



gender
equality

gender law reform

**Summary Report:
Policy Priorities and
Recommendations**

November 2016.

Equality Commission

FOR NORTHERN IRELAND

In Summary:

Reform sex equality and equal pay law to address gaps and to harmonise, simplify and clarify the law.

Action is required to address the significant gaps in protection against sex discrimination and harassment; harmonise, simplify and clarify the law; and strengthen the Commission's enforcement powers, as well as the available remedies.

The Commission has identified a number of significant gaps and weaknesses in sex equality law that urgently need addressed. In Northern Ireland, men and women have less protection against sex discrimination/harassment than in other parts of the UK.

Gaps in protection include the need to introduce protection against sex discrimination by private clubs / associations, by public bodies when carrying out their public functions; by schools as regards their treatment of trans pupils; prohibiting 'pay secrecy clauses'; measures to require large private / voluntary sector employers to publish gender pay information; provisions to strengthen the Commission's enforcement powers, and improve the remedies available under this legislation.

These changes will, for example, ensure that sex equality legislation in Northern Ireland keeps pace with legislative protection in other parts of the UK; help address key gender inequalities; harmonise, simplify and clarify the sex equality legislation; and ensure unjustifiable inconsistencies are removed.

Our Recommendations:

- 1.1 In Northern Ireland men and women have less protection against sex discrimination and harassment than in other parts of the UK. In particular, the introduction of single equality legislation, the Equality Act 2010, in Great Britain in October 2010 strengthened protection against sex discrimination across a range of areas, including areas highlighted in a number of our recommendations.
- 1.2 The Equality Commission for Northern Ireland (“the Commission”) is of the view that the introduction of single equality legislation would best harmonise and simplify the protections available in Northern Ireland. In the absence of single equality legislation, we recommend a clear timetabled commitment to strengthen equality law in Northern Ireland in key areas, including sex equality law.
- 1.3 More recently, the gap in legal protections between Great Britain and Northern Ireland has been criticised by the CEDAW Committee, which expressed concern that women in Northern Ireland did not have the same remit of equality protections as compared to their counterparts in other parts of the UK¹.
- 1.4 Pursuant to its duty under the sex equality legislation to keep the sex equality legislation under review and to make recommendations for change, the Commission has identified a number of significant gaps and weaknesses in sex equality law that urgently need addressed.

¹ CEDAW (2013) [Concluding Observations on UK, CEDAW Committee](#) . The Committee also expressed concern that certain provisions of the Equality Act 2010 had not come into force. The CEDAW Committee was particularly concerned that the legislative framework in Northern Ireland did not provide for protection from multiple discrimination and that there was no prohibition against pay secrecy clauses.

- 1.5 Some key recommended changes include, for example, prohibiting unlawful sex discrimination or harassment:
- by private clubs/ associations, including golf clubs and political parties;
 - by public bodies when carrying out their public functions;
 - by schools as regards their treatment of trans pupils.

Wider benefits of reform

- 1.6 We consider that there is a robust case for strengthening the sex equality legislation. In particular, the recommended changes:
- will strengthen protection for men and women against sex discrimination and harassment and ensure that sex equality legislation keeps pace with legislative developments that improved protection in other parts of the UK;
 - help address key gender inequalities, including those experienced by men and women;
 - harmonise, simplify and clarify the sex equality legislation and thereby make it easier to understand;
 - ensure unjustifiable inconsistencies are removed; ensure greater consistency with existing levels of protection on other equality grounds;
 - provide legal certainty in areas where the scope of the legislation is unclear;
 - are in keeping with the current overarching aims and objectives of the Executive's Gender Equality Strategy 2006-2016; where there is a commitment to "*improving protection against discrimination by improving legislative measures and keeping their effectiveness under review*"²;
 - ensure that the sex equality legislation is in line with the UK Government's international obligations under CEDAW and the recommendations of the CEDAW Committee.

² See OFMDFM 2006 [Gender Equality Strategy 2006-2016](#) page 15.

Our Recommendations

- 1.7 We recommend that there is a timetabled commitment to reform the sex equality and/or equal pay legislation aligned to our proposals summarised below. For ease of reference, proposals which have been already implemented in Great Britain (or will be implemented in the near future) are marked with an asterisk.

Forms of discrimination

- ***prohibit discrimination and harassment by public bodies on the grounds of sex in the exercise of their public functions. We have made it clear that this is a priority area for reform;**
- Unlike in Great Britain, the sex equality legislation in Northern Ireland does not prohibit discrimination by public authorities on the grounds of sex in the exercise of their public functions.
- This is a significant gap in Northern Ireland sex equality law, and a priority area for reform³, as it means that individuals cannot bring a complaint if they are discriminated against or harassed on grounds of their sex by public bodies, such as the police or immigration services, or prison authorities, when exercising their public functions, or by private bodies acting on behalf of a public authority.
- This provision, if introduced, would cover, for example, the exercise of public functions as regards: access to a discretionary welfare benefit; an application for a licence⁴; or the management of a prison or other places of detention by a private company.

³ See ECNI (2009) [ECNI Proposals for Legislative Reform](#)

⁴ For example, a licence to run a nightclub.

- In addition, protection against discrimination by public bodies when exercising their public functions already exists on a number of equality grounds in Northern Ireland⁵. There is no justifiable reason why there should be weaker protection against unlawful discrimination on the grounds of sex in the exercise of public functions than that which exists under other equality grounds.
- **permit hypothetical comparators in equal pay cases and introduce mandatory equal pay audits.**
- We recommend that the equal pay legislation is amended to permit the use of hypothetical comparators in *all* equal pay claims⁶. Currently a women cannot bring an equal pay claim for equal pay where there is no actual comparator doing equal work.
- We support the recommendation of the Joint Committee on Human Rights that called for the Equality Act 2010 to permit the use of hypothetical comparators in all equal pay claims⁷.
- Further, we recommend the inclusion of a requirement on employers to carry out mandatory pay audits or to regularly conduct a review of their policies and practices adopted for the purpose of maintaining or promoting equality of opportunity. We consider that these provisions will encourage a more proactive approach by employers to addressing equal pay⁸.

⁵ Namely, religious belief, race (the grounds of race, ethnic or national origin only), sexual orientation and disability

⁶ Please refer to the Commission's guidance for [an explanation of hypothetical comparators](#).

⁷ See Joint Committee on Human Rights (2009) [Legislative Scrutiny: Equality Bill](#).

⁸ See ECNI (2013) [ECNI CEDAW Shadow Report 2013](#) and ECNI (2009) [ECNI response to Discrimination Law Review](#)

- We have made it clear in our *Equal Pay Code* that equal pay reviews are the most appropriate method of ensuring that a pay system delivers equal pay free from sex bias⁹.
- We consider our recommendations are in keeping with the Concluding Observations of the UN CEDAW Committee (2013) which called for proactive and specific measures to narrow the gender pay gap.
- **introduce new protection against intersectional multiple discrimination.**
- We recommend the introduction of protection against intersectional multiple discrimination so that there is legal protection for individuals who experience discrimination or harassment because of a combination of equality grounds, including on the grounds of sex¹⁰.
- This change will introduce new protection for individuals who experience discrimination or harassment because of a combination of equality grounds; for example, black women may experience discrimination due to a combination of being both black and female.
- It will remove unjustifiable legal barriers that individuals face when trying to prove discrimination on multiple equality grounds. It will provide legal certainty and our recommendation is in line with the recommendations of international human rights monitoring bodies, for example, the UN CEDAW Committee¹¹.

⁹ ECNI [Code of Practice on Equal Pay](#) 2010

¹⁰ See ECNI (2014) [ECNI Race law reform proposals](#) (full report)

¹¹ For example, the failure of the UK Government to introduce protection against multiple discrimination was criticised by the CEDAW Committee in 2013. It was particularly concerned that the legislative framework in Northern Ireland did not provide for multiple discrimination and recommended a revision of the legislation to provide for multiple discrimination. See CEDAW (2013) [Concluding Observations on UK, CEDAW Committee](#) .

- **provide greater protection for employees against harassment on grounds of sex by a third party such as a customer or client.**
- We recommend that employers are liable if they know that an employee has been subjected to third party harassment on one previous occasion, or in circumstances that they ought to have been reasonably aware of the risk of third party harassment¹². A harassment by a third party could include, for example, where a customer or client subjects an employee to sexual harassment.
- Whilst we supported the introduction in the sex equality legislation in Northern Ireland of a clear duty on employers to take reasonably practicable steps to prevent employees being subjected to third party harassment, we did not agree that the employee should have to wait until the third incident of harassment before an employer is required to take action.
- We support the views of the Joint Committee on Human Rights that the threshold requirement, which provides that employer liability only applies where the employer knows that the same employee has been harassed on two prior occasions, “could be seen as permitting employers excessive leeway before they are required to respond to third party harassment”¹³.
- **introduce changes designed to clarify and strengthen *direct* discrimination; including:**
 - **clarification that direct discrimination on grounds of pregnancy is also direct discrimination on grounds of sex¹⁴; and**

¹² See ECNI (2014) [ECNI Race law reform proposals](#).

¹³ See Joint Committee on Human Rights (2009) [Legislative Scrutiny: Equality Bill](#).

¹⁴ See ECNI response to the OFMDFM consultation on a NI Single Equality Bill (2004) [Response to OFMDFM Consultation paper ‘A Single Equality Bill for Northern Ireland](#)

- *** strengthen protection against direct sex discrimination by allowing sex discrimination claims to be brought based on a hypothetical comparator, where there is evidence of direct sex discrimination in relation to contractual pay.**
- We recommend changes which will clarify and strengthen protection against direct discrimination under sex equality legislation in Northern Ireland.
- Specifically, we recommend that there is clarification that direct discrimination on grounds of pregnancy is also direct discrimination on grounds of sex. Under equality legislation in Great Britain, there is express protection for women from discrimination because of their pregnancy (and maternity) at work, in the provision of services, exercise of public functions and associations.
- Further, in the absence of equal pay legislation that permits hypothetical comparators in *all* equal pay claims¹⁵, we recommend, in line with protection under equality law in Great Britain that the provisions relating to direct sex discrimination in the workplace are strengthened. In particular, we recommend that the sex equality legislation is amended to permit a sex discrimination claim to be brought based on a hypothetical comparator, where there is evidence of direct sex discrimination in relation to contractual pay.
- In order to bring an equal pay claim for equal pay a woman is required to identify an actual comparator doing equal work¹⁶. This change would permit her to bring a claim of sex discrimination in such

¹⁵ As set out above, we recommend, in the first instance, that the equal pay legislation is amended to permit hypothetical comparators in *all* equal pay claims.

¹⁶ These provisions equally apply in circumstances where a man brings an equal pay case.

circumstances if she can show evidence of direct sex discrimination by her employer¹⁷.

- *** strengthen protection against discrimination or harassment by private clubs/ associations on the grounds of sex, including pregnancy and maternity and gender reassignment.**
- In line with protections under equality law in Great Britain, we recommend that the sex equality legislation is extended and strengthened to:
 - prohibit discrimination and harassment by associations on the grounds of gender, pregnancy and maternity and gender reassignment;
 - make it unlawful for associations to discriminate against or harass both existing and potential members and associates, as well as existing or potential guests;
 - include an exception that permits associations to restrict their membership in certain circumstances to people of a certain gender (or gender identity); for example, where the main purpose of the association is to bring together people of a specific gender.
- Associations can include, for example, private clubs, such as golf /sports clubs; young people's associations such as the Scouts, the Guides; as well as political parties¹⁸; and organisations established to promote the interests of its members.

¹⁷ For example, it would cover the situation where an employer tells an employee that she would be paid more if she were a man. If there are no men doing equal work in the workplace then she can not bring an equal pay complaint. However, if these proposed changes were introduced, she could claim direct sex discrimination as the less favourable treatment she has received is clearly based on her sex.

¹⁸ Private clubs/associations are defined in other equality legislation as associations that have at least 25 members and admission to membership is regulated by the association's rules and involves a process of selection.

- *** new protection for employees against pay secrecy clauses, aimed at prohibiting employers from preventing or restricting their employees from having discussions about their pay, where such discussions are aimed at establishing whether or not there is pay discrimination.**
- In line with protections under equality law in Great Britain, we recommend the sex equality legislation in Northern Ireland is strengthened to prohibit employers from preventing or restricting their employees from having discussions about their pay with colleagues (or former colleagues) or trade union representatives; in circumstances where such discussions are aimed at establishing whether or not there is pay discrimination.
- This change will ensure greater transparency within the workforce about pay. It aims to prevent 'pay secrecy clauses' or 'gagging clauses' which are terms of employment that seek to prevent or restrict workers from discussing or disclosing their pay. Further, restricting the use of these clauses will promote openness and dialogue about pay and bring an end to opaque pay structures.
- It would, for example, mean that a male employee who discloses his pay to a female colleague who believes that she is being paid less due to her sex, would be protected from victimisation by his employer as a result of disclosing his pay.
- In addition, the UN CEDAW Committee in 2013 expressed concern that the legislative framework in Northern Ireland did not provide protection against pay secrecy clauses and recommended action to address this gap in protection¹⁹.

¹⁹ CEDAW (2013) [Concluding Observations on UK, CEDAW Committee](#) .

- **amend the definition of ‘gender reassignment’ so as to remove the requirement that a person undergoing gender reassignment must be under medical supervision*; and give consideration to prohibiting discrimination on the wider ground of ‘gender identity’, rather than the narrower ground of ‘gender reassignment’.**
- We recommend changes which will strengthen protection against discrimination under sex equality legislation for transgender people in Northern Ireland.
- Specifically, in line with protections under equality law in Great Britain²⁰, we recommend the removal of the requirement that a person undergoing gender reassignment must be under medical supervision. This change will widen the definition of ‘gender reassignment’ and therefore widen the scope of the legislation²¹²².
- Further, we recommend that consideration is given to prohibiting discrimination on the wider ground of ‘gender identity’ rather than the narrower ground of ‘gender reassignment’.
- Whilst protection against discrimination on the grounds of ‘gender identity’²³ is not covered by the

²⁰ In particular, the Equality Act 2010 indicates that a person has the protected characteristic of ‘gender reassignment’ if the person is proposing to undergo, is undergoing, or has undergone, a process to change his or her sex. There is no reference to having to undergo ‘medical supervision’ in this definition. A transsexual person is defined in the Equality Act 2010 as someone who has the protected characteristic of gender reassignment.

²¹ Currently under the sex equality legislation in Northern Ireland, a person is protected from discrimination if they “intend to undergo gender reassignment, are undergoing gender reassignment, or has at some stage in the past undergone gender reassignment”.

²² In Northern Ireland, ‘gender reassignment’ is defined as “a process which is undertaken under **medical supervision** for the purpose of reassigning a person’s sex by changing physiological or other characteristics of sex, and includes any part of such a process”. There is therefore a reference to having to undergo ‘medical supervision’ in this definition.

²³ ‘Gender identity’ is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or

equality legislation in Great Britain, 'gender identity' is a term that is used by both the United Nations and Council of Europe in their recommendations for Member States²⁴.

- We note that the Women and Equalities Committee in its Inquiry (2016) into Transgender Equality²⁵ recommended that the Equality Act 2010 in Great Britain should be amended to include protection on the grounds of 'gender identity'.
- It was of the view that the use of the terms 'gender reassignment' and 'transsexual' in this legislation was 'outdated and misleading'; and 'may not cover wider members of the trans community'²⁶.
- *** new protection for transgender people in the field of education in schools and by qualifications bodies.**
- Unlike in Great Britain, transgender people in Northern Ireland do not have protection against discrimination in the field of education in schools or by qualifications bodies^{27,28}.
- Further, as set out above, they do not have protection against discrimination by public bodies

function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms. See Preamble to [Yogyakarta Principles](#) (2016).

²⁴ See, for example, Committee of Ministers [Recommendation](#) (2010) to Member States on combating discrimination on grounds of sexual orientation or gender identity issues.

²⁵ See House of Commons, Women and Equalities Committee (2016) [Transgender Equality Inquiry](#).

²⁶ It considered that this change would "improve the law by bringing the language in the Act up to date, making it compliant with Council of Europe Resolution 2048; and make it significantly clearer that protection is afforded to anyone who might experience discrimination because of their gender identity". The UK Government [responded](#) to the Inquiry in 2016 but did not accept the Committee's recommendation.

²⁷ In Northern Ireland transgender people have protection against unlawful discrimination in the areas of employment, vocational training and the provision of goods, facilities and services (in certain limited areas), as well as the disposal or management of premises.

²⁸ It will be noted that the definition of harassment in the Equality Act 2010 does not apply to the protected characteristic of gender reassignment. However, where unwanted conduct related to any of these protected characteristics results in a pupil suffering disadvantage that would constitute direct discrimination. See EHRC

when exercising their public functions, or by private clubs/associations.

- We recommend changes to equality law in Northern Ireland that strengthen protection for transgender children in schools; including as regards admission policies; the provision of education and access to facilities and services; or school exclusion policies. Protection against discrimination should also be extended to cover qualifications bodies²⁹.
- *** new protection for transgender people against indirect discrimination across all areas.**
- In line with protection under equality law in Great Britain, we recommend the extension of protection against indirect discrimination on the grounds of gender reassignment to areas outside employment and vocational training³⁰; including in the provision of goods, facilities, services and premises, in education, in the exercise of public functions, and by private clubs.
- In addition, we consider that this change will ensure compliance with the EU Gender Goods and Services Directive³¹.

Enforcement and remedies

- *** require tribunals to order a respondent who has been found by the tribunal to have committed an equal pay breach to carry out an equal pay audit.**

²⁹ A qualifications body is defined in other equality legislation in Northern Ireland 'as an authority or body which can confer, renew or extend a professional or trade qualification'. Qualifications bodies include the General Medical Council, the Nursing and Midwifery Council, and the Driver and Vehicle Testing Agency.

³⁰ Legislation recently introduced provides protection against indirect discrimination for transgender people in the areas of employment and vocational training only and not across all areas. [The Sex Discrimination Order 1976 \(Amendment\) Regulations \(Northern Ireland\) 2016](#) See ECNI (2016) [response](#) to OFMDFM consultation on changes to the Sex Discrimination Order.

³¹ Ibid.

- In line with provisions in Great Britain³², we recommend tribunals are required to order a respondent who has been found by the tribunal to have committed an equal pay breach to carry out an equal audit.
- This would mean that employers found by a tribunal to have committed an equal pay breach must undertake a systematic evaluation of their pay and award systems to ensure that further breaches do not occur or that existing breaches do not continue³³.
- We recommend that a tribunal would not be required to order that an employer carries out an audit in exceptional circumstances; for example, where an employer has recently completed an audit or in circumstances where it is clear without an audit whether any action is required to avoid equal pay breaches occurring or continuing.
- **grant a power to tribunals to make wide recommendations that benefit the whole workforce.**
- We recommend increased powers for tribunals to make recommendations that benefit the whole workforce and not simply the person bringing the discrimination complaint³⁴.
- Recommendations could include, for example, that an employer undertakes equality training in relation to the equality area in question (for example, sex equality training), or more specifically on particular policies (for example, recruitment, selection and

³² Under the Equality Act 2010 (Equal Pay Audits) [Regulations](#) 2014

³³ The audit must identify any differences in pay (including non-contractual pay) between men and women doing equal work in the same employment, provide reasons for any differences and set out an action plan for eliminating those differences, where they cannot be explained or justified otherwise than by reference to gender.

³⁴ See ECNI (2014) [ECNI Race law reform proposals](#) (full report). In our recommendations for race law reform the Commission has highlighted that whilst a number of our recommendations call for specific changes to the race equality legislation, some of our recommendations **apply equally to other equality grounds** including on grounds of sex.

promotion procedures or terms and conditions of employment).

- Our recommendation is in line with powers already available to the Fair Employment Tribunal under the fair employment legislation.
- **strengthen Commission enforcement powers across the sex equality legislation.**
- We recommend changes that will strengthen the Commission's enforcement powers across the sex equality legislation.
- For example, we recommend, in line with provisions under the fair employment legislation in Northern Ireland, that our power to conduct a formal 'named person' investigation under the sex discrimination legislation, does not require a 'belief' that an act of discrimination has occurred.
- We also recommend that our powers that exist under the fair employment legislation in this area are widened across all equality grounds, including sex³⁵.
- ***introduce Regulations requiring large private and voluntary sector employers to publish information about the differences of pay between their male and female employees.**
- We recommend the introduction of Gender Pay Reporting Regulations that require private and voluntary sector employers with 250 or more employees to publish information about the differences of pay between their male and female employees. We consider that such Regulations will encourage greater transparency in gender pay reporting.

³⁵ Ibid

- Our current recommendation (2014) was in line with provisions in equality legislation in Great Britain at that time³⁶. In light of recent developments both in Northern Ireland and Great Britain, the Commission is currently reviewing its recommendations in this area³⁷.

Conclusion

- 1.8 To advance gender equality, we recommend that the Executive, Departments and other key stakeholders act to address the above priorities, including via the Programme for Government and Budget, and the Gender Equality Strategy.

Further Information

- 1.9 For further information on our wider policy priorities and recommendations to advance gender equality in Northern Ireland, visit www.equalityni.org/gender

November 2016.

³⁶ See S78 of Equality Act 2010. Under this provision, a Minister of the Crown to make Regulations requiring private sector employers with at least 250 employees in Great Britain to publish information about the differences in pay between their male and female employees.

³⁷ It will be noted that the [Employment Act \(NI\) 2016](#) sets out a framework that requires employers to publish information showing whether gender pay disparities exist between employees and, where they do, to publish an action plan to eliminate them. Regulations due to come into force in Northern Ireland in 2017 will determine which employers are to be subject to these requirements to collect and publish gender pay information. Also, OFMDFM was required to publish, by October 2017, a strategy including an action plan, on eliminating differences in the pay of male and female employees. Responsibility for these have now passed to the Department for Communities. Regulations requiring large private and voluntary employers to publish gender pay information are due to come into force in Great Britain in early 2017.