

# **Equality Commission for Northern Ireland**

## **Gaps in equality law between Great Britain and Northern Ireland**

**March 2014**

### **Introduction**

This paper summarises the key gaps between equality law in Great Britain and Northern Ireland following the introduction of the Equality Act 2010 in Great Britain in October 2010. It also sets out the Equality Commission's views on the continuing impact of the lack of progress as regards steps to address deficiencies and to harmonise, simplify and strengthen Northern Ireland equality law. Further, it highlights the implications for Northern Ireland due to the widening gaps in equality law protection that have emerged between the two jurisdictions following the implementation of the Equality Act 2010 in Great Britain.

### **Key gaps between equality law in Great Britain and Northern Ireland**

The Equality Commission has consistently called for the urgent reform of the equality legislation in Northern Ireland. Pursuant to our duty under the equality legislation to keep this legislation under review we have made a number of recommendations for change. These include recommendations for change to the race equality legislation<sup>1</sup>, the disability legislation<sup>2</sup>, and the age discrimination legislation relating to the provision of goods and services<sup>3</sup>.

The need for reform of the equality legislation in Northern Ireland has been heightened by developments in Great Britain. In particular, the introduction of the Equality Act 2010 in Great Britain in October 2010 has addressed a

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<sup>1</sup> ECNI [Racial Equality Policy – Priorities and Recommendations](#), pages 3-6, 2013.

<sup>2</sup> ECNI [Strengthening Protection for Disabled People](#): Full and summary report, 2012.

<sup>3</sup> ECNI [Strengthening protection for all ages](#): Full and summary report, 2012.

number of the deficiencies which we highlighted in our recommendations for reform of Northern Ireland equality law; deficiencies that have not been addressed in Northern Ireland. It is important to note that prior to the Equality Act 2010, significant gaps between Great Britain and Northern Ireland equality law had already existed and these remain unaddressed in Northern Ireland<sup>4</sup>.

The Equality Act 2010, which came into effect in Great Britain in October 2010, was introduced in order to simplify, harmonise and strengthen GB equality law and to tackle new forms of discrimination and address deep-rooted existing inequalities<sup>5</sup>.

Its enactment, however, has resulted in significant differences between Great Britain 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.).

These differences also mean that there are varying levels of protection against discrimination across different parts of the United Kingdom; with less comprehensive and enforceable rights across a number of equality grounds for individuals in Northern Ireland.

These **key differences** between NI and GB equality law are summarised below<sup>6</sup>.

**Legislation harmonised and simplified:** The Equality Act 2010 addressed inconsistencies within the discrimination law framework in Great Britain so as to ensure uniform protection against discrimination across all grounds, where appropriate. For example, it harmonised the race equality legislation so that individuals have the same level of protection on the

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<sup>4</sup> For example, there is no protection under the sex equality legislation in Northern Ireland against discrimination by public bodies when exercising their public functions. This gap in protection was rectified in Great Britain prior to the Equality Act 2010.

<sup>5</sup> The provisions of the Equality Act 2010, apart from a few minor exceptions, only applied to Great Britain and did not change equality law in Northern Ireland. The majority of the Equality Act 2010 provisions came into force in October 2010. Some provisions, for example, those relating to outlawing age discrimination outside the workforce and provisions relating to the public sector equality duty, came into effect at a later date.

<sup>6</sup> The differences relate to the anti-discrimination legislation and do not include differences relating to the public sector duties on public authorities.

grounds of colour and nationality, as on the grounds of race, ethnic origin and national origin. It also harmonised protection from discrimination, harassment or victimisation in the exercise of public functions in relation to all equality grounds. In addition, it extended protection against discrimination in the exercise of public functions to the grounds of age, pregnancy and maternity and gender reassignment.

**Age discrimination outside the workplace:** The age discrimination legislation was extended in Great Britain to prohibit unjustifiable age discrimination against adults when accessing goods, facilities and services, or private clubs, and in the exercise of public functions<sup>7</sup>.

**Disability legislation strengthened:** The disability equality legislation was streamlined and strengthened in Great Britain. Changes include:-

- the replacement of the concept of ‘disability-related discrimination’ with protection against ‘indirect disability discrimination’ and ‘discrimination arising from disability’;<sup>8</sup>
- the definition of disability was amended to make it easier for disabled people to fall within the definition of disability;
- increased protection for disabled people against harassment when accessing goods and services;
- express protection for people, such as carers, friends or family members, who are subjected to direct discrimination or harassment due to their association with a disabled person or for individuals because they are wrongly perceived to be disabled<sup>9</sup>.
- questions by employers related to disability, prior to making a job offer, were prohibited except in specified circumstances;
- a new duty was placed on schools to make reasonable adjustments to auxiliary aids and services in respect of disabled pupils.

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<sup>7</sup> It will be noted that there is a commitment in the NI Executive’s Programme for Government 2012-2015 to introduce age discrimination legislation in the provision of goods and services. To date this legislation has not been introduced.

<sup>8</sup> 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.

<sup>9</sup> Protection against discrimination due to association and perception was also extended to the grounds of sex and gender reassignment.

**Equal pay provisions strengthened:** The equal pay legislation was strengthened in Great Britain to prohibit employers from preventing or restricting their employees from having discussions in order to establish if pay differences exist that are related to an equality ground (e.g. gender).

**Positive action measures extended:** Positive action measures were extended and harmonised in Great Britain so as to allow, but not require, employers and service providers to take a wider range of measures aimed at alleviating disadvantage experienced by under-represented groups across all equality grounds.

**Protection against discrimination by private clubs extended:** Protection against discrimination by private clubs in Great Britain was extended to cover additional equality grounds, including age and gender, religion or belief, pregnancy and maternity and gender reassignment.

It is important to stress that whilst a number of the changes we have recommended have already been introduced in Great Britain through the Equality Act 2010, in certain areas, we consider that the Equality Act 2010 has not gone far enough. We also therefore recommend a number of changes to legislation in Northern Ireland which go beyond the level of protection currently set out in equality legislation in Great Britain<sup>10</sup>.

## **Implications for Northern Ireland**

The lack of progress as regards steps to harmonise, simplify and strengthen Northern Ireland equality law and the resulting gaps in equality law between the two jurisdictions has had a number of important implications.

There are significant unjustifiable anomalies and complexities within the Northern Ireland equality legislation which need to be addressed. These anomalies and complexities have led to difficulties and confusion for those seeking to exercise their rights under the legislation and for those seeking to comply with the law, as well as a lack of consistency in protection

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<sup>10</sup> For example, we recommend Northern Ireland race equality law goes beyond the level of protection which currently exists in Great Britain in a number of areas; for example, by providing protection against intersectional multiple discrimination; strengthening protection for employees against third party racial harassment; increasing the powers of tribunals to make wider recommendations.

afforded to different equality groups. There is also a lack of legal certainty and **clarity** in a wide range of areas where the scope of the legislation is unclear.

Northern Ireland equality law also contains a number of unjustifiable exceptions which limit the scope of the equality legislation, as well as unnecessary barriers that limit individuals' ability to exercise their rights under the legislation. In addition, in some areas Northern Ireland equality law has failed to keep pace with new and emerging forms of discrimination and in these areas, individuals have no or limited protection against unlawful discrimination.

In addition, NI equality law, in certain areas is less likely to meet, and is potentially in breach of, the standards set out in international human rights conventions.

For example, in Great Britain, the Equality Act 2010 introduced protection against indirect discrimination and 'discrimination arising out of disability' in order to address the impact of the House of Lords' decision in *Malcolm*<sup>11</sup>; which restricted the ability of disabled people to claim disability-related discrimination.

The Joint Committee on Human Rights in Great Britain in its report on the UN Convention on the Rights of Persons with Disabilities (UNCRPD),<sup>12</sup> was of the view that the change in the law resulting from the *Malcolm* decision meant that the UK was "less likely" to meet its obligation under Article 5 of the UNCRPD<sup>13</sup>.

Further, a legal opinion obtained by the Equality Commission highlights that the "present situation in Northern Ireland, i.e. the application of *Malcolm* to disability discrimination law, renders Northern Ireland potentially in breach of the obligations under the Employment Framework Directive; and the UNCRPD"<sup>14</sup>.

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<sup>11</sup> [Mayor and Burgesses of the London Borough of Lewisham v Malcolm](#) [2008] UKHL 43.

<sup>12</sup> Joint Committee on Human Rights: [The UNCRPD, first report of session](#) 2008/09, Jan 2009, p.35.

<sup>13</sup> Article 5 of the UNCRPD prohibits discrimination on the basis of disability and guarantees disabled people equal and effective protection against discrimination on all grounds, It also contains an obligation to promote equality, eliminate discrimination and take appropriate steps to ensure that reasonable accommodation is provided for disabled people.

<sup>14</sup> Casserley C (2012), [The impact of 'Malcolm v London Borough of Lewisham'](#).

Whilst changes were introduced in Great Britain under the Equality Act 2010 to address the impact of *Malcolm*, no similar changes have been introduced in Northern Ireland.

In addition, it is of note that a number of international human rights monitoring bodies, including the *Advisory Committee on the Framework Convention for the Protection of National Minorities*<sup>15</sup> and the *UN Committee on the Convention for the Elimination of all forms of Racial Discrimination* (CERD) have urged the NI Executive to take proactive steps to address legislative shortcomings within the race equality legislation<sup>16</sup>.

The *UN Committee on CERD* has also expressed concern at the UK Government's response that Northern Ireland is responsible for developing its own equality legislative framework. It reminded the UK Government that the obligation to implement the provisions of the Convention in all parts of the territory is borne by the UK Government.

It made it clear that 'this makes the UK Government the duty bearer at the international level in respect of the implementation of the Convention in all parts of its territory notwithstanding specific governance arrangements that it may have adopted.' The UN Committee on CERD recommended that immediate steps were taken to ensure that a single equality law was adopted in Northern Ireland or that the Equality Act 2010 is extended to Northern Ireland.

More recently, the gap in legal protections between Great Britain and Northern Ireland has also been criticised by the *Committee on the UN Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), which expressed concern that women in Northern

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<sup>15</sup> See [Third opinion on the UK, of the Advisory Committee on the Framework Convention for the Protection of National Minorities, June 2011](#). The Advisory Committee expressed concern that, despite the commitment undertaken in the St Andrew's Agreement, there had been no progress made towards adopting comprehensive equality legislation in Northern Ireland. In addition, it highlighted that Northern Ireland legislation remains 'complex and piecemeal' and was concerned about the significant discrepancies and inconsistencies that exist between Great Britain and Northern Ireland. The Advisory Committee 'urged the authorities to adopt harmonised, comprehensive anti-discrimination legislation in Northern Ireland in order to put an end to the disparity in protection against discrimination that exists between Northern Ireland and Great Britain'. Available at [Specific monitoring in United Kingdom of the implementation of the Framework Convention for the Protection of National Minorities \(coe.int\)](#)

<sup>16</sup> [Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK](#), (2011) and [Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK](#), (2003).

Ireland did not have the same remit of equality protections as compared to their counterparts in other parts of the UK. It also expressed concern that certain provisions of the Equality Act 2010 had not come into force<sup>17</sup>.

The range of gaps in equality law between the two jurisdictions have the effect that vulnerable and marginalised individuals in Northern Ireland who experience discrimination have less protection against unlawful discrimination, harassment and victimisation across a number of equality grounds than their counterparts in GB.

Further, 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 also have to keep track of their responsibilities under differing legislative frameworks, as well as case-law emerging from separate legislative provisions.

The Equality Commission considers that the above demonstrates a clear need for the urgent reform of the equality legislation in Northern Ireland

**6 March 2014**  
**Equality Commission**

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<sup>17</sup> [Concluding Observations on UK](#), CEDAW Committee, 26 July 2013.