



## **EQUALITY COMMISSION FOR NORTHERN IRELAND**

### **Response to DTI Consultation on Proposals to Outlaw Sexual Orientation Discrimination in the Provision of Goods & Services**

**JUNE 2006**

#### **Introduction**

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 fair employment, 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.
2. The Commission’s general duties include:-
  - Working towards the elimination of discrimination;
  - Promoting equality of opportunity and encouraging good practice;
  - Promoting positive/affirmative action;
  - Promoting good relations between people of different racial groups;
  - Overseeing the implementation and effectiveness of the statutory duty on relevant public authorities; and
  - Keeping the legislation under review.
3. The Commission welcomes the opportunity to respond to the DTI consultation paper ‘Getting Equal: Proposals to Outlaw Sexual Orientation Discrimination in the Provision of Goods & Services’. The Commission when responding to this consultation, draws on the unique experience it has gained from

its role in enforcing in Northern Ireland the Employment Equality (Sexual Orientation) Regulations (NI) 2003 and in implementing the statutory duties under Section 75 of the Northern Ireland Act 1998 across nine equality grounds including sexual orientation.

The Commission would also welcome the opportunity at a later date to be consulted in relation to any draft Regulations which may be produced as a result of this consultation exercise. In addition, it will be noted from the Commission's response that it seeks clarification in relation to a number of the proposals contained within this consultation paper.

The Commission also intends to respond in detail to the consultation paper due to be issued shortly by the Office of the First Minister and the Deputy First Minister, which will set out the proposed scope and effect of Northern Ireland Regulations; Regulations which, once implemented, will fall within the Commission's remit.

As regards the structuring of this response, this paper deals in turn with the specific questions raised in the consultation paper. At the end of this paper, the Commission makes a number of recommendations for change specifically in the area of sexual orientation, which, although outside the scope of the consultation paper, outline proposals for further reform of sexual orientation equality law and other related legislation.

For ease of reference, the proposed new sexual orientation discrimination Regulations are referred to as the 'new Regulations', and the Employment Equality (Sexual Orientation) Regulations 2003 are referred to as the '2003 Regulations'.

## **Question 1**

### **Do you agree that the new sexual orientation Regulations should apply to goods, facilities and services?**

The Commission welcomes the proposed extension of the sexual orientation legislation to include prohibition on discrimination on the grounds of goods, facilities and services and in the exercise of public functions. It also welcomes the proposal that the prohibition will apply to housing, education in schools, advertising and clubs,

where those activities are not otherwise caught by the general goods, facilities and services provisions.

## **Question 2**

### **Should the concept of goods, facilities and services have the same scope as in other equality legislation, in particular Part 2 of the Equality Act 2006?**

On a broad basis, the Commission recommends that the new Regulations should reflect the 'best standards' within the existing regimes. In addition, subject to the need for justifiable exceptions and variations in certain equality areas, the new Regulations should offer the same level of protection to those who have rights under this legislation as that enjoyed by members of other groups protected under other equality legislation.

The Commission promotes a 'common template' across the equality legislation setting out common principles, exceptions and means of redress. The Commission is committed to 'equality of the inequalities' though it recognises that the differing nature of equality law grounds justifies variations of the 'common template'

In relation to the various proposals contained in the consultation paper, the Commission has commented in detail on the extent to which provisions contained in other equality legislation should be reflected in the new Regulations.

As regards the specific question on whether the scope of the goods, facilities and services provisions in the new Regulations should reflect that of Part 2 of the Equality Act 2006 ('the Equality Act'), the Commission notes that the illustrative list of examples contained in Part 2, does not, unlike the race and sex equality legislation refer to 'facilities for education'. In addition, unlike the race and sex equality legislation, the illustrative list does not make it clear that the services of a public authority are covered. The Commission asks the Government to consider whether in the interests of clarity and consistency with other equality legislation, the new Regulations should make it clear that these two areas are included within the scope of the goods, facilities and services provisions.

### **Question 3**

**Do you agree that we should provide an exemption from the prohibition on sexual orientation discrimination so that services to meet a specific and justified need can be provided separately to different groups on the basis of their sexual orientation? What specific activities would such an exception need to apply to?**

In line with other equality legislation, the Commission agrees with the proposed exception to the legislation to allow individuals and organisations to limit access to their goods, facilities or services to persons of a particular sexual orientation in order to meet a specific justifiable need.

As regards the specific activities the exemption should apply to, it is proposed that the specific activities should mirror those contained in the race equality legislation and Part 2 of the Equality Act; namely education, training or welfare and the provision of ancillary benefits.

### **Question 4**

**Do you agree that premises should be covered by the sexual orientation regulations?**

In line with other equality legislation, the Commission welcomes the fact that discrimination in the disposal and/or management of premises will be covered by the new Regulations. Although not specifically referred to in the consultation paper, it is assumed that this prohibition on discrimination will also apply to circumstances where a person's permission is required for the disposal of another person's interest in a property.

### **Question 5**

**Do you agree that an exemption should be provided for selling or letting of private dwellings as described in this consultation paper?**

The Commission accepts, in line with a similar exception in other equality legislation, that there should be a qualified exception in the

new Regulations to allow people to choose whom they live with in their own homes. The consultation paper sets out the circumstances in which this exemption can be relied upon. The paper has also made it clear that this exception will not apply to the letting of rooms in a private home that is being used on a commercial basis, such as a bed and breakfast or guesthouse.

## **Question 6**

**Do you agree that private members clubs should be included in the sexual orientation regulations?**

In line with the protection afforded in other equality legislation, the Commission welcomes the proposal to prohibit discrimination by private members clubs in the new Regulations.

## **Question 7**

**What is your view on our proposal that both private members clubs and associations should be permitted to include having a particular sexual orientation as a membership criterion, but only where this criterion is explicitly connected to the purpose for which the club has been established.**

The Commission agrees that the new Regulations should contain an exception allowing private members clubs that exist primarily for the benefit of persons of a particular sexual orientation, to restrict membership to persons of that particular sexual orientation.

The Commission does not agree that this exception should apply to 'informal associations' as defined by the consultation paper. It is already proposed, as outlined in question 3 above, that the new Regulations will contain an exemption from the prohibition on sexual orientation discrimination so that services to meet a specific and justified need can be provided separately to different groups on the basis of their sexual orientation. The Commission has proposed that the specific activities covered by the exemption, should mirror those contained in race equality legislation and Part 2 of the Equality Act: namely education, training or welfare and the provision of ancillary benefits.

## Question 8

**Do you agree that the new sexual orientation regulations should apply to public functions as well as to goods, facilities and services? Do you think that any specific additional exceptions might be needed from a prohibition on sexual orientation discrimination in the exercise of public functions?**

The Commission welcomes the proposal to make it unlawful for a public authority to discriminate on the grounds of sexual orientation in carrying out its functions. The consultation paper makes it clear that these provisions will apply to activities carried out by public authorities that are not otherwise caught by the general goods, facilities and service provisions. The paper also clarifies that this prohibition on discrimination will apply to anyone exercising a public function, including where the function is being undertaken by a private or voluntary body on a public authority's behalf.

## Question 9

**Do you agree that schools should be covered by the sexual orientation regulations?**

The Commission welcomes the proposal to extend the protection against unlawful discrimination on the grounds of sexual orientation to include access to, and provision of, education in all schools (both maintained and independent).

It notes that it is proposed that the new Regulations will prohibit schools from discriminating in relation to their admission policies, access to privileges or opportunities, disciplinary policies etc.

The Commission is disappointed to note, as indicated in paragraph 3.28, that 'the behaviour of pupils towards each other will not be caught directly by this legislation'. Instead it is proposed that if a school fails to deal with homophobic bullying as firmly as any other kind of bullying, e.g. racist bullying, they may be vulnerable to a claim of discrimination under the new Regulations. This position means that if a school chooses not to treat homophobic harassment (as well as any other form of harassment) between pupils seriously, a Lesbian, Gay or Bisexual ('LGB') pupil who is subjected to

harassment by other pupils, cannot bring a complaint against the school under the new Regulations.

The Commission notes that in the Republic of Ireland, the Equal Status Acts provide that a person who is responsible for the operation of an educational institution must ensure that any person who has a right to be there is not harassed. 'The responsible person' is liable for the harassment unless he or she took reasonably practicable steps to prevent it. This would make an educational institution liable for the harassment of pupils by other pupils on a prohibited equality ground unless it took reasonably practicable steps to prevent the harassment occurring.

### **Question 10**

**Are there any circumstances in which you consider that schools, or a part of the schools sector, should be exempted from the regulations.**

The consultation paper has sought views on whether teaching in schools should be covered by the new Regulations.

The Commission is of the view that all exceptions to the equality legislation should be narrowly construed and justified.

The paper refers to the fact that Government guidance has been provided for maintained schools which makes it clear that teaching, particularly in subjects such as Personal, Social and Health Education, 'should meet the needs of all young people whatever their developing sexuality'. The paper also states that guidelines allow schools to 'exercise appropriate flexibility to ensure that the subjects they are obliged to teach can be taught in a way that is relevant and appropriate to the school's ethos and with which the individual teacher feels comfortable'.

The paper concludes that it is the intention to use the 'current statutory and non statutory framework to ensure that schools in the maintained sector deal appropriately with subjects and situations where sexual orientation is a relevant issue'. The Commission is not clear whether or not it is proposed to include an exception as regards the curriculum which will apply to all schools (maintained and independent) or solely to maintained schools. The Commission

is also unclear whether it is proposed that such an exception will apply to both faith and non-faith schools or solely to faith schools.

As regards an exception in relation to the curriculum for faith schools, the Commission recognises that the purpose of such an exception is to allow faith schools to teach subjects that deal with sexuality in a way that is relevant and appropriate to their ethos. However the Commission asks the Government to consider whether there is a tension between the inclusion of such an exception and the recommendation in its guidance that teaching should meet the needs of all young people whatever their developing sexuality. For example, can a school or teacher that teaches that homosexuality is deviant or sinful behaviour be deemed to be meeting the needs of a gay or lesbian pupil?

In addition, the Commission asks the Government to consider whether such teaching could be deemed to amount to harassment of a LGB pupil or create an environment in the class/school which makes a LGB pupil more susceptible to homophobic bullying by other pupils (either on the grounds of his/her actual or perceived sexual orientation or on the grounds of the actual or perceived sexual orientation of the pupil's parents/associates).

In the Commission opinion, the main difficulties faced by LGB pupils at schools do not relate, for example, to the application of a school's admission policies or disciplinary policies, but arise out of isolation, loneliness, fear of rejection, harassment and the problems associated with being 'invisible'.

Research undertaken in Northern Ireland has confirmed this. For example, in 2003, research commissioned by the Department of Education and carried out by Youthnet, focused on the experiences of young people in the youth and education sectors, including those at school and in further and higher education. The findings of this research were startling; 35% of LGB young people surveyed stated that they had been subjected to physical abuse; 65% had experienced verbal abuse; 29% had attempted suicide; 44% of respondents said they had been bullied at school because of their sexual orientation; 33% of students and pupils believed they had achieved lower results because of their sexual orientation.

The problems faced by LGB individuals at school have also been recently highlighted by the Equalities Review in its interim report. It



has identified the educational attainment of LGB teenagers who have suffered homophobic bullying as one of the 'persistent and disturbing challenges for the task of reducing inequality and increasing fairness'. It should also be noted that in its summary report on 'The call for evidence', the Equalities Review states that one of the top priorities for the Review suggested by respondents, was 'action in schools both to educate pupils about discrimination and to combat the impact of policies and practices within schools that are seen as having a harmful effect on minority groups'. In the Commission's view, schools have the potential to play a pivotal role in delivering equality and challenging prejudice and discrimination in the wider society.

The Commission also believes that schools, both at the primary and secondary level, should be proactively addressing homophobic harassment both of pupils and staff.

In addition, as part of this consultation exercise, the Commission assumes that the Government will take into account views on the extent to which such an exception, if applied to non-faith and faith schools, is considered compatible with the human rights legislation; for example, the degree to which it is consistent with the Article 2 Protocol 1 (the right to an effective education) and Article 14 (the right to enjoy the rights and freedoms set out in the Convention without discrimination) of the European Convention on Human Rights as enshrined in the Human Rights Act 1998.

The Commission also assumes that it will take into account views on the extent to which such an exception is deemed consistent with the United Nations Convention on the Rights of the Child (UNCRC); for example, the degree to which it is deemed compatible with the following principles enshrined in the UNCRC; Article 2 (right to enjoy rights in the UNCRC without discrimination); Article 3 (that the best interests of the child must be a primary consideration); Article 6 (need to ensure to the maximum extent possible the survival and development of the child); Article 12 (the right of a child to express views and those views to be given due weight); Article 17 (access to information and material, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health); and particularly Article 28 (the right to education) and Article 29 (the aims of education).

The Commission notes that in the Republic of Ireland, the Equal Status Acts prohibit unlawful discrimination by educational establishments, including schools. No specific exemption was deemed necessary as regards the curriculum either for faith or non faith schools.

### **Question 11**

**Are there any areas of activity for schools for which you consider special provision needs to be made?**

The consultation paper asks whether any special provision needs to be made to enable faith schools both in the maintained and independent sectors, 'to balance the new obligations that they will have under the new Regulations with their need to operate in a way that is consistent with their school's ethos'.

The Commission has indicated above the various issues that need considered when considering an exception as regards the curriculum for faith schools. It is of the view that there is no justification for excluding any other areas of activities or services performed by faith schools, either in the maintained or independent sectors.

### **Question 12**

**Do you consider that an exemption should be provided from the regulations for some of the activities of religious organisations?**

The Commission notes that it is proposed to have an exception for religious organisations in relation to 'activities closely linked to religious observance or practices that arise from the basic doctrines of a faith'. The paper mentions in particular activities such as 'worship, teaching and preaching, officiating in marriage, conducting baptisms and giving sacraments to members of their religious community.' The Commission assumes that such an exception will cover the content of and access to those activities. If such an exception exists, it will therefore not permit a religious organisation to refuse membership to a LGB individual, but it will allow the

organisation to restrict that individual from attending or participating in certain activities.

If such an exception is included in the new Regulations, the Commission argues that it should not permit religious organisations to discriminate against a person because of the actual or perceived sexual orientation of that person's parents, friends or other associates.

As stated earlier in this response, the Commission believes that all exceptions should be both narrowly construed and justifiable. The Commission is concerned that the wording 'activities closely linked to religious observance or practices that arise from the basic doctrines of a faith' is not sufficiently precise and will lead to uncertainty and confusion about which activities are lawfully covered by this proposed exception. Could, for example, a religious organisation claim that its charitable work was a practice that arises from the basic doctrines of its faith? If such terminology is used, is it the Government's intention to give an illustrative list of the type of activities it considers this exception will apply to?

The Commission also seeks clarification, if this exception is to be included in the new Regulations, as to whether the wide definition of 'religious organisations' as outlined in Part 2 of the Equality Act, will be adopted in the new Regulations. The Commission is concerned that such a broad definition, coupled with a lack of clarity about the scope of the activities covered by the exception, will lead to unjustifiable discrimination.

The Commission also notes that there is no indication that a religious organisation, in order to rely on the proposed exception, must show the following: that the restriction on accessing certain activities is required in order to comply with the doctrines of the religion or so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers. The Commission seeks clarification as to whether such a caveat to the operation of the exception is proposed.

The Commission welcomes the fact that it is not proposed to exempt activities that are provided by an organisation related to religion or belief, or by a private individual who has strongly held religious beliefs, where the sole or main purpose of the organisation offering the service is commercial.

The Commission also welcomes the proposal that churches, charities or other similar groups with a religious ethos, that are contracted by a public authority to deliver a service on its behalf will not be allowed to discriminate.

The Commission notes that in the Republic of Ireland there is no specific exemption on the ground of sexual orientation under the Equal Status Acts as regards religious organisations.

### **Question 13**

**Do you agree that these exemptions should be restricted to activities that are primarily doctrinal? If there are any other activities that you consider should be covered by an exemption, what are these and why do you consider that the need to be exempted?**

The Commission has outlined above its concerns about the proposed exception relating to activities closely linked to religious observances or practices that arise out of the basic doctrines of a faith. The Commission believes that there is no justification for any other activities carried out by religious organisations to be excluded from the new Regulations.

### **Question 14**

**Do you agree that an exception should be provided for charities that provide services specifically to people because of/according to their sexual orientation?**

In line with other equality enactments, the Commission agrees that the new Regulations should contain an exception allowing charities, in pursuance of the provisions of a charitable instrument, to restrict benefits to persons of a particular sexual orientation.

As stated in its reply to question 12, the Commission welcomes the proposal that charities with a religious ethos, that are contracted by a public authority to deliver a service on its behalf, will not be allowed to discriminate.

## Question 15

**Do you agree that the sexual orientation regulations should include direct and indirect discrimination as well as victimisation? Are there any particular considerations or situations that should be taken into account in how such provisions are drafted?**

Subject to the points raised below, the Commission broadly welcomes the proposal to include direct and indirect discrimination and victimisation within the scope of the new Regulations. It notes that discrimination 'on grounds of sexual orientation' will, in line with the 2003 Regulations, cover discrimination because of a person's actual or perceived sexual orientation as well as discrimination against a person by reason of the sexual orientation or perceived sexual orientation of a person with whom s/he associates. The Commission agrees, in line with the amended 2003 Regulations, that the new Regulations should provide that a civil partner can bring a direct discrimination claim against providers of goods, facilities and services where they are treated less favourably than a married person in similar circumstances.

### **Indirect Discrimination**

The Commission notes that it is proposed to include indirect discrimination in the new Regulations. The consultation paper indicates that discrimination will occur if a 'particular disadvantage' is suffered or there is a 'disproportionate adverse effect' on persons of a particular sexual orientation as compared to persons who are not of that orientation. On the basis that the words 'particular disadvantage' as oppose to 'disadvantage' are used, the Commission assumes, as regards the definition of indirect discrimination, that the new Regulations will adopt a similiar approach to that taken in the 2003 Regulations (which refers to 'particular disadvantage') rather than in Part 2 of the Equality Act (which refers simply to 'disadvantage').

The Commission also assumes, as regards the justification test, that the new Regulations, in line with the 2003 Regulations, will refer to a 'proportionate means of achieving a legitimate aim' rather than the approach taken in Part 2 of the Equality Act which refers to a reasonably justifiable test. The Commission is of the view, in the

interests of consistency, that the definition of indirect discrimination in the new Regulations, should reflect that in the 2003 Regulations.

## **Victimisation**

Subject to the points raised below the Commission welcomes the proposal to include protection against victimisation in the new Regulations. Although not specifically referred to in the consultation paper, the Commission assumes that the protection against victimisation will also apply where 'A' suspects that 'B' has done or intends to do any of the actions listed and will therefore mirror the protection against victimisation as outlined in the 2003 Regulations and in other equality legislation.

## **Harassment**

The Commission notes that it is not proposed at this stage to include a definition of harassment in the new Regulations. Instead, the intention is to publish later this year, a consultation paper setting out the initial conclusions of the DLR – including potential approaches to harassment across all discrimination grounds. The paper refers to the fact that there was concern during the passage of the Equality Act about the difficulty in establishing the threshold for what would constitute harassment by a goods or service provider.

The Commission is aware of the difficulties surrounding the definition of harassment which arose during Parliamentary discussions on Part 2 of the Equality Act. The Commission seeks further clarification as to why it is considered that the difficulties faced in this area on the ground of religion and belief, also apply to the same extent to the ground of sexual orientation.

In addition, a failure to include a specific definition of harassment in the new Regulations will lead to the anomalous situation whereby such a definition will exist in the 2003 Regulations but not in the new Regulations. It also leads to further inconsistencies between the equality enactments in that harassment is specifically defined in the area of goods, facilities, services, education etc. under the race equality legislation, but not in those areas as regards religion and belief or sexual orientation.

Harassment on the grounds of sexual orientation in the area of goods, facilities, services, the exercise of public functions, housing, education in schools and other areas, is a major issue for members of the LGB community. The Commission is of the view that effective and clear legislative provisions are required in order to ensure maximum protection against such discriminatory conduct.

The Commission recognises that a failure to include a definition of harassment in the new Regulations does not mean that a complaint of harassment cannot be taken. A case can still be brought if a service provider treats a person less favourably on the grounds of sexual orientation by refusing to provide that person with goods, facilities or services in a manner which is the same as or similar to that normally provided to the public. However, in the absence of a definition of harassment, persons alleging harassment under the new Regulations, will have to satisfy the comparator test.

In addition, if a definition of harassment was to be included, it would have to be open to the legislature (should the new Regulations allow for an exception as regards the teaching in schools) , to permit an exception as regards the curriculum, but make it clear that harassment on the grounds of sexual orientation was unlawful.

The Commission regrets that it is not proposed to include a definition of harassment in the new Regulations. It believes there is an urgent need for an agreed definition in order to ensure a degree of clarity about the standards and tests to be applied in harassment cases. There is also an urgent need to address, should a definition not be included, the unsatisfactory situation that there will be a lack of consistency, as regards the test of harassment, between the 2003 Regulations and the new Regulations, as well as tests adopted in other equality legislation.

In the Commission's view, rather than await the outcome of the debates surrounding harassment, a similar definition to that contained in the 2003 Regulations should be incorporated into the new Regulations, in order to ensure firstly consistency between the two Regulations and to ensure some clarity about the standards and tests to be applied in harassment cases.

## **Question 16**

**Do you agree that discriminatory practice should be included in the scope of the sexual orientation regulations?**

The Commission welcomes the proposal to make it unlawful under the new Regulations to operate a practice which results in unlawful discrimination or which is likely to result in unlawful discrimination if applied to persons of a particular sexual orientation. It also welcomes the proposal to grant the Commission for Equality and Human Rights ('CEHR') enforcement powers in relation to such discriminatory practices.

## **Question 17**

**Do you agree that discriminatory advertising should be included in the scope of the sexual orientation regulations?**

The consultation paper indicates at paragraph 4.21, that the 2003 Regulations make it unlawful to publish an advertisement, or to cause an advertisement to be published, which indicates (expressly or by implication), an intention by any person to discriminate. It states that it is the intention to maintain this approach in the new Regulations, making it unlawful to publish an advertisement that can reasonably be understood to indicate the intention to act in a way that is discriminatory.

In the Commission's view, there is no specific provision in the 2003 Regulations that makes it unlawful to publish an advertisement or to cause an advertisement to be published. It is accepted that employers who publish discriminatory advertisements for recruitment purposes may be held to discriminate as regards the 'arrangements' made for the purposes of determining who should be offered that employment. In addition a publisher of an unlawful advertisement may be held to have 'unlawfully aided' an act provided s/he had 'knowingly' done so.

The Commission welcomes the proposal to include the publishing of discriminatory advertisements in the new Regulations and urges the Government to urgently address the fact that the publishing of a discriminatory advertisement is not specifically prohibited under the 2003 Regulations.



The Commission also notes that in line with other equality enactments, it is proposed that enforcement action in relation to discriminatory advertisements is to be pursued by the CEHR exclusively, rather than by an individual through the court. The Commission welcomes the extension of this power to the CEHR, but notes that the Equality Act has not provided for the CEHR to have a similar enforcement power as regards the publishing of discriminatory advertisements under the 2003 Regulations. The Commission is of the view that this anomaly should be urgently addressed.

### **Question18**

#### **Do you agree that instructions to discriminate should be covered by the sexual orientation regulations?**

The Commission welcomes the proposal to make unlawful the act of instructing another to discriminate or causing another to discriminate under the new Regulations. The Commission notes however, that similar to publishing unlawful advertisements, the 2003 Regulations do not specifically prohibit instructing or pressurising a person to discriminate. Although not specifically referred to in the consultation paper, in line with other equality legislation, it is assumed that the CEHR solely will be granted the power to take enforcement action in relation to persons who give instructions or pressurise others to unlawfully discriminate under the new Regulations.

The Commission notes that the Equality Act does not either make instructing or pressurising another to unlawfully discriminate unlawful nor grant the CEHR power to enforce such a provision in relation to the 2003 Regulations. In order to ensure consistency with other equality legislation, and with the new Regulations, the Commission urges the Government to urgently amend the 2003 Regulations to address this anomaly.

### **Question 19**

#### **Do you agree that validity of contracts should be covered by the sexual orientation regulations?**

In line with the protection afforded in other equality enactments, the Commission welcomes the proposal to include a provision that will ensure that a term of a contract is void in the following

circumstances; where it provides for an act which is made unlawful by the new Regulations, where it is included to further an unlawful act or where its inclusion renders the making of the contract unlawful.

## **Question 20**

**Do you agree that the enforcement provisions for the sexual orientation regulations should match those for the other equality enactments?**

The Commission notes that in line with the time limits set out in the Equality Act for the lodgment of proceedings relating to discrimination on the grounds of religion or belief in the provision of goods, facilities and services, that complaints brought under the new regulations must be lodged within six months of the alleged unlawful act, or if later, with the permission of the court.

## **Question 21**

**Do you have any comments on the Government's plans for how the sexual orientation regulations will be enforced and supported by the CEHR?**

The consultation paper makes it clear that the CEHR will have the power to grant legal assistance to individuals. The Commission notes (paragraph 59) that it is expected that the CEHR will use its resources 'sparingly and strategically, supporting those cases likely to clarify the law'. The Commission suggests that the CEHR should use its resources 'effectively and efficiently' rather than 'sparingly'.

As regards the supporting of cases which 'clarify the law', it should be noted that the Equality Act does not specifically list the criteria to be used by the CEHR when deciding which cases to support and the explanatory notes to the Equality Act confirm that the CEHR will determine the criteria on which legal assistance is to be granted. Although clarification of the law may be an important factor as regards the granting of assistance, the Commission suggests that it is not the sole criterion.

The consultation document also mentions that the CEHR will be able to provide advice and guidance and be able to issue a Code of Practice in respect of the new Regulations. In addition, it indicates that the CEHR will have a 'suite of enforcement powers' including powers to conduct investigations, apply for injunctions (interdict in Scotland) and make arrangements for the provision of conciliation services.

Although not specifically referred to in the consultation document, the Commission notes that the CEHR, in pursuit of its duties under the Equality Act, will also have the following powers:-

- Publishing/disseminating ideas or information;
- Undertaking research;
- Providing education or training;
- Conducting inquiries;
- Making grants;
- Making or assisting in arrangements to monitor crimes;
- Undertaking activities to reduce crime within or affecting members of those groups;
- Arranging social, recreational, sporting, civic, educational or other activities designed to involve members of groups.

The Commission assumes that these powers can be exercised by the CEHR in relation to the new Regulations.

## **Recommendations for change**

Although not part of this consultation exercise, the Commission wishes to raise a number of recommendations for change in the area of sexual orientation equality legislation.

### **Sexual Orientation Public Sector Equality Duty**

The Commission recommends that the Government as a matter of urgency, takes steps to introduce a positive duty on public authorities to promote sexual orientation equality; in line with the action already taken or committed to in the areas of race, disability and gender equality. The Commission also believes that this positive duty should include a duty to promote good relations between persons of different sexual orientation.

In order to ensure parity amongst the various equality strands and to guard against a hierarchy of inequalities, whereby members of 'protected groups' gain a higher level of protection than that enjoyed by others, the Commission recommends that this duty is introduced as soon as possible.

In addition, in the Commission's view the Equal Treatment Directive on Goods and Services will require an extension of GB goods and services law to transsexuals by December 2007. It follows that the gender equality duty (as regards having due regard to the need to eliminate unlawful sex discrimination) will have to apply to transsexuals from that date- though the Commission recommends that the Government when implementing the gender equality duty in April 2007, takes account of the requirements of the Equal Treatment Directive at that stage. This will lead to the unsatisfactory situation that public authorities will have a statutory duty as regards transsexuals by December 2007 at the latest, but not members of the LGB community.

### **Tribunal rules of Procedure**

In relation to sexual orientation discrimination cases brought under the Employment Equality (Sexual Orientation) Regulations (NI) 2003 in Northern Ireland and the 2003 Regulations in GB, the Commission believes that the Rules of Procedure for tribunals should be amended to allow tribunals to issue restricted reporting

orders, a register deletion order and/or a restricted attendance order in relation to complaints brought under those Regulations, in circumstances where the applicant would otherwise be deterred from proceeding with his or her case. For example, in Northern Ireland, Industrial Tribunals currently can only provide for restricted reporting orders in relation to cases involving national security (Article 12 of the Industrial Tribunals (NI) Order 1996), sexual misconduct (Article 13), and disability (Article 14).

In the Commission's view the inability of a tribunal to issue restricted reporting orders and the other orders referred to above, and therefore ensure anonymity for the person bringing a sexual orientation discrimination complaint in the area of employment and vocational training, can act as a major deterrent to potential LGB complainants who do not want their sexual orientation disclosed to the wider public.