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National Consultative Committee on Racism and Interculturalism

Submission on the Equality Bill 2004

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Introduction

The NCCRI welcomes the publication of the Equality Bill 2004, both as a reflection of commitment to a European anti-discrimination agenda, as well as an instrument to strengthen existing Irish provisions. This Bill marks an important step in a process which is a relatively new one in the Irish context, and serves to demonstrate Ireland's commitment to combating discrimination. In the context of the Irish Presidency, the Bill provides an example to those EU member States who have not yet implemented Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

The Race Directive provides a broad framework for the implementation of measures to combat racism and discrimination, though as is in the nature of Directives, it leaves the exact detail of implementation up to individual States. The Directive generally reflects the approach which has been adopted in Ireland, though there are key areas of implementation which need to be addressed. It is the Equality Bill 2004 which seeks to close these gaps.

No prohibition of discrimination can be absolute, and any system of equality law must provide for exceptions in appropriate circumstances. The NCCRI recognises that anti-discrimination legislation must be flexible in its approach to specific key areas, however it is concerned that such exemptions should not undermine the broader goal of a comprehensive and multi-ground approach to tackling discrimination in Ireland. In recent weeks a number of areas of concerns have been brought to the attention of the NCCRI. This submission seeks to highlight the range of these concerns, particularly with regard to their applicability to discrimination against minority ethnic groups, including the Traveller community.

This submission does not represent a detailed legal analysis of the Equality Bill 2004, but in its capacity as an advisory body the NCCRI seeks to highlight the range of concerns, and place them in the broader policy context.

Equality Bill 2004

The Equality Bill 2004 amends a number of provisions of the Employment Equality Act 1998 (EEA) and the Equal Status Act 2000 (ESA) to give effect to Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation and Directive 2002/73/EC amending Council Directive 76/207/EC on the implementation of the principle of equal treatment for men and women. The intention of the Bill is stated to be to preserve the comprehensive and multi-ground approach to equality of the two Acts by transposing the Directives in a way which, where possible and appropriate, applies their provisions to each of the nine grounds and to both the employment and service provision areas.

The Equality Bill 2004 brings existing legislation into line with the Directive in the following areas:

- The definition of discrimination

- The definition of indirect discrimination
- The definition of harassment
- Including self-employment/partnerships within the scope of the EEA
- The definition of occupations qualifications
- Shift in the burden of proof

The NCCRI is concerned about the manner in which the Bill has been introduced. According to a European Commission paper on the state of play on the implementation of the Race Directive in Ireland produced by Dave Ellis in September 2003, ‘there has been virtually no public debate on the Directive’. While the paper does acknowledge that this may in part be due to the fact that many of the issues raised by the Directive have already been the subject of debate at the time of the passing of the EEA and the ESA, the NCCRI believes that the opportunity for debate would serve to highlight to provisions of the Directive.

However since the publication of the Bill a number of concerns have been expressed regarding its content. These include:

- NGO Representation
- Sanctions/Compensation
- Domestic workers
- Education
- Public order defence
- Housing
- Action required by an enactment or order of a court
- Defence of Rights
- Misconceived claims
- Religious discrimination

NGO Representation

The Directive requires member states to ensure that associations, organisations and legal entities with a legitimate interest may engage in judicial remedies and administrative procedures on behalf or in support of a claimant. The NCCRI is concerned that the Equality Bill 2004 fails to address this provision.

Sanctions/Compensation

The Bill fails to address the present limitations imposed on the maximum level of compensation under the EEA and the ESA. The maximum amount which may be ordered by the Director by way of compensation shall be the maximum amount that could be awarded by the District Court in civil cases.

The ongoing levels of cases of discrimination at work reported by the ODEI – The Equality Tribunal may indicate that existing sanctions are insufficient. Consequently it may be that existing sanctions are not effective, proportionate and dissuasive, in line with the provisions of the Directive.

Domestic workers

Section 3 excludes from the protection of the EEA a person 'employed in another person's home for the provision of personal services'. 'Personal services' are defined as 'such services provided in a person's home', this definition includes but is not limited to services that are in the nature of services in loco parentis or involve caring for those residing in the home'.

Concerns have been raised regarding the scope of this provision. The definition of 'personal services' is unclear, and should be drawn out more definitively, for example does it apply to home help, child care workers, care attendants, social care workers, cleaners, housekeepers, etc?

The NCCRI welcomes the amendments made in the Seanad which eliminate some of the original exemptions for individuals working in the home.

Education

The Bill leaves section 37.1 of the EEA in force. This section allows a religious, educational or medical institution under the direction or control of a religious body to discriminate in order to maintain its religious ethos. This subsection does not contain any requirement that where difference in treatment based on a person's religion or belief, that religion or belief should constitute a genuine, legitimate and justified occupational requirement.

Section 7 of the ESA is amended with the addition of a subsection which states that the Minister for Education and Science does not discriminate where he/she requires grants to be restricted to nationals of a member State of the EU. A submission by the Free Legal Advice Centres (FLAC) on the Equality Bill 2004, concludes that it is very disappointing that rather than take into account the recommendations of the ODEI-The Equality Authority (that the government remove the nationality restriction) the government has chosen to approach the matter by amending the ESA.

Public order defence

The provisions of the ESA in relation to what is commonly known as the 'public order defence' and the exclusion of actions taken in good faith by publicans seeking to apply the licensing laws are not amended by the Bill. Section 15 of the ESA states that 'action taken in good faith by or on behalf of a licence or other authorisation which permits the sale of intoxicating liquor, for the sole purpose of ensuring compliance with the provisions of the Licensing Act, 1833 to 1999, shall not constitute discrimination.'

Concern has been expressed that limiting the justification of discrimination to actions taken in good faith, does not provide sufficient safeguards against discrimination. Section 15 has been identified as highly subjective, an individual is allowed to discriminate in 'good faith' even if that 'good faith' is based on prejudice and stereotypes.

Housing

Section 46 of the Bill provides for the exclusion of ‘the provision of accommodation by a person in a part (other than a separate and self-contained part) of the person’s home, where the provision of the accommodation affects the person’s private or family life or that of any other person residing in the home’.

While recognizing the right to privacy in the family home in terms of having the ability to choose who one will live with, similar to the provisions relating to domestic workers it is unclear why this exception has been extended to the provision of accommodation once a tenant has been selected, and has signed a contract with their landlord.

Section 6.6 provision of the ESA allowing public housing authorities or voluntary housing associations to treat certain categories differently has not been extended to the race ground.

Action required by an enactment or order of a court

Section 49 of the Bill states that ‘any action taken in accordance with any provision or condition made by or under any enactment, or made otherwise by a public authority, and governing or arising from the entry to and residence in the State of persons who are not nationals or a category of such persons’.

This provision may affect individuals who are legally resident in Ireland, for example asylum seekers. FLAC has stated that in its opinion ‘to remove the protection of the Equal Status Act from a particularly vulnerable category such as asylum seekers in relation to their dealing with public authorities is a severe undermining of the intent and purpose of the Equality legislation’.

Defence of Rights

There is no provision in the Bill for cases to be taken by NGOs etc. on behalf of complainants under either the EEA or the ESA. In many jurisdictions the importance of providing a range of supports to claimants has been formalised within the anti-discrimination system. Central to these supports is the provision to allow representative organisations to take cases on behalf of claimants.

Misconceived claims

Section 32/53 allows the Labour Court to dismiss a ‘misconceived’ claim. The Bill states that ‘The Director or the Labour Court may dismiss a claim at any stage if of the opinion that it has been made in bad faith or is frivolous, vexatious or misconceived or relates to a trivial matter’.

Concerns have been expressed by a number of actors that this provides disproportionate power to the Court to determine prior to adjudication whether a case, which has up to then been valid, is in fact misconceived. It has been argued that this provision is a further restriction on the exploration of the limits of the legislation and its interpretation.

Religious discrimination

In relation to Directive 2000/78/EC, the Bill leaves Section 37.1 of the EEA in force. This section allows a religious, education or medical institution under the direction or control of a religious body to discriminate in order to maintain its religious ethos.

The section does not qualify this exemption in line with the Race Directive, that occupational requirement be a genuine, legitimate and justified.

Clarification

In terms of the specific concerns which have been expressed in relation to the Equality Bill 2004, the NCCRI would welcome further clarification and debate on the following questions:

- What is the position with regard to domestic workers in terms of the range of its applicability and the protections which exist for such workers?
- What is the scope of a 'misconceived claim'?
- Will the recent decision by The ODEI – The Equality Tribunal in terms access to third level grants be reflecting in education provision?
- Can the existing practice whereby NGOs can support claimants be formalised in terms of a provision for representative claims?
- How will the 'good faith' provision in relation to public order offences be qualified in order to ensure that such good faith cannot be based on prejudicial belief?
- How can the religious discrimination exemption be qualified in terms of genuine, legitimate and justified occupational requirements?

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