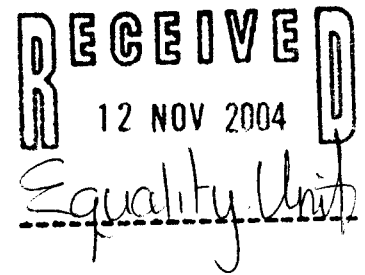


A Single Equality Bill For Northern Ireland

**Southern Area Equality and Human Rights
Partnership Forum**



October 2004

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BACKGROUND

The Board, Trusts and Southern Health Council within the Southern Area welcome the opportunity to respond to the OFMDFM Consultation Paper, 'A Single Equality Bill for Northern Ireland'.

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The Southern Area Equality and Human Rights Partnership Forum includes the following HPSS organisations:

- Craigavon Area Hospital Group H&SS Trust
- Craigavon and Banbridge Community H&SS Trust
- Armagh and Dungannon H&SS Trust
- Newry and Mourne H&SS Trust
- Southern Health and Social Service Board
- Southern Health and Social Services Council

1. Introduction

We support the overall aims of a Single Equality Bill (SEB) in that it will attempt to harmonise, as far as practicable, the existing separate pieces of legislation into one succinct Bill. Presently the existing legislation is too fragmented in nature and has given rise to inconsistencies, largely attributed to the fact that they have been enacted at different times. This has presented practical difficulties for practitioners in the field of equality. Current equality law is to be found in over 70 legislative provisions and is both complicated and confusing in character. The proposal of a SEB is long overdue and therefore welcomed. We are encouraged by the acknowledgement, in the consultation document, that in seeking to harmonise the separate statutes this does not mean that provisions will, or indeed, should be the same across all the grounds. We would therefore support the Equality Commission for Northern Ireland's (ECNI) view that every area of discrimination is different and hence there may be reasons to employ 'variable geometry' (i.e. modest variations in the common template in relation to particular grounds thus ensuring that each ground of discrimination is sensitivity applied). For example disability legislation may be more difficult to harmonise than legislation on other grounds. That said we do support the underlying principles of harmonisation and non-regression.

We believe that the SEB should avail of the opportunity presented to it to focus on providing substantive equality of outcomes for society. The emphasis for too long has been on the prevention of discrimination rather than the proactive promotion of equality. As

such we would support an approach that is not unduly onerous, from a regulatory point of view, in favour of an approach which provides for a degree of flexibility where employers could adopt a more positive, proactive stance to the promotion of equality akin to S75 of the NI Act 1998.

We fully support the commitment in the consultative document to subject the SEB to a full Equality Impact Assessment (EQIA) - not only its overall policy objectives - but also the various options proposed within it. This will enable OFMDFM to evaluate the overall impact of the proposed legislation. This is particularly important in the complex area of age within the sphere of goods, facilities and services (GFS). In the absence of an EQIA it is impossible to project the full impact of the legislation and its potentially far-reaching ramifications.

Finally, we also welcome the commitment by the ECNI to produce associated Codes of Practice which will provide guidance to employers and service providers on the practical outworking of the legislation.

2. Draft Purpose and Principles

We agree with the intended purpose of the Bill in that it will provide a clear and accessible framework of anti-discrimination and equality law for NI. Further, we agree with the underpinning principles that support the overall aim of the SEB in that it will be compliant with The European Convention on Human Rights and other Conventions to which the UK is a signatory; be premised on

the commitment to minimise the tendency for hierarchies of inequality to develop; and provide for speedy and effective resolution of any dispute etc.

3. Grounds

3.1 Existing Grounds

We believe that the grounds to be covered in the proposed SEB should extend to cover those identified in the Framework Directive and those covered by Section 75 NI Act 1998. Note however, we would support the ECNI view that protection to 'persons with or without disabilities' and 'persons with or without dependants' should be extended to persons with disabilities and persons with dependants only.

With regards the compulsory grounds i.e. those currently protected under existing anti-discrimination legislation and those already, or due to be implemented as a result of the EU Employment Framework Directive (2000/78/EC), we agree with the intent to rectify the absence of colour and nationality in the EU Race Directive in the SEB.

We would also support the proposal to incorporate some of the remaining recommendations of the Disability Rights Task Force within the SEB such as protection to be extended to those with progressive conditions from the point of diagnosis e.g. HIV and people with cancer etc.

With regard political opinion we would concur with the view of ECNI in that *the exclusion of political opinions that support the use of violence should not be restricted to opinions connected with the affairs of NI but on the understanding that this refers to 'continuing' support for such matters.*

3.2 Possible extension to new grounds

Whilst the current provisions have been criticised for their inconsistencies (due in the main to the different timescales within which they were enacted) an obvious point to be made is that having been enacted at different times, it has enabled employers to prepare for their new found responsibilities at the same time enabling them to build capacity to address same.

Careful consideration should be given to the implications of extending the current legislative base to address a fairly extensive range of possible new grounds within the proposed SEB. There are issues of definitions, implications of applying indirect discrimination and affirmation action around some of these categories. On a very practical level the Industrial Tribunal (IT) and Fair Employment Tribunal (FET) have had obvious difficulties in dealing with the current volume of complaints referred to them under the existing provisions. Should these new grounds be fully embraced there will be apparent resource implications for employers, services providers, ECNI, and systems for redress etc.

There follows our comments in relation to the potential new grounds for protection:

Past Convictions:

In the context of Health and Social Care a conviction is never considered as 'spent'. Its relevancy is considered in light of the job. We acknowledge however that the Rehabilitation of Offenders legislation is currently under review by the NI Office which will provide for the disclosure of previous convictions within a fair system reducing the chance of discrimination whilst ensuring the safety of the public. That said we would not be in favour at this stage to include past convictions within the proposed SEB.

Victims:

There are difficulties around defining 'victim' status and as such which victims should be for inclusion under the proposed SEB. For said reasons we would not be in favour of including victims in the proposed Bill.

Languages:

Provision exists in the European Social Charter for the protection of regional and minority language albeit non-rights based. Further, it could be argued that language may be indirectly covered by the Race Relations Order 1997 (RRO). In view of these existing provisions we do not support the inclusion of language as a separate ground within the proposed SEB.

Socio-Economic Status:

There are a number of measures already in place to tackle socio-economic status such as New Targeting Social Need (NTSN), Promoting Social Inclusion (PSI) etc. NTSN has been the subject of a formal review, the findings of which will inform future priorities for Government in tackling poverty and deprivation. Perhaps there needs to be further consideration given to the targeting of discrimination and/or disadvantage based upon 'socio-economic status' but we do not favour the inclusion of Socio-Economic Status in the proposed SEB at this stage.

Genetic Predisposition:

We are not convinced by the arguments that genetic predisposition should be included under the proposed SEB as a protected ground for the reasons expounded upon in the draft proposals i.e. with the one exception cited – employers are not using genetic test results to determine health issues of employees.

Equal Pay:

The operation of the Equal Pay Act has been problematic as a result there has been limited progress in addressing the pay differential in men and women's pay since its enactment. We agree that it is timely to review the practical outworkings of this legislation. We would not however be in favour of extending the Equal Pay provisions to other grounds at the present time.

Marital or family status/dependants

If a broader interpretation is adopted in the proposed SEB i.e. an approach which includes all cohabiting couples and dependants we would like to see the EQIA examine issues in relation to pension and survivors and other benefits before a final decision is made.

Pregnancy and Maternity:

We feel that these issues are adequately addressed under current employment law and are best left within that domain. We would however wish to see clarification in the SEB that direct discrimination on grounds of pregnancy is also direct discrimination on grounds of sex.

Other Status:

We see the merit in providing for a degree of flexibility in defining new grounds for protection without having to repeatedly legislate for new protection. We would therefore have some support for the inclusion of a residual category for issues not specially covered under the legislation.

NB: The opportunity should be taken to consider the most appropriate means of addressing some of the above protected rights, e.g. victims, those with convictions and the issue of languages through some other effective means of redress other than the SEB.

4. Scope

Following on from the comments provided in 3 above, whilst in principle we support the argument that the scope of the SEB should be the same for all protected grounds in the interest of harmonisation we accept it may not always be appropriate to have exactly the same provisions for each grounds. The issue of age is by far the most problematic as much legislation in NI - within the sphere of GFS - includes many age-related exceptions and in this respect we would favour delaying/staging implementation where the EQIA highlights genuine difficulties for providers. Provision should be made, where necessary and appropriate, for specified exemptions along with provision for a Genuine Service Requirement (GSR).

Employment, self-employment occupation:

We would support option (b) i.e. the SEB should use the definition of employment in current legislation, namely, employment under a contract of service etc. Whilst we do accept that certain voluntary relationships do have a sufficient degree of permanence to amount to a form of employment relationship we believe this is best left to the Tribunal to determine this on a case-by-case approach.

Social protection, including social security, healthcare and social advantages:

We support option (a) – the SEB does not define these concepts but leaves it to the courts to decide on a case-by case-basis

Education:

We see no reason why a separate disability discrimination regime is allowed to develop within the sphere of education and as such we support option (a).

Goods, Facilities and Services (GFS):

This is an extremely complex issue and will require a thorough EQIA to fully appreciate the possible ramifications in relation to the various protected grounds – see earlier comments.

Private Clubs/Voluntary Associations:

We see no reason as to why the SEB should not apply to private clubs/voluntary associations – the genuine occupational requirement/genuine service requirement (GOR/GSR) would form the basis for exceptions.

5. Definitions of Discrimination

Direct Discrimination:

We would support option (a) maintaining the existing definition of direct discrimination, as contained in the EU Directive and in

current NI legislation. In addition, the reasonable adjustment duty would remain as currently set out in the disability legislation.

Indirect Discrimination:

We are in favour of a standardised definition of indirect discrimination relating to all grounds to be covered by the SEB premised on The Framework/Race/Equal Treatment Directive definition.

Harassment:

We welcome an explicit definition of harassment as defined by the EU Framework, Race and Equal Treatment Directives for all grounds. We acknowledge that the use of comparators can be problematic in that they are useful only insofar as the circumstances are similar. We would therefore have support for ECNI's view that comparators are used as a matter of proof rather than necessity in harassment cases. We support the continued need for a comparator, premised on the above rationale, save in cases of blatant acts of harassment where no comparator should be required.

Victimisation:

We support the common definition of victimisation as defined on page 28 of the consultation document which should be applicable to all protected grounds.

6. Exceptions

We believe it is timely to rigorously re-evaluate the present list of exceptions under the prevailing legislation with a view to questioning their continued validity. We accept that some GOR/GSR should be articulated in the SEB accompanied by a Code of Practice on GORs/GSRs in the interest of clarity.

7. Goods, Facilities and Services

The term “goods, facilities and services” is not specifically defined in current NI legislation. Of the three possible options we would favour option (a) i.e. the SEB could continue to leave “goods, facilities and services” without express definition but with guidance by way of examples with others articulated in an accompanying code of practice. The courts would be left to define the term as they think fit.

We are also in favour of a GSR, with some examples explicitly set out in the SEB and others set out in an accompanying code of practice.

With regards timing of the introduction of GFS, as previously stated we would be in favour of deferring the implementation until the implications are fully explored via the EQIA.

8. Addressing Under Representation in Employment

We would not be in favour of the Fair Employment and Treatment NI Order (FETO) model being extended to all protected grounds. This would impose undue hardship on employers in relation to data collection not to mention the difficulties in securing sensitive data in the areas of sexual orientation, political opinion etc. For example, the Disability Discrimination Act places emphasis on self-declaration as a result it is difficult to capture the true extent of disability. With regards racial background - Black and Minority Ethnic Groups (BME) are underreported in 2001 NI Census. Further, the current ethnic monitoring categories are not capturing data on most of the recently arrived migrant workers. As such they are likely to be bypassed by the current categories which are founded on the former British colonies.

The FETO model favours monitoring, reporting, determination of fair participation and affirmation action where under representation has been identified. Such actions need to be based on reliable data collection and comparators which we believe would be problematic for some of the grounds. Instead we would favour a more innovative approach retaining elements of the existing FETO model together with a consultative model akin to S75 of the NI Act. Employers should be facilitated to undertake voluntary, proactive, positive action measures in furthering their equality duties.

Affirmation Action Agreements arising out of the FETO model have been accredited as the main driver for bringing about change in the under representation of Roman Catholics in employment since

1989. We remain to be convinced that this is the only way forward. Rather, we believe there is much to be gained through a partnership approach along with scope for voluntary undertakings. It is our experience of the operation of the statutory equality duty that qualitative monitoring has as much to offer in the diagnosis of inequality as quantitative monitoring. In this sense we support a consultative approach as the appropriate model to be developed in NI both in the sphere of employment and GFS. The end result being a workable piece of legislation which vested parties can sign up to.

9. Equality Commission for NI – Functions and Courts

The general duties of the Commission should be as similar as possible. The FETO duty to promote affirmation action is linked to the concept of fair participation in the workplace and thus to workforce monitoring. For reasons stated in 8 above, we do not feel it is practical to extend this duty to all of the protected grounds. We therefore support option (b).

Codes of Practice:

We support option (a) in that the extent of subject matter which can be legally covered by ECNI codes of practice should be made consistent within the scope of each piece of legislation with as much harmonisation as is practicable – see earlier comments which would have a bearing. It would also provide a timely opportunity to remove any conflicting advice between the various codes which in turn would ease practical application.

The wording “admissible in evidence” should remain in the codes as a matter of certainty. The code of *guidance* produced for the Sexual Orientation Regulations should likewise be given the same status as a code.

We agree that there should be a harmonised procedure for carrying out formal investigations. The formal investigation procedure is a good way to address sectoral discrimination. To date it has not been adequately resourced and it needs to be.

10. Tribunals and Courts

There is a natural progression from a single Equality Commission to a SEB and a Single Equality Tribunal (SET). We would wish to see the expertise in the tribunal system applied across the full range of protected grounds in the both spheres i.e. employment and GFS.

In relation to legal assistance we would wish to see the RRO time limit for consideration of applications for assistance applied to all SEB grounds.

With regards remedies we would support a more proactive approach towards remedies in the Tribunal and Courts. As such we would like to see Courts and Tribunal being able to issue orders to employers to co-operate with the Commission in proactive remedies which may require changes to policy and practice - this is not the case at present.

11. Alternative Dispute Resolution

We would fully support the exploration of alternative means for dispute resolution as very many equality disputes are capable of 'alternative dispute resolution'. For example there may be sensitive cases such a harassment in which a more informal system of dispute resolution may be more attractive and effective than any traditional form of judicial process. Further, early intervention is desirable in the interests of maintaining workplace relationships.

The present system is too formalistic, protracted and places a primacy on recall of events some 2 or 3 years down the track due to the current backlog of cases.

Whatever system is put in place it needs to be adequately resourced if it is going to meet the underlying purpose and principles of the SEB *....to provide a clear, efficient and effect means of redress, including dispute resolution whenever a claim of unlawful discrimination arises, and, in employment disputes, to take particular account of the desirability of early resolution in the interests of workplace relationships.*

Conclusion

The SEB presents us with an opportunity to create a workable piece of legislation. We trust that the above comments will go

some way to influencing this debate. We look forward to receiving the first draft Bill and the accompanying EQIA.

LG/EAU
20 October 2004