill of Rights, reiterating Article 14 of the ECHR and clarifying principle 4 'to provide an effective, efficient and equitable framework of legislation and public policies to help eliminate unlawful discrimination and promote equality of opportunity and to demonstrate no regression from existing law.' We would like to see the lessons of implementing the Fair Employment and Treatment Order (FETO) and Section 75 highlighted eg the importance of open, timely and inclusive consultation with representative groups and individuals directly affected by inequality and the focus on monitoring and positive action.  
We support the desire to minimise hierarchies of inequalities and to recognize multi-identities in order to avoid the message that some are more equal than others.

## **3. Grounds**

- 3.1 NICVA welcomes the proposed extension of the Race Relations Order (RRO) to cover nationality and colour, which were excluded from the EU Race Directive and we support the proposals to extend the definition of disability. As for political opinion, we would prefer the addition of 'continued' to the exemption for political opinion that supports the use of violence connected with the affairs of Northern

Ireland. We would have concerns about extending this to other countries because it may impact adversely on asylum seekers who flee from repressive regimes.

#### **4. Possible extension to new grounds**

- 4.1 NICVA recommends the inclusion of Section 75 grounds although we would caution against replicating the phrases about persons with or without disabilities and with or without dependants because the law should focus on the protection of the disabled and carers in these cases. We also support the change to ‘marital and family status’ to cover people who are married, single, cohabiting and with dependants, including both opposite and same-sex couples.
- 4.2 NICVA would also support the inclusion of ‘past convictions’ with the caveat that people who commit serious crimes such as sexual abuse should not be covered.
- 4.3 Victims are defined in the document as persons who have been affected by the conflict in Northern Ireland, but organizations involved in women’s rights may wish to include consideration of the victims of domestic violence.
- 4.4 Socio-economic status – NICVA supports its inclusion on an asymmetrical basis. The South African legislation sets a precedent for the protection of people who are disadvantaged by poverty, low employment status or low-level educational qualifications. We would argue that its inclusion would strengthen nTSN by encouraging the government to tackle hard issues such as inequality in order to develop an effective anti-poverty strategy. It would also support the NIHRC which has indicated its support for inclusion of social, economic and environmental rights in a proposed Bill of Rights.
- 4.5 Language – We note that the UK has honoured its commitment to ratify the European Charter for Regional or Minority Languages and that a person can also take a case under the RRO to a tribunal or court on the basis of discrimination because of national or ethnic origin. We are not convinced about the appropriateness of language as a ground and our policy manifesto calls for a comprehensive language act to clarify issues.
- 4.6 Genetic predisposition – NICVA would argue that the rights of those with particular genetic dispositions will require protection, especially in insurance cases.
- 4.7 Other Status – We agree that its inclusion would provide flexibility to develop the law to protect emerging groups who are not covered by the other grounds, either through ministerial order or judicial interpretation in the same way as sexual orientation was covered through the ‘other status’ ground in Article 14 of the ECHR.
- 4.8 Equal Pay – The Republic of Ireland’s equal pay claims are not restricted to men and women and can be taken on grounds of gender, marital status, family status, sexual orientation, religious belief, age, disability, race and membership of the

Traveller community. It has been in place since 1992 and seems to be operating well and therefore it would make sense to extend the existing provisions of the Equal Pay Act to other grounds within the SEB.

- 4.9 One major omission in the chapter on grounds is non-nationals including asylum-seekers, migrant workers and refugees. They represent some of the most vulnerable members of society, illustrated by the high incidence of recent racist attacks and the imprisonment of asylum-seekers who have committed no crime. The Human Rights Act does not incorporate Protocols 4 and 7 of the ECHR therefore these groups need to be protected in the SEB.

Under new hate crime legislation judges must treat racial and religious aggravation and hatred of sexual orientation and disability as an aggravating factor when sentencing and their sentencing powers have also increased. Criminal Justice minister John Spellar has said that the government will not tolerate racism, sectarianism, or hostility based on sexual orientation or disability and therefore we would argue that this message should be reflected in the SEB's protection of vulnerable groups including asylum seekers, refugees and migrant workers.

## **5. Scope**

- 5.1 NICVA believes that the scope of the SEB should be harmonised across all the recognized grounds and that any exceptions should be justified, as in age-related exceptions like the age of consent.

- 5.2 Employment, self-employment and occupation

We support the broader definition of 'employment relationship' rather than contract of employment or self-employment in order to protect casual, agency, contract and migrant workers.

- 5.3 Volunteers

Volunteers are essential to the ethos and continued survival of the community and voluntary sector. There has been considerable debate within the sector around the issue of extending protection to volunteers. Volunteers are not employees and there is concern that including volunteers in legislation relating to employment will blur the lines between volunteers and employees, change the nature of the relationship between volunteers and their organization and may discourage organizations from involving volunteers. However it is widely agreed that volunteers must be protected from discrimination and it could be argued that protection from discrimination and employment law are two separate issues.

We have concerns about the suggestion of extending protection only to volunteers who have signed agreements. Volunteer agreements are good practice; like all aspects of volunteering they are not mandatory and as such they would prove to be an inconsistent and arbitrary way of deciding which volunteers are protected. In any case we do not believe that the way forward is to include some volunteers in the scope of the legislation and not others. In light of the lack of clear information and various options currently being discussed, including those suggested by the Volunteer Development Agency, NICVA recommends that more work is needed to

find a way to protect volunteers from discrimination and promote equality in volunteering which reflects and safeguards the unique nature of volunteering.

- 5.4 Social protection, including social security, healthcare and social advantages  
These areas of protection are currently exclusive to the Race Directive requirements and have been implemented by the Race Relations Order Regulations which make it unlawful for a public authority to discriminate in the provision of any form of social security, healthcare, any other form of social protection or any form of social advantage. NICVA would like to see the scope of the SEB include social protection and we would also support its extension to private organizations.
- 5.5 Education  
At the moment only further and higher education are included in fair employment legislation, while all sectors are covered in race and sex legislation. The draft special education needs and disability order will outlaw discrimination against disabled children and adults. NICVA favours bringing all the education sectors within the scope of the SEB with specific exceptions such as single-sex schools because we believe that discrimination in education contributes to disadvantage in employment and other areas of life.
- 5.6 Goods, facilities, services  
We note that the new legislation introduced to implement the Directives does not provide any GFS protection for the grounds of sexual orientation and age. We therefore support extending the scope of protection for GFS to these grounds as well as to marital, family status and gender reassignment.
- 5.7 Disposal and management of small premises  
The EU Race Directive required the abolition of the exemption for small premises and NICVA would argue that the exception should be removed for all grounds with the retention of an objective justification test based on the Genuine Occupational Requirement or Genuine Service Requirement (GOR/GSR) test which is applicable across the SEB.
- 5.8 Coverage of public functions  
The document discusses the role of section 75 and details the Northern Ireland race relations legislation which makes it unlawful for a public authority to discriminate on the grounds of race, ethnic or national origin in the course of carrying out any functions that consist of provisions of any form of social protection or advantage. The GB race relations legislation makes it unlawful to discriminate when carrying out any of its functions. The document discusses the feasibility of extending the legislation to all public functions, including public procurement. However the options refer to the race relations legislation and not to Section 75. The NIHRC has written to OFMDFM about this 'limited approach' to the terms of reference of the Green Paper because it confines itself to transferred matters. The reserved provision of Section 75 could be incorporated into the SEB according to

the NIHRC and indeed OFMDFM has responded that ‘the Green Paper is...an options paper so nothing is expressly ruled out.’ Therefore it would appear that a case could be made for including section 75 in the SEB if the Secretary of State consented or if the provisions of the Northern Ireland Act regarding competence were otherwise fulfilled. (Reserved matters can become transferred on the request of the Assembly by cross-community vote; they may also be covered by Assembly legislation or Order in Council with the formal consent of the Secretary of State.)

5.9 Associated with the above, we note the principle ‘To promote respect for the equal dignity and worth of all, and to facilitate full participation and good relations in society.’ However this principle does not seem to have been thought through in the rest of the document and NICVA would therefore support its development to embody the good relations duty enshrined in section 75.

5.10 Private clubs/voluntary associations

Race legislation currently outlaws discrimination by clubs with 25 or more members. The proposed draft Disability Discrimination Order in Council will extend the DDA to clubs with 25 or more members. NICVA would therefore like to see the SEB apply to private clubs and voluntary associations, with GOR/GSR the model for consideration of exceptions.

## **6. Direct discrimination**

6.1 NICVA agrees with the Equality Commission’s reservations about the definition of discrimination based on a comparator - ‘one person is treated less favourably than another is, has been or would be treated in a comparable situation’. This approach is evidence of discrimination rather than its essence and therefore we would welcome a definition which states that direct discrimination occurs when a disadvantage is based upon any ground and helps tackle multiple identity issues by providing that disadvantage can be based upon any combination of grounds. We would also argue that harassment is a form of direct discrimination and that a comparator should not be necessary in the case of harassment or victimization.

## **7. Indirect discrimination**

7.1 The EU Directives define indirect discrimination as occurring where an apparently neutral provision, criterion or practice would put persons having a particular religion, age etc at a particular disadvantage compared with others, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. NICVA supports this definition but suggests that ‘necessary’ should replace ‘legitimate’ in order to strengthen the ability to protect disadvantaged groups. Moreover, NICVA would support the application of ‘reasonable accommodation’ duty from disability legislation to all the grounds in the SEB. Canadian equality law favours this approach which is a more anticipatory and proactive than reliance on indirect discrimination principles.

## **8. Exceptions**

- 8.1 We note the range of exceptions currently set out in anti-discrimination legislation which are listed over three pages in the appendix and we therefore see the logic of simplifying the issue with a GOR/GSR model. However we also note that GOR/GSR does not offer the same certainty as listing exceptions and we therefore propose that the SEB should articulate a general GOR/GSR model combined with a range of exceptions as examples.
- 8.2 NICVA would welcome the removal of the exemption for teachers' recruitment on the grounds of religion or belief, which is only available in Northern Ireland law. We support the introduction of shared secular education but we recognize the strength of feeling about parental choice. As a way forward, we suggest that the exception should be retained for primary school teachers in the short-term but removed at secondary level. This exception would be an example of the general GOR test of a genuine and essential characteristic of that employment.

## **9. Goods, Facilities and Services**

- 9.1 In recognition of the fact that the Human Rights Act binds all public and private bodies exercising public functions, that the Section 75 duty requires the equality impact assessment of the performance of public functions and that the GB Race Relations Act makes it unlawful for a public body to discriminate on the grounds of race in respect of any of its functions, NICVA recommends the universal application of the principle of non-discrimination in the performance of public functions by public and private bodies, especially since so many public functions are contracted out to the private sector.
- 9.2 As stated above, we support the introduction of exceptions called GSR to permit discrimination on given grounds if a genuine requirement of the service, combined with examples of specific exceptions. Examples could be the provision of single sex schools and derogations to cover special treatment to compensate for disadvantage experienced by a particular group such as free eye tests for older people.

## **10. Addressing Under-Representation in Employment**

- 10.1 The Fair Employment and Treatment Order (FETO) model with its monitoring, review and positive action elements has been successful in helping to redress the under-representation in employment on grounds of community background, with employers recognizing the business case for promoting equality and diversity in the workplace; under Section 75 public authorities are required to consult, monitor and review policies. The objective of FETO is to go beyond redressing under-representation to promoting equality of opportunity and the Equality Commission is already promoting integrated equality plans across a range of grounds. NICVA would therefore recommend a combination of the FETO and Section 75 approaches across all the grounds in the SEB. This would involve consultation, participation, monitoring, reviews and the obligation to consider mitigation of adverse impacts.

NICVA would also recommend that the SEB embrace positive/affirmative action as a major way to promote equality of opportunity by preventing or compensating for disadvantages linked to any ground.

## **11. Government contracts and grants**

11.1 Under FETO eligibility for government contracts and grants depends on compliance with particular provisions of the legislation. FETO also introduced a provision facilitating recruitment of the unemployed and a current pilot requires certain contracts to target unemployed workers. Under Section 75 public authorities are required to have due regard to the need to promote equality of opportunity in carrying out their procurement and grant-giving functions. Since NICVA argues for the extension of duties to all grounds in the SEB, we would suggest that compliance with these duties should be a condition in all contracts and grants.

## **12. Equality Commission**

12.1 NICVA would like to see wider publication of RRO Article 43 which allows for provision of financial and other assistance to organizations which are concerned with the promotion of equality of opportunity and good relations between persons of different racial groups. According to the document, there is little evidence that this provision has been much used since 1997 and NICVA recommends extension of this assistance to other grounds as well as more publicity about its existence. In line with the recommendation to extend the FETO model to other grounds, it makes sense to extend the Commission's powers to undertake investigations to other grounds and GFS. This implies the need for increased resources (and even more if the Commission is given powers to represent claimants in an Equality Tribunal). However one of the problems from the voluntary and community sector's perspective is the Commission's apparent lack of independence and its difficulty in instigating timely investigations of breaches of equality schemes.

## **13. Tribunals and courts**

13.1 Most people will agree that the SEB will only be useful if it is enforceable, if there is money to take cases and if representative claims are allowed. At the moment, it can take up to three or four years for the fair employment tribunal to hear a discrimination case on the grounds of religious belief and political opinion; other grounds such as gender and race are the responsibility of industrial tribunals and GFS cases are rare because they are heard in the county courts and costs can be prohibitive. Considering the complexity of equality law, NICVA would recommend a single Equality Tribunal– this would mean that one tribunal would cover all grounds and fields; equality expertise would be located in one body and costs would be reduced. It would also help improve the gender balance, which tends to be better in specialist tribunals than the judiciary as a whole.

13.2 It might be useful to consider the Irish system where an independent investigations office receives complaints, undertakes mediation, conciliation and investigation and makes binding legal decisions. The litigation process in the tribunal only takes place if either party is not satisfied.

- 13.3 We would also recommend that organizations such as the Equality Commission, trade unions, the Labour Relations Agency and voluntary sector bodies such as NICEM, Age Concern, Disability Action, the Refugee Action Group, the Children's Law Centre and CoSo should be able to represent claimants. This raises the issue of enhanced resourcing of the voluntary and community sector not only for its advocacy and representative role but also for its general policy and equality work.
- 13.4 The document points out that legal aid is outside the remit of an SEB because it is a reserved matter, but NICVA would argue that access to legal aid is necessary to ensure full and effective equality. For the same reason, the legislation should allow for class or group actions and the award of large damages, with the requirement to change policies and practices, to encourage a culture of equality. It might also be useful to discuss related issues such as the need to provide equality training for lawyers and judges in order to help deliver justice.

#### **14. Conclusion**

- 14.1 Given the complexity of the task and bearing in mind the aim to create a strong and inclusive instrument to promote equality, we would argue that the SEB must be written in clear, understandable language. The Green Paper often tries to explain difficult concepts but it is weak on providing examples and scenarios to help decision-making. It would perhaps be useful to have the paper take a range of hypothetical case studies through the different stages from discrimination to potential remedy to help illustrate the key issues for debate.
- 14.2 We would also argue that the Bill represents an opportunity to discuss the meaning of equality and clarify the true purpose of the legislation because many are confused about the difference between equality, equity, equality of opportunity, positive action, affirmative action, positive discrimination, reverse discrimination and quotas.
- 14.3 As it stands, the SEB's emphasis seems to be on harmonizing anti-discrimination law and extending it to new categories. The chapter on under-representation in employment suggests that positive action mostly applies in this area. NICVA would argue that the legislation should take this opportunity to adopt a more proactive and progressive approach to equality. It is for this reason that we support the option of combining the FETO and Section 75 approaches across all the grounds in the SEB.
- 14.4 It might also be worthwhile to set the legislation in context by outlining not only its purpose and principles but also other legislation which has a bearing on equality such as the Human Rights Act, the Hate Crime legislation, the Police Bill, the proposed nTSN, Bill of Rights and Shared Future legislation, as well as the equality clauses in the UN and Council of Europe treaties and the EU's Charter of Fundamental Rights.

- 14.5 We endorse the NIHRC's position about including Section 75 in the SEB and we believe this raises another related issue about transferred and reserved matters. It is not made clear in the document whether the duties on public authorities should be limited to transferred matters. In light of the imprisonment of asylum seekers, the introduction of ASBOs, the treatment of women prisoners in Maghaberry and their transfer to Hydebank, the lack of consultation and equality proofing of direct payments for people on benefits, NICVA would argue that the SEB should state that duties on public bodies will extend to Westminster and to any jurisdiction which affects the lives of people in Northern Ireland, whether national or non-national.
- 14.6 After decisions such as the introduction of ASBOs, many people are also confused about the definition of consultation; therefore NICVA would suggest that the legislation should state clearly that consultation involves representative groups and directly affected individuals.
- 14.7 Many commentators argue that equality and human rights were central to the conflict and are fundamental to its resolution and a new future. In order to achieve the necessary political commitment to a shared agenda and widespread participation, NICVA would recommend that the SEB should highlight the international standards, the importance of enforcement and the need for education programmes at all levels. We believe that the key message about the need to create a culture of equality and social justice as the foundation of a democratic and rights-based society will be undermined if the proposed equality laws fail to achieve widespread support and tangible equality outcomes for real people.

