

Equality Commission

FOR NORTHERN IRELAND

Response to ‘Promoting Equality of Opportunity and Implementing EU Equality Obligations in Northern Ireland: Updating the Sex Discrimination Order’ July 2005

Introduction

The Commission is an independent public body established under the Northern Ireland Act 1998. It took over the responsibilities of the Equal Opportunities Commission, the Commission for Racial Equality, the Fair Employment Commission and the Northern Ireland Disability Council. The Commission is responsible for implementing the legislation on sex discrimination and equal pay, fair employment, race relations, sexual orientation and disability discrimination. The Commission also oversees the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act.

The Commission’s general duties include:

- Working towards the elimination of discrimination
- Promoting equality of opportunity and good practice
- Promoting positive and affirmative action
- Promoting good relations between people of different racial groups
- Overseeing the implementation and effectiveness of the statutory duty on public authorities and
- Keeping the equality legislation under review.

The Commission is pleased to respond to these proposals to implement the Amended Equal Treatment Directive 2002 (AETD)¹.

Below are the Commission's responses to the specific questions set out in the Consultation Document.

Responses

Q4. Do you regard the proposed new definition of indirect discrimination as satisfactory or not? (Draft regulation 4)

The Commission values the concept of indirect discrimination as a vital tool in combating structural discrimination and promoting equality of opportunity across all equality law grounds. It should first be said that the Commission welcomes the replacement of the 'disproportionate effect' test with a 'particular disadvantage' test as in the other equality law regimes. However, the Commission is doubly unhappy with the proposed objective justification test in the indirect discrimination definition. The Commission's first objection is well documented in its previous responses to EU directive implementation, namely that **it is inadequate implementation to use a 'proportionate means' test of objective justification when the Directive requires an 'appropriate and necessary means' test.** The 'proportionate means' test gives respondents, tribunals and courts too much latitude in providing objective justification for what would otherwise be indirect discrimination.

The Commission's second objection is more fundamental. It relates in particular to the 'legitimate aim' test for objective justification. The Commission considers this test to be 'regressive' in the context of the 'non-regression test in the AETD.

Although the Race and Ethnic Origin Directive 2000 (REOD) and the Framework Employment Equality Directive 2000 (FEED) are 'green field' Community legislation, in the sense that the Community had not legislated in these areas before, sex equality law is significantly different not merely because the original Equal Treatment Directive

¹ References to Articles in the AETD are references to the ETD as amended and not Articles in the Amendment Directive itself.

1976 (ETD) is being amended but also because both the ETD and, more importantly, Article 141 EC (x-Article 119 EC)(on equal pay) have been extensively interpreted by the European Court of Justice (ECJ) and, indeed, the definition of indirect discrimination has already been amended by way of the Burden of Proof Directive (BPD).

This second objection is therefore based on the proposition that both Article 141 EC and the ETD, as interpreted and amended, are part of Northern Irish law and hence that the non-regression clause in the AETD (Article 8e.2) applies to EU implementation, even if the 'minimum standards' of the AETD appear to be lower than previous legislative provision on sex equality law, as interpreted by the ECJ. Hence what is regrettable in terms of implementation of 'green field' equality law legislation is inadequate implementation in relation to amendments to NI sex equality law.

The ECJ in Case 170/84 *Bilka-Kaufhaus* [1986] ECR 1697 established the authoritative test for objective justification in that disparately impacting practices correspond to a real need on the part of the undertaking concerned and are appropriate and necessary to the achievement of those needs. Although the Court has not applied this 'real need' test in welfare equality cases and has, regrettably accepted a 'legitimate aim' test even in relation to statutory employment schemes, it has never reneged from the *Bilka* test in non-statutory employment cases. Hence, 'justifiable' in the original Sex Discrimination Order must be interpreted in accordance with *Bilka*.

The Burden of Proof Directive provides a first legislative definition of indirect discrimination. It is submitted that the Community legislature intended to articulate the ECJ's development of the indirect discrimination principle. The Burden of Proof Directive (Article 2.2) defines indirect discrimination as being:-

"2. For purposes of the principle of equal treatment referred to in paragraph 1, indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex."

Although the Sex Discrimination Order was amended in light of the Burden of Proof Directive definition in relation to matters such as “provision, criterion or practice”, the term “justifiable” was retained and the articulated Objective Justification test in the Burden of Proof Directive was not included. However, the Commission submits that “justifiable” in the amended Indirect Discrimination test must still conform to ECJ case law and the terms of the Burden of Proof Directive. Hence the “provision, criterion or practice” itself must be “appropriate and necessary” and not just “appropriate and necessary means” to achieve a “legitimate aim”.

It might be argued that this is a different Indirect Discrimination definition and hence that ‘non-regression’ does not apply. The Commission does not accept this proposition. It has already welcomed the improvement of the substantive Indirect Discrimination principle through the introduction of the ‘particular disadvantage’ approach. However it firmly rejects any ‘*quid pro quo*’ whereby the Objective Justification test may be weakened.

In this context, the introduction of a ‘legitimate aim’ test into the proposed amendments to the Sex Discrimination Order does not satisfy the pre-existing requirements of either the Burden of Proof Directive test or ECJ case law, both of which are an integral part of NI law.

The Commission therefore proposes that the Objective Justification test in the amended Sex Discrimination Order should refer either to a “necessary aim” test or a “real need” test to prevent regression from pre-existing protection against discrimination as protected by Article 8e.2.

Q5. Are you satisfied with our proposed regulations to explicitly outlaw a) harassment on grounds of sex, b) sexual harassment, c) harassment on grounds of gender reassignment and d) rejection of, or submission to, such unwanted conducted? (Draft regulation 6)

The Commission generally welcomes the definition of ‘harassment’ and ‘sexual harassment’ in the Draft Regulations. However, the

Commission does not accept that harassment cases, as set out in draft regulation 6A(1)(a) should be focussed on whether the alleged 'unwelcome conduct' should be "on grounds of" sex as opposed to "related to" sex as required in Article 2.2, 3rd indent, as amended. There is a clear distinction, particularly in disability discrimination law, between discrimination "on grounds of" a person's disability which is not open to justification, and discrimination "related to" a person's disability which is subject to a wide justification test. We are therefore well used to this distinction in NI equality law and there is no basis for not adopting the required terminology of the AETD in the harassment definition.

Q6. Are you satisfied with the proposed explicit references in the SDO to discrimination on the grounds of pregnancy and maternity leave, and the way they impact on employers? (Draft regulations 5 and 8)

Article 2.7, 2nd sub-paragraph provides:-

"Less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC shall constitute discrimination within the meaning of this Directive."

As stated above, there is a clear distinction in NI equality law between discrimination "on grounds of" a prohibited factor and discrimination "related to" a prohibited factor. **It is not adequate implementation of the Amended Equal Treatment Directive to restrict 'pregnancy and maternity leave' discrimination to cases "on grounds of" rather than "related to" pregnancy and maternity leave.**

Q8. We propose to add a 'reasonableness' requirement to the supplementary genuine occupational qualifications in Article 10B (2)(b) of the SDO. This applies to posts which involve performing intimate physical searches pursuant to statutory powers, where the employee or applicant is undergoing or intends to undergo gender reassignment. Is this proposal satisfactory? (Draft regulation 10)

The Commission has no difficulty with this amendment to this provision in so far as it restricts its scope in cases where other employees can conduct 'intimate physical searches' and hence the GOQ will not apply.

Article 2.6 AETD provides:-

"Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."

The Commission notes that the EOCGB seriously questioned the continuing acceptability of many of 'specified list' categories of GOQs. The Commission regrets that the opportunity has not been taken to conduct a 'root and branch' review of GOQs.

Q12. We have drafted regulations to amend Article 21 SDO to clarify the circumstances in which it is permissible to apply requirements to ministers of religion which would otherwise be discriminatory. Is this proposal satisfactory? (Draft regulation 19)

The Commission is concerned that Article 21 Sex Discrimination Order is being extended rather than 'clarified'. First, Article 21 has never been tested against the original GOR test in the Equal Treatment Directive. In relation to the equivalent exception in the Sexual Orientation Regulations, they were interpreted narrowly, within the limits set by the equivalent in the FEED to Article 2.6 AETD, in *R v Secretary of State, ex parte UNISON*. It would therefore be open to the ECJ at some future date to determine whether, and to what extent, this formulation satisfies Article 2.6. The Commission is not satisfied, for example, that the "strongly held religious convictions of a significant number of the religion's followers" satisfies the "genuine and determining occupational requirement" test in Article 2.6, taking its other aspects into account.

The Commission is of the view that the requirements set out in the proposed Article 21 may well satisfy the Article 2.6 GOR test in relation to many religions. However it would prefer that a ministerial statement is made and reported in *Hansard* to the effect that Article 21 is amended in full cognisance of its interpretation and application being in conformity with Article 2.6.

Q15. Do you agree with our decision to retain the existing SDO definition of direct discrimination?

The Commission is in full agreement with the EOCGB in that it is inadequate implementation to restrict the direct discrimination definition to discrimination “on grounds of her sex”. There is no basis in the AETD for this qualification and it places sex equality law in an inferior position to race, religious belief and political opinion and sexual orientation discrimination. Issues of ‘perceived’ sex may overlap with provisions on gender reassignment but it is not consistent that ‘perceived’ religion, for example, is covered but ‘perceived’ sex is not. It is also inconsistent that ‘discrimination by association’ is not protected.

The direct discrimination definition should be “on grounds of sex”, not “her sex”.

Q16. Do you agree with our proposals to retain the SDO’s wording on unlawful discrimination by way of victimisation?

The Commission has not accepted that comparators are required in victimisation cases and does not consider this restriction to be adequate implementation of the AETD.

Q18. Do you agree that the Equality Commission for Northern Ireland’s current powers enable it to carry out the role and range of activities required by the ‘designated body’ under the provisions of the amended Equal Treatment Directive?

The Commission has consistently maintained that Article 6.3 AETD requires that it has the power, along with trade unions and

NGOs, to bring cases in its own name on behalf of named complainants.

Q19. The amended Equal Treatment Directive introduces a number of duties designed to improve equal opportunities across Europe. Do you agree that existing measures being taken by Government, together with the introduction of regulations to implement the amended Equal Treatment Directive, satisfy its requirements?

Article 1.1a of the Equal Treatment Directive as amended now requires Member States actively to take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas covered by the Directive. **The Commission is not at this time proposing any amendments to section 75 or Schedule 9 of the Northern Ireland Act 1998 but will take it into account in its Effectiveness Review of section 75.**