



## **Response to Government Equalities Office's consultation on multiple discrimination**

**June 2009**

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 age, fair employment and treatment, sex discrimination and equal pay, race relations, sexual orientation and disability. The Commission's remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998, and the disability duties under the Disability Discrimination Act 1995.
2. The Commission welcomes the opportunity to respond to the Government Equalities Office ('GEO') consultation on 'assessing the impact of a multiple discrimination provision'. The Commission, when responding to this consultation, draws on the unique experience it has gained from its role in enforcing the equality legislation in Northern Ireland, including statutory duties under Section 75 of the Northern Ireland Act 1998 across nine equality grounds, and the disability duties on public authorities under the DDA 1995.
3. In general, the Commission welcomes the GEO's proposal to include in the Equality Bill protection against intersectional multiple discrimination; namely, discrimination where a person's multiple identities intersect in such a way that they are completely inseparable.

4. In its response to the Discrimination Law Review<sup>1</sup>, the Commission supported the introduction of protection against multiple discrimination and highlighted the difficulties faced by complainants subjected to multiple discrimination in identifying an actual or hypothetical comparator with the same characteristics, as required when proving direct discrimination. Although retained in the Equality Bill, the Commission does not support the requirement for a comparator in direct discrimination cases and wishes to see a definition which provides that direct discrimination occurs when a 'disadvantage is based upon' a prohibited factor.
  
5. The Commission has commissioned research in order to explore the reality of diversity in people's identities. For example, it has published research<sup>2</sup> highlighting how the experiences of disabled women in Northern Ireland differ from those of disabled men, or women who were not disabled; for example, they were less likely to be in paid employment compared to disabled men or women who were not disabled. Additional research undertaken by the NI Human Rights Commission<sup>3</sup> has also highlighted the particular difficulties facing young lesbian, gay and bisexual people in Northern Ireland in accessing health services and employment.
  
6. Data collected by the Commission supports the view that there is a need for protection against multiple discrimination. As highlighted below, there has been steady increase in enquiries from complainants to the Commission alleging discrimination on two or more equality grounds over the period between April 2004 – March 2009:-

Number of enquiries on 2 or more grounds (% of total enquiries)

April 04/05	167 (8.2%)
April 05/06	241 (7.0%)
April 06/07	245 (7.4%)

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<sup>1</sup> ECNI response to Discrimination Law Review, September '07, ECNI, [www.equalityni.org](http://www.equalityni.org)

<sup>2</sup> *Re-thinking identity, The challenge of Diversity*, K Zappone, 2003

<sup>3</sup> Ditto

April 07/08	257 (8.2%)
April 08/09	346 (9.3%)

7. Although the GEO has raised a number of questions in the consultation document, the Commission has concentrated on those questions relevant to its own remit and experience. In particular, the Commission wishes to raise the following points in relation to the GEO's proposals.

### **Restricting claims to two grounds**

8. First, it notes that it is proposed that the Equality Bill will restrict multiple discrimination claims to claimants combining **no more than two** protected characteristics. The GEO advances this proposal on the grounds that the large majority of cases would be addressed by allowing multiple discrimination claims combining 2 protected characteristics, and that the benefit of extending protection to combinations of three or more protected characteristics would be 'marginal'.
9. If the GEO proceeds with this proposal, it is recommended that the impact of this restriction to two grounds, is monitored and reviewed at an early stage, in order to ensure that individuals' access to their rights is not unjustifiably restricted. Comprehensive monitoring and review of this provision is essential for a number of reasons.
10. First, restricting the combination of grounds to no more than two denies complainants the opportunity to argue that a third protected characteristic has had an impact on their treatment. As highlighted by Fredman, when considering US cases of race and gender, "courts remained concerned at the possibility of a flood of cases by numerous sub-groups. This led the courts to hold that that multiple discrimination should be restricted to a combination of only two grounds. On this analysis, only race and gender can be addressed; the impact of sexual orientation, religion, disability or age is ignored. The result is both artificial and paradoxical. The more a person differs from the norm, the more likely she is to experience

multiple discrimination, the less likely she is to gain protection.”<sup>4</sup>

11. Secondly, although still a small proportion of the overall number of enquiries received (approximately 0.9% in 2008/09 (34 enquiries)), there has been gradual increase in enquiries from complainants to the Commission alleging discrimination on three or more grounds over the last 5 years.
12. It is of note that the European Parliament in its final report<sup>5</sup> on the Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation<sup>6</sup>, recommended that Article 2 of the draft Directive prohibited discrimination on ‘**one or more**’ of the grounds covered by the Directive. The Parliament did not advocate restricting multiple discrimination claims to a combination of not more than two, as proposed by the GEO. If the Parliament’s amendment is accepted by the Council, then the GEO will have to ensure that the restriction to two grounds is compatible with the final Directive.
13. Finally, the Commission notes that the extension of protection against multiple discrimination on more than two grounds has been embraced by other jurisdictions, including Canada and South Africa.

### **Monitoring multiple identities**

14. As highlighted by a report on tackling multiple discrimination<sup>7</sup> commissioned by the European Commission, a lack of data adds to an incomplete picture of which intersectional groups are vulnerable and in which sectors multiple discrimination occurs. The report stressed that ‘it is imperative to monitor and track the unique ways in which people experience multiple discrimination through numerous tools and

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<sup>4</sup> *Double trouble: multiple discrimination and EU law*, Sandra Fredman, European Anti-Discrimination law review, Issue No.2, 2005 p13-18

<sup>5</sup> European Parliament Report, 20 March 2009

<sup>6</sup> COM (2008) 0426

<sup>7</sup> *Tackling multiple discrimination, Practices, policies and laws*, commissioned by European Commission, 2007

strategies.’<sup>8</sup> It also highlighted that ‘collecting data enables decision-makers and other stakeholders in the field of anti-discrimination and equal treatment to target their efforts at effectively protecting vulnerable groups of individuals from being subject to discrimination.’<sup>9</sup>

15. Although there are proposals within the Equality Bill in relation to extended monitoring on gender, disability and race by certain public sector employers, there is no explicit mention of the need, when collecting this data, to consider multiple identities. The Commission recommends that any guidance to public sector bodies on these new duties, makes it clear that, when reviewing and reporting on this data, they should consider multiple identities. The Commission has explicitly stated in its own monitoring guidance for public authorities under S75 of the Northern Ireland Act 1998, that they should consider the need to address multiple identities when specifying the data that the authority will need to gather.<sup>10</sup>
16. It should also be made clear to all public sector bodies subject to the proposed single equality duty, that they should consider the impact of their policies, decisions and practices on people with multiple identities. The need for such consideration was highlighted in the case of *R(Kaur and Shah) –v- LB Ealing* (The Southall Black Sisters case)<sup>11</sup>. In this case, it was alleged that a funding decision by Ealing Council which made it a requirement of funding that an organisation must provide service in a race/gender neutral way, had a disproportionate impact on black and minority ethnic women. The Court agreed that the Respondent had, throughout the process leading to the decision, failed to consider the impact on black and minority ethnic women.

## **Harassment**

17. The Commission is concerned that it is proposed to limit

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<sup>8</sup> Ibid p6

<sup>9</sup> Ibid p55

<sup>10</sup> *S75 Monitoring guidance –for use by public authorities*, ECNI, July 2007

<sup>11</sup> [2008] EWHC 2062

multiple discrimination claims to direct discrimination only and not to enable claims of harassment to be brought on a combined basis. The GEO has advanced two arguments to support this proposal; first, it is of the view that extending the provisions to include harassment could be unwieldy for businesses and organisations trying to ensure they comply with the multiple discrimination provision; and secondly, on the grounds that there is little evidence presented through the consultation that there was a need for such protection.

18. It is of note that a recent European Union survey<sup>12</sup> across Member States has revealed that Muslims aged 16-24 experience more discrimination in comparison with other age groups. In particular, 1 in 3 respondents in this age group said they had been discriminated against. In addition, on average 1 in 4 Muslim respondents were stopped by the police in the previous 12 months and 40% of these believed that this was specifically because of their immigrant or minority status. The research also highlighted that, on average 37% of Muslim respondents stopped by customs or border control in the previous 12 months believed that this was specifically because of their immigrant or minority background.
19. The Commission is concerned that if, for example, there was evidence that policies or procedures relating to stop or arrest by a law enforcement body when carrying out its public functions, amounted to harassment and had a disproportionate effect on young minority ethnic men, this specific impact on this group could not be argued in a multiple discrimination complaint.
20. Finally, the absence of an explicit reference to harassment (as regards multiple discrimination complaints) as a form of unlawful conduct under the Equality Bill, will mean that public bodies will not have to due regard to the need to eliminate this form of conduct, in pursuance of their single equality duty.

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<sup>12</sup>*European Union Minorities and Discrimination Survey, Data in Focus report- Muslims*, European Union Agency for Fundamental Rights, June 2009