

## EQUALITY COMMISSION FOR NORTHERN IRELAND

### Response to OFMDFM consultation on draft amendments to the Sex Discrimination (Northern Ireland) Order 1976

January 2016

#### 1 Executive Summary

- 1.1 In general, we support OFMDFM's proposals to amend the Sex Discrimination (Northern Ireland) Order 1976 (SDO 1976). The proposed changes are in line with recommendations that the Commission had previously raised with OFMDFM in relation to the SDO 1976.
- 1.2 The Commission would encourage OFMDFM to *proactively* address legislative gaps in the sex equality, and other equality legislation, including changes that are required to ensure compliance with European Directives.
- 1.3 In particular, we support the proposed amendments to the definitions of direct discrimination and indirect discrimination. We agree with the proposed approach to amend the SDO 1976 so as to provide a single definition of indirect discrimination that will apply to the entire SDO 1976.
- 1.4 We also support the proposal to extend protection against indirect discrimination on the grounds of gender reassignment to the areas of employment and vocational training.
- 1.5 However, in line with developments in Great Britain, in the interests of consistency across the sex equality legislation, and to ensure compliance with the Gender Goods and Services Directive, we recommend that protection against indirect discrimination on the grounds of gender reassignment is extended across *all* areas covered by SDO 1976.

## 2 Introduction

- 2.1 The Equality Commission for Northern Ireland has set out below its response to the OFMDFM consultation on draft amendments to the Sex Discrimination (Northern Ireland) Order 1976 (SDO 1976)<sup>1</sup>. Further details on the scope of the Commission's remit and duties is contained in Annex 1.

## 3 General comments

- 3.1 In general, we support OFMDFM's proposals to amend the SDO 1976 so as to address concerns raised by the European Commission in relation to transposition of the Recast Directive<sup>2</sup> in Northern Ireland.
- 3.2 The proposed changes are in line with recommendations that the Commission had previously raised with OFMDFM in relation to the SDO 1976 .
- 3.3 The Commission would encourage OFMDFM to *proactively* address legislative gaps in the sex equality, and other equality, legislation, including changes that are required to ensure compliance with European Directives.
- 3.4 The Commission has consistently called for the equality legislation in Northern Ireland to be harmonised, updated and strengthened. We are of the view that the introduction of single equality legislation would best harmonise and simplify the protections available in Northern Ireland.
- 3.5 As OFMDFM is aware, the law in Great Britain has been harmonised and strengthened through the introduction of the Equality Act 2010. This has meant that there are now significant gaps in equality law between Great Britain and Northern Ireland.<sup>3</sup>
- 3.6 It is important to note that all of the changes proposed by OFMDFM in this consultation document have already been implemented in Great Britain since 2010.
- 3.7 We welcome the fact that OFMDFM in the consultation document, recognises the need for some of the changes so to avoid "*the potential for confusion and inconsistency*". In light of this, we would

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<sup>1</sup> [OFMDFM consultation](#) on draft amendments to the Sex Discrimination (Northern Ireland) Order 1976 (SDO 1976), 2016

<sup>2</sup> Council Directive 2006/54/EC (Recast Directive) which implements the principle of equal opportunities and equal treatment of men and women in matters employment and occupation.

<sup>3</sup> See [Key Point Briefing: Gaps in equality law between GB and NI](#), 2015

urge OFMDFM to address other significant deficiencies which currently exist, both in the sex equality legislation and in other equality laws, that cause confusion and inconsistencies.

## 4 Specific Comments

### *Direct discrimination*

- 4.1 The Commission **supports** the proposed amendment to the definition of direct discrimination. This is in line with the Commission's previous recommendation to OFMDFM that the definition of direct discrimination in SDO 1976 be amended to cover both sex discrimination on the basis of perception and discrimination by association.<sup>4</sup>
- 4.2 We would draw OFMDFM's attention to the recent decision of the Court of Justice of the European Union (CJEU) in the case of *CHEZ Razpredelenie Bulgaria*<sup>5</sup> (2015) which considered the scope of discrimination on the grounds of ethnic origin under the Race Directive.
- 4.3 In that case, the CJEU held that the principle of equal treatment under the Race Directive applied not only to persons who are themselves a member of a particular race or ethnic group, but also to those who are *not* members of such a group, but who experience a particular disadvantage or less favourable treatment on one of those grounds.<sup>6</sup>

### *Indirect discrimination*

- 4.4 The Commission **supports** the proposed amendment to the definition of indirect discrimination.

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<sup>4</sup> As recommended by the Commission in its [Response](#) to OFMDFM consultation on implementing Gender Goods and Services Directive, 2007  
<sup>5</sup> [2015] EUECJ C-83/14 <http://www.bailii.org/eu/cases/EUECJ/2015/C8314.html>

<sup>6</sup> In this particular case, the CJEU held that "*The concept of 'discrimination on the grounds of ethnic origin', for the purpose of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and, in particular, of Articles 1 and 2(1) thereof, must be interpreted as being intended to apply in circumstances such as those at issue before the referring court — in which, in an urban district mainly lived in by inhabitants of Roma origin, all the electricity meters are placed on pylons forming part of the overhead electricity supply network at a height of between six and seven metres, whereas such meters are placed at a height of less than two metres in the other districts — irrespective of whether that collective measure affects persons who have a certain ethnic origin or those who, without possessing that origin, suffer, together with the former, the less favourable treatment or particular disadvantage resulting from that measure*".

4.5 We agree with the proposed approach to amend the SDO 1976 so as to provide a single definition of indirect discrimination that will apply to the entire SDO 1976. We also agree that this will help reduce confusion and inconsistency. This is also in line with the Commission's previous recommendation to OFMDFM.<sup>7</sup>

### ***Indirect discrimination on the grounds of gender reassignment***

4.6 The Commission **supports** the proposal to extend protection against indirect discrimination on the grounds of gender reassignment to the areas of employment and vocational training. This is in line with the Commission's previous recommendation to OFMDFM.<sup>8</sup>

4.7 However, we are disappointed that OFMDFM has not taken this opportunity to extend protection against indirect discrimination on the grounds of gender reassignment to areas *outside employment and vocational training*, and we recommend that this gap in protection is addressed as a matter of urgency.

4.8 In our response<sup>9</sup> to the OFMDFM consultation on the implementation of the Gender Goods and Services Directive (2007), we raised concerns that the proposals at that time did not fully transpose the Gender Goods and Services Directive into Northern Ireland sex equality law.

4.9 Specifically, we recommended, in order to fully transpose the Gender Directive into Northern Ireland legislation, that the draft 2007 Regulations prohibited indirect discrimination on the grounds of a person's gender reassignment in the provision of *goods, facilities, services and premises*.

4.10 It is important to note that protection against indirect discrimination on the grounds of gender reassignment has been prohibited in Great Britain since 2010 under the Equality Act 2010 across *all* areas; that is, areas *both inside and outside* employment, including in the provision of goods, facilities, services and premises, in education, in the exercise of public functions, and by private clubs.

4.11 Thus, even if the proposals set out in the consultation document are implemented, transgender people in Northern Ireland, unlike in Great Britain, will have *no* protection against indirect discrimination in the provision of goods, facilities and services, in education, by

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<sup>7</sup> See [Response](#) to OFMDFM consultation on implementing Gender Goods and Services Directive, 2007

<sup>8</sup> Ibid

<sup>9</sup> Ibid

private clubs, or by public bodies with exercising their public functions.

- 4.12 We **recommend** that protection against indirect discrimination on the grounds of gender reassignment is extended across *all* areas covered by SDO 1976. This is in line with developments in Great Britain, will ensure greater consistency across the sex equality legislation, and importantly, will ensure compliance with the Gender Goods and Services Directive.
- 4.13 As highlighted above, we urge OFMDFM to take a proactive approach and amend this gap in protection, particularly so as ensure compliance with the Gender Goods and Services Directive.
- 4.14 Finally, we ask OFMDFM to note that we have also **recommended** that the SDO 1976 is amended to prohibit sex discrimination (both indirect and direct) and harassment in the exercise of public functions. We consider this to be a priority area for reform<sup>10</sup>. We recommend this is addressed as a matter of urgency, in addition to the other gaps in protection outlined above.

## **Equality Commission**

**28 January 2016**

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<sup>10</sup> See [ECNI Proposals for Legislative Reform](#), 2009

## **5 Annex 1: The Equality Commission for Northern Ireland**

1. The Equality Commission for Northern Ireland (the Commission) is an independent public body established under the Northern Ireland Act 1998. The Commission is responsible for implementing the legislation on fair employment, sex discrimination and equal pay, race relations, sexual orientation, disability and age.
  
2. The Commission's remit also includes overseeing the statutory duties on designated public bodies under Section 75 of the Northern Ireland Act 1998 (Section 75) and to promote positive attitudes towards disabled people and encourage participation by disabled people in public life under the Disability Discrimination Act 1995.
  
3. The Commission's general duties include:
  - working towards the elimination of discrimination;
  - promoting equality of opportunity and encouraging good practice;
  - promoting positive / affirmative action
  - promoting good relations between people of different racial groups;
  - overseeing the implementation and effectiveness of the statutory duty on public bodies;
  - keeping the legislation under review.
  
4. The Equality Commission, together with the Northern Ireland Human Rights Commission, has been designated under the United Nations Convention on the rights of Persons with Disabilities (UNCRPD) as the independent mechanism tasked with promoting, protecting and monitoring implementation of the Convention in Northern Ireland.