

The gaps between GB and NI equality law

BRIEFING NOTE

JANUARY 2011

1. Introduction

In recognition of the need to streamline and modernise Northern Ireland equality law and to keep pace with developments in Great Britain (GB), the Equality Commission has developed a number of **proposals for legislative reform**.

These proposals are set out in brief (section 2) along with the current and emerging gaps in protection (section 6) that exist between GB and Northern Ireland since the introduction of the Equality Act 2010.

These proposals were first shared with the Junior Ministers in the Office of the First and deputy First Minister (OFMdFM) in 2009 and highlighted in subsequent meetings in 2010.

2. ECNI proposals for legislative reform

The Equality Commission's proposals relate to changes to the **age**, **sex**, **disability** and **race** equality legislation as well as the **fair employment** legislation. In particular:-

- the extension of **age discrimination** legislation to non-employment areas;

- the amendment of the **race equality legislation** so that individuals have greater protection against discrimination and harassment due to the colour of their skin or their nationality when in employment or accessing goods and services;
- the amendment of the **sex equality legislation** so as to make it unlawful for public bodies to subject women (or men) to unlawful sex discrimination and harassment, when exercising their public functions;
- wide-ranging reform of the **disability equality legislation** in order to address inconsistencies within the legislation and strengthen protection against discrimination for disabled people;
- the extension of the workplace monitoring requirements placed on registered employers under the **fair employment legislation**, so that employers can make a more accurate assessment as to whether or not Roman Catholics or Protestants are under-represented in their workforce;
- the removal of the exception in the **fair employment legislation**, which allows secondary level schools to discriminate on the grounds of religious belief when recruiting teachers; with early consideration as to whether the exception should also be removed as regards primary level schools.

Further information on these proposals is available on the Equality Commission's website¹.

¹ ECNI proposals for legislative reform, 2009, available at http://www.equalityni.org/sections/default.asp?secid=5&cms=The+Law+Legislative+Reform&cmsid=4_285&id=285

3. Reasons for reform

The Commission has made it clear that its proposed changes to the equality legislation are required for a number of reasons including the need to:

- address the key inequalities facing people in Northern Ireland;
- to ensure that vulnerable and marginalised people in Northern Ireland do not have less protection from discrimination than people in GB;
- to secure greater harmonisation and simplification of the equality legislation;
- to further the aims and objectives of the Executive's *Programme for Government 2008/2011*;
- to ensure that the legislation complies with the anticipated requirements of the draft European Commission Directive on the provision of goods and services² and international obligations.³

The Equality Commission has met with Junior Ministers in OFMdFM on two occasions, most recently in July 2010, in relation to its proposals for reform.

In response, the Junior Ministers indicated that they recognise the need to take steps to strengthen anti-discrimination law so as to ensure that Northern Ireland citizens enjoy the same legal protection as citizens elsewhere. They also confirmed that they are considering how best this might be achieved.

Subsequent statements in the Assembly by the deputy First Minister and Junior Ministers show that these considerations are ongoing.⁴

² *Draft Council Directive on implementing the principle of equal treatment outside the workplace between persons irrespective of religion or belief, disability, age or sexual orientation*, July 2008, COM(2008)0426

³ For example, obligations on the UK under the UN Convention on the Rights of Persons with Disabilities.

⁴ OFMdFM Question Time, June 1, 2009; October 11, 2010 and January 24, 2011.

4. Developments in Great Britain

As indicated below, some of the Equality Commission's proposals for reform have been addressed in GB through the Equality Act 2010; other proposals refer to specific provisions of the fair employment legislation, which only apply to Northern Ireland, and therefore have not been addressed through the Equality Act 2010.

Highlighted below are some of the **key differences** that currently exist between GB and Northern Ireland equality law as a result of the changes that have come into force (or will come into force) under the Equality Act 2010.

In general, the Equality Commission **supports** many of the changes to the equality legislation introduced in GB by the Equality Act 2010, as these changes are in line with our previous recommendations for reform.

It is important to stress that in some areas it is the Commission's view that the Equality Act 2010 has not gone far enough in terms of ensuring effective protection against discrimination for disabled people. It is also essential that changes to Northern Ireland equality law reflect the **particular circumstances** of Northern Ireland society.

The Equality Commission has outlined its concerns in relation to some aspects of the Equality Act 2010 in its submission to the House of Commons in June 2009.⁵

5. The Current Situation NI Equality Law vs GB Equality Law

In April 2010, the **Equality Act 2010** was passed in GB. The provisions of the Act, apart from a few minor exceptions, only apply to GB and will not change equality law in Northern Ireland.

⁵*ECNI submission to House of Commons on the Equality Act 2010, June 2009*
<http://www.equalityni.org/archive/word/MemsubmittedbyECNItoHCConEqBillJune09.doc>

The Equality Act 2010 replaces the existing anti-discrimination laws in GB with a single Act. It simplifies, harmonises and strengthens GB equality law in order to tackle new forms of discrimination and address deep-rooted existing inequalities.

The enactment of the Equality Act 2010 has, however, resulted in **significant differences** arising between GB and Northern Ireland equality law. These differences affect all grounds of discrimination (race, sex, age, disability, etc.) across a wide range of areas (employment, education, the provision of goods and services and housing, etc.).

As a result of the changes that have taken place in GB, vulnerable and marginalised individuals in Northern Ireland have **less protection** against unlawful discrimination, harassment and victimisation than those in GB. This gap in protection will continue to widen as further planned changes to the equality legislation in GB under the Equality Act 2010 are implemented.

These changes also mean that employers and service providers who operate both in Northern Ireland and GB, have to grapple with the **increased inconsistencies and differences in equality law** between the two jurisdictions. They have to keep track of their responsibilities under differing legislative frameworks, as well as case-law emerging from separate legislative provisions.

6. Key changes and emerging gaps

Outlined below are some of the key changes which have taken place (or are due to take place) in GB following the enactment of the Equality Act 2010. The majority of the Act's provisions came into force in October 2010. As noted below, a number of other key provisions are due to come into force at a later date and there are also a number of provisions which the UK Government is still considering.

- **Legislation harmonised and simplified**

The Act addresses inconsistencies in the current discrimination law framework so as to ensure uniform protection against discrimination

across all grounds, where appropriate. For example, it has harmonised the **race equality** legislation so that individuals have the same level of protection on the grounds of colour and nationality, as on the grounds of race, ethnic origin and nationality. Harmonising and simplifying the legislation will also make it easier for people to understand and comply with the Act.

In general, the Commission **supports** the harmonisation and simplification of Northern Ireland equality legislation. As highlighted in its **proposals for legislative reform**, it advocates the harmonisation of the race equality legislation in Northern Ireland so that there is the same level of protection against discrimination across all grounds.

- **Disability legislation strengthened**

The disability equality legislation has been both streamlined and strengthened. Changes include:-

- greater protection for disabled people against discrimination. In particular, disabled people are protected against '**indirect disability** discrimination' and '**discrimination arising from disability**'; the latter replacing the concept of 'disability-related discrimination' contained within the Disability Discrimination Act 1995.

These provisions are primarily designed to address the effects of the House of Lords' decision in *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* [2008] UKHL 43, which severely restricted the scope for disabled people to claim disability-related discrimination.

- express protection for **carers** and others who are subjected to direct discrimination or harassment due to their association with a disabled person and for individuals because they are **wrongly perceived** to be disabled.
- employers are prohibited from asking job applicants **questions related to disability**, prior to making a job offer, except in certain specified circumstances.

- changes to the **definition of disability** have made it easier for disabled people to fall within the definition of disability;
- the harmonisation and simplification of the disability legislation, so that there is a uniform set of definitions of discrimination and other provisions across the scope of the legislation;
- disabled tenants have additional rights in relation to the making of reasonable adjustments to common parts (such as hallways and stairs).⁶
- the extension of the reasonable adjustment duty on **schools** to cover the provision of **auxiliary aids and services** (such as extra equipment).⁷

As made clear in its **proposals for legislative reform**, the Equality Commission **supports** wide-ranging reform of the Disability Discrimination Act 1995 and the Special Educational Needs (NI) Order 2005. In addition, the changes highlighted above address many (but not all) of the Equality Commission's previous recommendations for reform set out in *Enabled?*.⁸

- **Age discrimination outside the workplace prohibited**

The Equality Act 2010 contains provisions prohibiting age discrimination against people aged 18 or over **outside** the workplace. These provisions, once enacted, will mean that individuals will have protection against unjustifiable age discrimination when accessing health or social care, financial services or private clubs.

The Act also contains provisions prohibiting public bodies (such as Government Departments or local councils) in GB from discriminating

⁶ The UK Government is currently considering this provision and no implementation date has, as yet, been set.

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⁸ *Enabled? Recommendations for change to the Disability Discrimination Act 1995, 2003*, ECNI <http://www.equalityni.org/archive/word/Enabledfinalpublished260603.doc>

on the grounds of age when exercising their **public functions**. The provisions relating to age discrimination outside the workforce are expected to come into force in April 2012.

As made clear its **proposals for legislative reform**, the Equality Commission **supports** the extension of the age discrimination legislation to cover areas outside employment and vocational training; although the Commission recommends that protection against unjustifiable age discrimination outside the workplace is extended to cover under 18s.

- **Equal pay provisions strengthened**

The Equality Act 2010 makes pay secrecy clauses unenforceable. In particular, employers in GB are prohibited from preventing or restricting their employees from having discussions in order to establish if pay differences exist that are related to an equality ground (for example, gender).

There are also provisions which make it easier for an employee, in certain circumstances, to claim sex discrimination in relation to contractual pay.

In general, the Equality Commission **supports** measures aimed at tackling sex discrimination and the equal pay gap between men and women.

- **Positive action measures extended**

Employers, service providers, and public bodies carrying out public functions in GB are allowed (but not required) to take a **wider range** of special measures (known as '**positive action**' measures) aimed at alleviating disadvantage experienced by under-represented groups.

The positive action provisions in the Equality Act 2010 enable employers, service providers and others to take **proportionate** action to remedy discrimination and disadvantage experienced by particular groups.

For example, across **all** equality grounds, employers in GB can take a range of measures, such as targeting training at a specific group, work shadowing, or encouraging applications from an under-represented group.

In addition, across **all** equality grounds, service providers and others can take positive actions measures, such as providing additional or bespoke services, separate facilities, accelerated access to services, targeting resources or induction or training opportunities to benefit a particular disadvantaged group.

In general, the Equality Commission **supports** an expansion of the positive action measures which employers and service providers can take. There is currently more limited scope for employers and service providers in Northern Ireland, than those in GB, to take positive action across a number of grounds, apart from on the ground of disability.

- **Extended protection against harassment and victimisation**

The Equality Act 2010 has harmonised and extended protection against harassment. For example, employees have greater protection against harassment by third parties, such as customers or clients, across a number of equality grounds, including race, disability and religion or belief. Disabled people also have greater protection against harassment when accessing goods and services.

In addition, there is stronger protection for individuals against victimisation; for example, where a person is treated badly because they have brought a complaint of discrimination.

In general, the Equality Commission **supports** greater protection for individuals against harassment and victimisation. It has, however, raised concerns in relation to the scope of the provisions aimed at tackling third party harassment of employees.⁹

⁹ See *ECNI submission to House of Commons on the Equality Act 2010*, June 2009
<http://www.equalityni.org/archive/word/MemsubmittedbyECNItoHCConEqBillJune09.doc>

- **Dual discrimination prohibited**

The Equality Act 2010 contains provisions prohibiting direct dual discrimination on up to two **combined** grounds, for example, disability and gender or gender and race. The UK Government is currently considering these provisions and no implementation date has, as yet, been set.

The Equality Commission **supports** the extension of the equality legislation in Northern Ireland to cover dual (or multiple) discrimination, although it recommends it covers both direct discrimination and **harassment**.

- **Extended protection in private clubs**

Private clubs (such as golf clubs) are prohibited from discriminating against their members and guests on the **additional** grounds of sex, religion or belief, pregnancy and maternity, and gender reassignment. The provisions prohibiting discrimination by private clubs on the ground of age are expected to come into force in April 2012.

The Equality Commission **supports** greater protection for members and guests against discrimination by private clubs. Currently, there is no protection for members (both existing or potential) or guests in Northern Ireland against discrimination by private clubs on the grounds of gender, age, religious belief, political opinion, pregnancy and maternity or gender reassignment.

- **Extended protection against discrimination by public bodies**

The Act has harmonised and strengthened protection against discrimination by **public bodies** (such as the police or immigration authorities) when carrying out their **public functions**.

Public functions may also be carried out by **private organisations** (such as a private company which manages a prison).

Public functions include law enforcement, the setting of budgets, the collection of taxes, planning control or licensing, or determining frameworks for the entitlement to benefits or services.

The provisions prohibiting discrimination by public bodies when exercising public functions on the ground of **age** are expected to come into force in April 2012.

In general, the Equality Commission **supports** measures which harmonise and strengthen protection against discrimination by public bodies when exercising public functions. The provisions in Northern Ireland equality law in this area are currently less extensive than in GB across a range of grounds.

In its **proposals for legislative reform**, the Equality Commission has called for:-

- the extension of the **sex** and **age** discrimination legislation to cover protection against discrimination by public bodies when exercising their public functions;
- the harmonisation of the **race** relations legislation, so that **all** racial grounds are covered by the provisions on public functions.

- **Public sector duties extended**

The Act introduces a new streamlined and strengthened **equality duty** on **public authorities**. This duty applies to public bodies and others carrying out public functions, and is designed to embed equality considerations into the day-to day work of public authorities.

From 6 April 2011, public authorities in GB will be required to have due regard to the need to eliminate discrimination and other unlawful conduct under the Act, advance equality of opportunity and foster good relations across the **additional** grounds of age, religion and belief, sexual orientation, gender reassignment, and pregnancy and maternity.

Listed public authorities will also be required to publish a wide range of **equality information** and set **equality objectives**, in accordance with a set timescale.

The Equality Commission in November 2008 published its report on its comprehensive review of the effectiveness of Section 75 of the Northern Ireland Act.¹⁰

Section 75 places a duty on designated public authorities in Northern Ireland to have due regard to the need to **promote equality of opportunity** across nine equality grounds; and to have regard to the desirability of **promoting good relations** across three equality grounds.

In its report, the Commission made it clear that, although it had made a series of conclusions and recommendations for change to redirect energies to the duties to promote equality of opportunity and good relations, it was of the view that the changes proposed should be allowed to have effect before consideration is given to amending this relatively new piece of legislation.

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¹⁰ *Effectiveness review Final report*, ECNI, November 2009, available at:- <http://www.equalityni.org/archive/pdf/EffectivenessReviewFinalRpt1108.pdf>