

## **RESPONSE OF THE COMMISSION FOR NORTHERN IRELAND TO THE PROPOSALS FOR A SINGLE EQUALITY BILL FOR GREAT BRITAIN**

**September 2007**

### **Introduction**

1. The Equality Commission for Northern Ireland ('the Commission') welcomes this opportunity to contribute to the development of a new legislative framework on discrimination and equality in Great Britain. The Commission was established in 1999 with responsibilities for the equality laws in existence at that time in Northern Ireland in terms of gender, race, religion and political opinion, and we have since assumed additional responsibilities especially in relation to disability, sexual orientation and age. We have extensive experience of working with the Government in Northern Ireland on the preparations for single equality legislation. These preparations have been reinvigorated in recent months and there is much to be gained from liaison and interaction between the administrations on the core components of the developments.
2. The Commission welcomes the opportunity to respond to the consultation paper 'Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain' issued by the Department for Communities and Local Government ('the Department'). The Commission, in responding to this consultation, draws on its expertise and the unique experience it has gained from its role in enforcing the anti-discrimination legislation in Northern Ireland and in implementing the statutory duties under Section 75 of the Northern Ireland Act 1998 across nine equality grounds.
3. It is vital that the Department uses this unique opportunity, not simply to harmonise and simplify existing laws, but to develop innovative and creative ways of creating effective

equality legislation that is fit for the 21<sup>st</sup> century. Although it is essential that the Single Equality Act (SEA) effectively addresses individual and systemic discrimination, the Commission would wish to see a move beyond the anti-discrimination approach, which relies on litigation by individual victims of discrimination, to a more outcome - focused positive approach to the promotion of equality of opportunity and good relations on the part of employers, service providers and others, such an approach would include stronger positive action provisions and a more effective public sector equality duty.

4. The Commission has produced a number of consultation responses and position papers on the proposals for a Single Equality Act for Northern Ireland (a copy of which are enclosed) which address in detail a number of issues raised in the consultation paper. These should be read together with this response. The responses, outlined below, are also available on our website: [www.equalityni.org](http://www.equalityni.org)
  - *Response to OFMDFM consultation paper, 'A Single Equality Bill for Northern Ireland', November 2004.*
  - *Position paper, Update on the Single Equality Act Autumn 2002.*

## **Part 1 Harmonising and Simplifying the Law**

### **Chapter 1**

#### **Purpose and Key Principles**

5. In the Commission's view, the SEA should outline in a purpose clause the objective of the Act, as well as encapsulate the key principles on which it will be based. The Commission has welcomed the inclusion of a purpose clause outlining the functions of the CEHR as contained within Section 3 of the Equality Act 2006. It agrees with the Disability Rights Commission, the Commission for Racial Equality and the Equal Opportunities Commission (as set out in a joint statement issued earlier this year) that the purposes of the SEA should include the following:-
  - to prevent discrimination;
  - to secure full equality of opportunity in practice and promote social inclusion;
  - to ensure respect for and protection of the human dignity of every person;
  - to provide effective remedies for victims; and
  - to promote good relations between individuals and groups.
  
6. There are a number of key principles which should underpin the SEA. In particular, there should be 'non regression' from current standards of protection and due process which currently exist in the Great Britain equality law system. The Commission envisages a 'rising floor' of principles below which the standards of the SEA cannot fall. It wishes to see satisfaction of European Union and international standards and harmonisation to the 'best template' across all the grounds in the SEA, setting out common principles, exceptions and means of redress. Although also committed to 'equality of the inequalities', it recognises that the differing nature of equality law grounds justifies variations of the 'common template'.

## **Promoting Compliance**

7. The Commission agrees that businesses and other organisations should have comprehensive authoritative and practical guidance and that the Commission for Equality and Human Rights (CEHR) should have primary responsibility for issuing guidance and codes.

## **Definitions and Tests**

### **Requirement for a comparator**

8. There is much to be gained from the harmonisation and simplification of the equality legislation. The present plethora of definitions and tests in relation to discrimination is unnecessarily complex. With the exception of disability, the same legal definitions should apply to all grounds. In relation to direct discrimination, the Commission does not support the proposal that there should continue to be a requirement for a comparator. The difficulties with a need for a comparator are well documented, especially in cases of victimisation and harassment. The view of the Commission is that a comparator is *evidence* of discrimination but not the *essence* of discrimination.
9. Under the Equal Pay Act 1970, claimants need to be able to point to an actual comparator, although if the woman is claiming that she is being paid less by reason of pregnancy or she works in a gender segregated employment, this is virtually impossible. In comparison, claimants can use a hypothetical comparator under sex discrimination legislation. Accordingly, the Commission considers that the absence of a comparator should not prevent a tribunal or court from considering whether discrimination has taken place. Discrimination should be considered simply as putting someone at a disadvantage on grounds of their race/sex/religion etc.

### **Single definition of disability discrimination**

10. We agree with the Department's proposal to simplify the definition of disability discrimination. In 2003, the Commission set out in detail its recommendations for

changes to disability legislation in 'Enabled? Recommendations for change to the Disability Discrimination Act in NI' ('Enabled') a copy of which is enclosed. Although some of these recommendations have been incorporated into the Disability Discrimination Act 1995 (DDA) through the Disability Discrimination (NI) Order 2006, many recommendations remain unaddressed.

### **Protection for perception and association**

11. The Commission notes that currently both perception and association are only protected in Great Britain on the grounds of race, religion or belief and sexual orientation and that it is not proposed to extend this protection to other equality grounds (other than an extension to protect against discrimination on the grounds of association with transsexual people).
12. The Commission recommends that both perception and association on the grounds of disability, sex and age are also covered. This would also apply to transsexual people. The Commission does not agree with the proposed piecemeal approach and seeks harmonisation to 'best standards' across all equality grounds.

### **Indirect discrimination**

13. The Commission agrees with the proposal to extend indirect discrimination to cover gender reassignment. We note that the Department is not proposing to extend indirect discrimination provisions into disability discrimination law on the basis that reasonable adjustment requirements can help to address group disadvantage in a similar way to the indirect discrimination provisions operating in relation to other protected groups.
14. The Commission considers that the indirect discrimination provisions focus on the potentially discriminatory impact of a 'policy, practice or procedure' and therefore have a potentially wider scope of protection than the individual reasonable adjustment duty. However, in the Commission's opinion, the greatest impact on protection against discriminatory practices and procedures will be achieved by

placing an 'anticipatory duty' as regards the making of reasonable adjustments on employers. At present, the anticipatory approval as regards the provision of reasonable adjustments, only currently applies in relation to service delivery and education. The Commission therefore recommends that an 'anticipatory duty' as regards the making of reasonable adjustments is extended to employers.

15. The Commission agrees that 'provision, criteria or practice', following the wording of the relevant European directives, should be used for all grounds. We also support the use of 'particular disadvantage' test across all indirect discrimination provisions.

### **Objective Justification**

16. The Commission notes the current referral to the ECJ on the objective justification of direct discrimination on grounds of age. We strongly recommend the revision of this objective justification test.
17. We agree with the proposal to harmonise the objective justification test, as regards indirect discrimination. We note that the Department proposes that the test should be a proportionate means of achieving a legitimate aim. The Commission recommends the adoption of the EU Directive definition of indirect discrimination but with the substitution of a necessary aim test for the 'legitimate aim' test.

### **Justification of Disability Discrimination**

18. We agree that the different justification tests in disability discrimination law should be replaced with a single objective justification test.

### **The Threshold of Reasonable Adjustments**

19. We agree that there should be a single threshold for the point at which the duty to make reasonable adjustments is triggered.

20. We consider that 'substantial disadvantage' should be the appropriate trigger for the point at which the duty to make reasonable adjustment is engaged.

### **Victimisation**

21. We agree with the proposal to remove the requirement for a comparator for victimisation. The Commission would also recommend that, in line with established case law, the legislation makes it clear that the provisions extend to ex-employees.

### **Simplifying Exceptions – Genuine Occupational Requirement (GOR) Test.**

22. The Commission supports the removal of an exhaustive list of circumstances where a protected ground is defined as a GOR. It recognises that, in the interests of clarity, it may be useful to include some examples explicitly in the SEA and explain others in a Code of Practice. The Commission stresses that specific exceptions should be *examples* of the general GOR, unless EU Directives explicitly provide for such an exception. It agrees that a GOR test should be introduced for all grounds of discrimination, with the exception of disability (where it is not necessary).

### **Genuine Service Requirement (GSR) Test**

23. The Commission recommends a single GSR test which will allow service providers and those exercising public functions to objectively justify actions that are a genuine requirement of the services or functions being provided.
24. As with the GOR test, we recognise that in the interests of clarity, it may be useful to include some GSR examples explicitly in the SEA and explain others in a Code of Practice.

### **Specific Exceptions**

25. The Commission notes that specific exceptions in legislation can become outdated as, over time, it becomes clear that they reflect stereo-typical views of what was considered

appropriate for certain groups when they were devised. We therefore recommend a detailed reconsideration of the present exceptions. We agree that the exceptions listed in Annex A table 2 should be removed and that all remaining exceptions are subject to a five year review of the operation of the SEA.

## **Insurance**

26. The Commission is very concerned about the exceptions for the supply of insurance products based on actuarial or other data information. We are unconvinced as to the accuracy of the data or other information which is frequently relied upon. We are regularly contacted by individuals who are refused insurance products based on their gender, health condition, age or a mixture of all these. The data is never available to the individual who has been refused service or offered poorer service.
27. The Commission considers that the current exceptions which allow insurers to treat people differently on grounds of sexual orientation and sex should not be included in the SEA. It notes that such an exception was not included in the equivalent NI sexual orientation Regulations (namely the Equality Act (Sexual Orientation) Regulations (NI) 2006).
28. If it is proposed to retain these exceptions, then in the interests of consistency across the grounds, the SEA should include a requirement that the actuarial evidence is published and regularly updated.
29. Again, in the interests of consistency and harmonisation, we recommend that an amendment is made to the DDA, so that data relevant to establishing the case for differential treatment by disability must be published and regularly updated.



## **Chapter 2**

### **Goods, Facilities and Services and Public Functions**

#### **Harmonising the Law**

30. The Commission agrees that a harmonised approach to the way the equality law treats goods, facilities, services and public functions would have considerable benefits. There are a number of inconsistencies across the equality legislation in terms of the scope of protection in non-employment related areas. For example, the Commission notes that the scope of the Race Relations Order 1997 is considerably wider than other equality legislation in that it covers social protection (including social security, social advantages and health care). The Commission would wish to see the scope of the SEA include these areas.

#### **Streamlining Exceptions**

31. We are also of the view that, where appropriate, there should be a streamlined approach to exceptions for goods, facilities and services and public functions. For example, we recommend the adoption of a General Service Requirement (GSR) across the scope of the SEA outside employment and training.

## **Chapter 3**

### **Equal Pay**

32. The Commission acknowledges that the causes of the gap in the pay of men and women are complex and legislation on equal pay, while significant, will not of itself eliminate the pay gap. However, the present equal pay legislation is notoriously complex, so much so, that relatively few women use it as a vehicle for addressing their pay differential.
33. However, it is essential that the importance of equality in pay to women's equality in employment, and in turn to their financial independence, is recognised by combining the provisions relating to equal pay with the provisions relating to sex equality in a SEA. It is vital that the provisions for

dealing with these two strands of inequality are seen to be working in harmony.

34. We note that the proposals are to bring the pay provisions within the SEA but to retain the current distinction between contractual and non contractual pay matters and also not to allow the use of hypothetical comparators. Importantly, it is not proposed to mandate equal pay reviews. Instead the Department is proposing the development of a voluntary 'light touch equality check tool' for employers (both private and public), which they could use to assess where any problems they have on gender equality might lie. The Commission's view is that, taken together, these proposals will result in little change and will certainly not clarify and simplify the law.
35. The Commission does not consider that this is the best way forward in terms of equality in pay and has recommended mandatory pay reviews as one of a series of measures to address the gender pay gap; specifically in its recommendations to the UN Committee on the Elimination of Discrimination Against Women.<sup>1</sup> Instead, the Commission would propose that in this area employers are required to regularly (for example, every three years) conduct a review of their policies and practices adopted for the purpose of maintaining or promoting equality of opportunity. This will enable employers to identify problems and develop solutions by way of a pay equity plan. In this way, employers will identify any apparent difficulties in the relative pay of men and women and this in turn will trigger the requirement for an equal pay review. The consultation document incorrectly states that equal pay reviews address only gender pay discrimination. This is not the case; pay reviews can also consider occupational segregation, patterns of seniority, skills differences, etc.
36. Furthermore, the Department's proposals for a voluntary 'light touch equality check tool' approach to equal pay for both public and private sector employers, do not 'link' with obligations on public authorities in this area under the gender equality duty. The Equal Opportunities Commission guidance

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<sup>1</sup> Submission by Equality Commission for NI to the United Nations Committee on the Elimination of Discrimination Against Women, April 2003, ECNI, [www.equalityni.org](http://www.equalityni.org).

on the gender duty clearly sets out the expectation that a public authority, in complying with the gender duty, set objectives and take action on the gender pay gap. The Commission's recommendation for mandatory pay reviews is consistent with the outcomes anticipated under the public sector duty.

37. It should also be noted that the changes in patterns of employment further complicate the ability of an individual to pursue an equal pay claim on the basis of a comparator paid from the same or associated employer. The practice of outsourcing elements of an organisation's functions, whether in the public or private sector, presents further barriers to pursuing an equal pay claim. The Government has issued a statutory Code of Practice to regulate for the transfer of workers and protection of their terms and conditions in these circumstances. Our proposal to permit the use of a hypothetical comparator would allow for greater protection for those who find themselves working for new employers, and who otherwise would be in a position to take an equal pay claim.
38. In summary, the Commission does not support the proposals to retain the distinction between contractual and non contractual pay matters, nor the proposal not to allow hypothetical comparators. We propose a much more proactive approach to tackling pay inequality.

## Part 2

### More Effective Law

#### Chapter 4 - Balancing Measures

39. The Commission considers that addressing inequality should be the fundamental objective of legislation and that this is consistent with the principle of equal treatment. Where there is clear evidence of inequality, the legislation should encourage intervention to secure greater equality. For example, European legislation has specifically recognised the measures in Northern Ireland to achieve a more representative police force.
40. The Commission does not view positive action to be a narrow exception to the non-discrimination principle, but a major vehicle for the promotion of equality of opportunity. In this regard, the Commission welcomes consideration of the proposal to permit wider balancing measures to address under representation but is disappointed that positive action programmes are not to be expressly encouraged. Although the Department is considering widening the scope of positive action, there is little impetus for private sector organisations to take such measures.
41. The Commission agrees that it would be helpful for organisations seeking to tackle under representations to be able to take a wider range of measures. Furthermore, the Commission agrees that such measures should always be necessary, proportionate and time limited.
42. There are a number of existing models which encourage employers (both public and private) to take a proactive approach to positive/affirmative action. The fair employment model in Northern Ireland was originally drawn from the employment equity policy introduced in Canada in the late 1980s. This required monitoring of four groups, visible minorities, women, people with disabilities and native peoples. Employment equity in Canada permits forms of affirmative action but stops short of quotas.

43. In Northern Ireland fair employment monitoring is also required and all employers must conduct regular reviews of employment practices. The Fair Employment and Treatment (NI) Order 1998 (FETO) provides for affirmative action measures which exclude quotas but provides for the setting of goals, timetables and outreach measures including the use of welcoming statements in recruitment advertisements. There is clear evidence that the approach under FETO has resulted in a significant improvement in labour market representation between Roman Catholics and Protestants. The Commission is disappointed that the DLR has not put forward specific proposals as regards an effective framework or model which would encourage employers to take a proactive approach to positive action.
44. The Commission agrees with the DLR requirement that balancing measures should always be necessary. The type of analytical requirement of monitoring and formal review in the fair employment regime has provided the critical evidence to satisfy this necessary test. The collection of relevant monitoring information has enabled employers to determine whether or not there is a need for affirmative action measures and the success of measures taken. In many jurisdictions, monitoring is seen as a key component of an effective equal opportunities policy. It is vital that there is a strong connection between positive action measures and the gathering of monitoring information, so that such action is targeted at addressing identified under-representation and that the effectiveness of the measures can be properly assessed.
45. The Commission agrees that positive action measures also have to be proportionate. The concept of 'fair participation' is at the heart of the fair employment strategy; positive action, but not positive discrimination, is permitted to secure a greater balance between the catchment area and an employer's workforce profile. There has been no legal challenge to this practical interpretation of 'fair participation'; rather there has been widespread compliance with the provisions by employers who have welcomed the clarity provided by the legislation and the Code of Practice and other guidance from the Commission.

46. The Commission's experience is that the compulsory FETO provisions of monitoring and review are widely complied with by employers in Northern Ireland. The voluntary 'positive action' provisions in the sex, race and sexual orientation equality legislation are not widely used. In Northern Ireland some employers voluntarily adopt a more evidence-based approach in terms of monitoring and analysis on grounds such as gender and race. Such employers would welcome greater certainty about the scope for positive action measures. The Commission is accordingly disappointed that the proposals do not provide for monitoring, reporting and positive action where necessary.

### **Extending the concept of reasonable adjustment.**

47. The Commission supports the extension of a reasonable accommodation duty to those in other protected groups; for example, reasonable accommodation for those of particular faiths.
48. Moreover, if the Commission's recommendations on positive action triggered by evidence were adopted, such reasonable adjustments/accommodations would be part of these activities.

### **Other ways of expanding positive action measures.**

49. The Commission welcomes an expansion of positive action measures across all equality grounds not only in the employment sphere, but also in other areas such as education, the provision of goods, facilities and services and the exercise of public functions.
50. As made clear in the consultation paper, European Directives provide a significantly wider scope for positive action, albeit short of quotas, than is currently permitted under GB equality law. The Commission wishes to see a significantly expanded role for positive action within the SEA in line with the permissive limits of the EU definition.

## **Extending measures to meet special needs in education, training welfare or ancillary benefits.**

51. The Commission agrees that measures to meet special needs in these areas should be permitted in respect of all protected groups.

## **Clear Guidance**

52. The Commission concurs that in order to encourage the taking of positive action, there needs to be clarity both as regards the type of positive action measures employers, service providers and others can take, and the purpose and benefits behind taking those measures. We agree that greater clarity on the scope of positive action permitted under the SEA could be provided through a statutory Code of Practice and/or practical guidance produced by the CEHR.
53. The Government does not propose that the CEHR will have a formal role in 'approving' positive action programmes, on the grounds that it will only add an additional hurdle to the process and would not provide total legal certainty for businesses embarking on positive action programmes. The Commission agrees that only the tribunals and courts will provide total legal certainty on specific positive actions measures in particular circumstances. However, it is vital that the CEHR has a strong facilitation role as regards positive action programmes, to encourage positive action and to maximise the impact of legislative provisions. An alternative option recommended by the Commission is that there should be legislative protection for employers and others who voluntarily take positive action measures 'in good faith', and/or protection for those who take positive action measures with the approval of the CEHR.

## **Political Representation**

54. The Commission agrees that allowing political parties to take positive action measures should continue and should extend beyond gender. It is because the Commission supports the case for representative decision making at all levels, that we support the option of positive action which is necessary and proportionate in political parties and in other spheres.

## Chapter 5 - Public Sector Equality Duties

55. The Commission's views on the proposals regarding a public sector duty are informed by its knowledge and experience of overseeing implementation of Section 75 of the Northern Ireland Act 1998, since its commencement in 2000. Section 75 is a public sector positive equality duty; placing an obligation on public authorities to have due regard to the need to promote equality of opportunity between nine equality categories and to have regard to the desirability of promoting good relations between three equality categories.
56. The Commission has almost seven years experience in providing advice to public authorities, monitoring compliance with the legislation and using our enforcement powers to ensure effective implementation. The Commission also has powers to review the effectiveness of the legislation. It recently completed its first strategic review of the effectiveness of Section 75, and made a number of conclusions and recommendations to enhance the effectiveness of the duty. We enclose a copy of that report and hope the findings of this review will be of help to the Department as it develops proposals for a single positive equality duty in GB<sup>2</sup>.
57. The Commission supports the introduction of a single duty on public authorities and, on the basis of its experience, would recommend that the duty requires public authorities to promote equality of opportunity across a broader range of strands than race, disability and gender. The Department will be aware that in Northern Ireland, Section 75 covers the additional grounds of age, sexual orientation, religious belief, political opinion and persons with dependants.
58. The Department will also be aware that in Northern Ireland there is a good relations duty under Section 75 in relation to religious belief, political opinion and racial group; there is a good relations duty in GB only on the grounds of race. Also, like GB, in Northern Ireland there is a duty on public

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<sup>2</sup> Section 75, Keeping it effective, Reviewing the effectiveness of Section S75 of the Northern Ireland Act 1998, 2007, ECNI



authorities to have due regard to the need to promote positive attitudes towards disabled people.

59. We note the Department's commitment to 'build on the good relations element in the race equality duty and the positive attitudes element in the disability equality duty to make clearer the links between promoting equality and promoting good relations between different groups in society'. We also note that there is a duty on the CEHR to 'encourage good practice in relation to relations both within and between members of the different protected groups (which covers groups with a common attribute in respect of age, disability, gender, gender reassignment, race, religion or belief and sexual orientation). Although we welcome this commitment to 'build' on the race and disability duties and to 'make clearer links' between promoting equality and good relations, there is no clear indication in the consultation paper as to how this will be achieved, or in line with the CEHR's express duty, what steps are to be taken to encourage good practice in this area.
60. The Commission is also concerned that the proposed amendments to the current public sector equality duty in GB will weaken existing legislation; this is inconsistent with the Department's commitment in paragraph 1.1 of the consultation paper that it will 'not erode existing levels of protection against discrimination'.
61. The proposals for a single public sector duty rightly aim to ensure that equality becomes part and parcel of public authorities' core business. The Commission has found that the NI model, which requires public authorities to assess the impact of their policies, is an effective model of mainstreaming. It has led to more informed and evidence based policy making with substantial institutional and cultural change taking place to mainstreaming equality of opportunity and good relations throughout organisations. The Commission therefore recommends that to ensure that equality becomes part of core business for each public authority, a model of mainstreaming through policy appraisal be included in the GB duty.

62. The proposals for a single equality duty include a focus on the need to achieve outcomes on equality. The Commission considered how best to ensure action takes place in order to achieve outcomes from Section 75. Clearly, there is a need for a greater focus on achieving actions on equality, and critically, to measure the impact of these actions on individuals. However, the Commission is of the view that change can be achieved without changing the duty to promote equality of opportunity and good relations, which is still relatively new, but in focusing attention on implementation.
63. In order to successfully meet the objectives of the legislation, public authorities should consider their individual roles in the promotion of equality of opportunity and good relations. This should be done by public authorities taking a systematic approach to examining their functions, and how these relate to the promotion of equality of opportunity and good relations. They should outline actions for the promotion of equality of opportunity and good relations, in the context of their functions and policies. These actions should be based on an analysis of the inequalities that exist in society and of the experience of inequality amongst service users.
64. The Commission's decision not to recommend changes to the legislation is informed by independent research and the views of public authorities, many of whom reported a desire to work more effectively to achieve outcomes, given the relative familiarity with process following seven years of implementation. However, the Commission is clear that a process is required in order to achieve these outcomes, and to measure impact. Our focus on outcomes arises not from dissatisfaction with process, but with a desire to use it better to ensure the legislation has the impact intended.
65. Equality schemes have been a useful framework for the promotion of equality; public authorities have themselves reported in scheme reviews that schemes are an effective way of ensuring a corporate approach to promoting equality. The Commission is recommending continued use of equality schemes, with our recommendations proposing that schemes are linked better to Corporate Plans, with actions

for the promotion of equality of opportunity and good relations to be set out in schemes.

66. In its review, the Commission noted the work of UK-wide public authorities to promote equality of opportunity. Currently, organisations such as the Electoral Commission and the Heritage Lottery Fund, have an equality scheme and disability action plan which applies to NI, and three further schemes/plans on race, gender and disability to meet its GB obligations on equality. The Commission would urge the Department to review ways to work towards a common system of reporting for these bodies, so that they can demonstrate progress in meeting their obligations in GB and in NI, in an effective and efficient manner. We would welcome further discussion with the Department and with the incoming CEHR on these issues.

### **Public sector procurement**

67. In relation to public sector procurement, the Commission believes that the application of the equality duty on public authorities in NI cannot be confined 'within the walls' of public authorities. The effectiveness of the duty depends not just on how public authorities comply with the duties, but in how they ensure the private sector, through public procurement, promotes equality of opportunity. The duties were clearly intended to cover all the functions of public authorities, including public procurement.
68. The Commission considers that the Section 75 framework is sufficiently robust to ensure that equality of opportunity is at the heart of public sector procurement and is not at this point recommending that a specific obligation on public authorities is required. It agrees that the approach should be one of further guidance and action to encourage good practice. The Commission has been preparing guidance, in conjunction with the Central Procurement Directorate of the Department of Finance and Personnel, to advise on the duties in Northern Ireland and how they should apply to public procurement.
69. Through the development of this guidance, it is clear that:

- the opportunity to pursue equality of opportunity and good relations through procurement is an option for public authorities;
- this is consistent with the rules and regulations on procurement;
- however this is not being consistently or systematically applied by public authorities.

70. There is a clear need for political leadership on this matter to facilitate the identification of the opportunities through policy goals in the first instance. Therefore, guidance needs to address not only the practical application of the procurement process, but also the strategic planning and objective setting before procurement is commenced.

### **Role of Inspectorates**

71. The Commission recognises the important role of public service inspectorates in assessing compliance with public sector equality duties. However, it is essential that the following issues are addressed in order to ensure that their role is effective.

- inspectorates should have clearly defined roles and responsibilities, so that there is clarity as to what they are legally required to do as regards assessing compliance and how this interacts with their performance of the main duties of their job;
- inspectorates require appropriate training and guidance in order to equip them with the necessary skills and knowledge to enable them to effectively assess compliance with equality standards;
- there needs to be clarification of reporting mechanisms and role of CEHR in enforcing and assessing non-compliance;
- clarification of the role of inspectorates as to whether their role is both assessing practices and policies and tangible equality outcomes.

## **Private Sector Equality Duties**

72. The Commission considers that the private sector should be encouraged to take a wider range of positive action measures. Our views on promoting good practice in the private sector are set out below.

## **Chapter 6**

### **Promoting good equality practice in the private sector**

73. The Commission notes the Department's proposals as regards the development of a voluntary 'equality check tool' for employers and the introduction of a voluntary equality standard scheme which could be an independently assessed accredited standard or a non-accredited good practice and compliance tool. The Department seeks other suggestions for promoting good equality practice in the private sector without introducing additional legislation.
74. In Northern Ireland there has, for many years, been statutory duties under FETO on private sector employers to monitor their workforce composition, review their employment practices and determine reasonable and appropriate affirmative action where there is a lack of fair participation. These duties have been effective in addressing under-representation in employment. Importantly, too, employers in Northern Ireland have recorded that the regime has professionalized their recruitment activity resulting in a workforce which more appropriately meets their needs. They also report significantly better equality practice.
75. The Northern Ireland duties presently require monitoring only on grounds of community background and gender and the Commission is keen, as part of the present development work in respect of a Single Equality Act in Northern Ireland, to explore with Government the option of extending the model to other equality strands, while not imposing undue additional burdens on employers.
76. The Commission is of the view that an 'equality check tool' and the development of a voluntary equality standard (particularly if independently assessed) can act as an

important incentive for private sector business and others to adopt good practice across a range of equality grounds. However in order to ensure the effective out-working of such a scheme, consideration needs to be given to the following:-

- in relation to an 'accredited' scheme, clarification of which organisations have responsibility for granting accreditation;
- there needs to be the development of a 'baseline' against which businesses can assess themselves. This requires consideration of who will devise the baseline and what will it cover (e.g. will it cover all equality grounds and apply to employment, goods, facilities and services, etc.) and what standard will be set.
- it is important that the assessment does not merely focus on 'policies and procedures' but also equality outcomes;
- if self-assessment is used, what 'checks' will be put in place to ensure the system is not 'open to abuse';
- there needs to be clarification of role of the CEHR in the assessment process and in the development of baseline criteria;
- clarification of the circumstances in which an award (either independently or self-assessed) can be revoked.

77. In Northern Ireland, the Commission recommends a voluntary initiative for employers (across all sectors) for the purposes of promoting equality of opportunity in employment across all the discrimination grounds. This initiative, entitled 'Employment Equality Plans', was developed by the Commission in accordance with the requirements of each of the equality laws in Northern Ireland and the recommendations of the relevant Codes of Practice. Importantly, the plan is flexible to reflect each employer's needs and circumstances

78. The plan is based on the establishment of equality objectives and the development and implementation of a three year

action plan to meet these. The objectives of the plan are as follows:-

- development of an equal opportunities policy;
- development of a policy on eliminating harassment and promoting an harmonious working environment;
- development of a monitoring strategy;
- regular review of employment composition;
- regular review of recruitment practices;
- regular staff survey; and
- programme of staff training in equality.

79. Although current plans focus solely on employment related areas, there is the potential to extend the plans to non-employment related areas.

## **Chapter 7**

### **Effective Dispute resolution**

80. Alternative dispute resolution (ADR), if applied effectively in discrimination disputes in the field of goods, facilities, services, etc., can ensure an earlier and less costly resolution of complaints with meaningful outcomes. We note, for example, that the Disability Rights Commission (DRC), as regards its Disability Conciliation Services, has a success rate of nearly 80 per cent of all cases where parties met to discuss the complaint. The Commission has also recently contracted with Mediation Works, which provides the Disability Conciliation Service for the DRC, for the provision of a disability conciliation service for goods and services complaints in Northern Ireland. The service will commence on 10 September 2007. The Commission welcomes the fact that the CEHR under the Equality Act 2006, has the power to provide a voluntary conciliation service for non-employment discrimination cases across all protected grounds.

81. The Commission recognises that in certain types of cases, for example, harassment cases, an informal system of dispute resolution may be more effective and appropriate and individuals may benefit from the private nature of the outcome. However, it also recognises that there are cases in which it is necessary to establish precedents in both law and

practice and the Commission has a continuing role in assisting cases of strategic importance to its corporate objectives.

82. The Commission recommends that any review of ADR in relation to non-employment cases considers the following:
- the introduction of appropriate and similar statutory County Court time limits across all equality grounds which apply in circumstances when a person is referred to conciliation services;
  - the development of clear guidelines on best practice in ADR in non-employment discrimination cases across the equality grounds, which will encourage service providers and others to follow good practice in this area;
  - steps are taken to ensure that discrimination rights are not diluted during the ADR process; in particular to ensure that vulnerable applicants receive the same level of protection which would be expected in the judicial process.

### **Improving the handling of discrimination cases in the courts**

83. The Commission recommends that a single Equality Tribunal/Court be established to deal with all Single Equality Act cases (both employment and non-employment). It is necessary to develop a system of judicial process which can manage the complexities of equality law. In the Commission's opinion, the issues of law and evidence raised in non-employment cases are very similar to the issues raised in employment equality cases. Northern Ireland has a specialist equality tribunal in the Fair Employment Tribunal (FET), which has played a vital role in the development of the fair employment case-law in NI.
84. We note that in considering effective dispute resolution the Department does not address the issue of remedies available to tribunals/courts. The Commission has made a range of recommendations in relation to the development of more proactive remedies for tribunals and courts. In particular it has recommended that the Equality Tribunal (and



existing tribunals/courts) should have the power to make orders requiring changes in policies and practices and equality audits. These orders could be made under the supervision of the Commission which would bring back to the Tribunal any respondent which had failed to abide by the terms of the order. It has also called for the power for tribunals to order reinstatement and re-engagement for dismissed workers. It should also be possible for courts and tribunals, in some exceptional circumstances, to issue injunctive relief in order to prevent an act of discrimination occurring or being repeated.

85. The Commission agrees that the powers of the Additional Support Needs Tribunals for Scotland should be extended to include consideration of disability discrimination cases in education. At present, in Scotland, these cases are heard by sheriff courts. These proposals will reflect the position in the remainder of the UK; as claims regarding disability discrimination in education are currently heard by the Special Education Needs and Disability Tribunals (SENDIST) in England and in Northern Ireland, and the Special Educational Needs Tribunal for Wales.

### **Representative Actions**

86. In addition, the consultation paper considers the issue of whether representative actions could be taken by a body such as a trade union or other organisation on behalf of a group of individuals and concludes that it does not propose to establish this further mechanism. The Commission is of the view that the CEHR and other organisations should have standing to bring representative actions on behalf of both named and unnamed individuals, as a means of tackling institutionalised or systematic discrimination.

### **Multiple discrimination**

87. In the Commission's view, complainants experiencing multiple discrimination face a number of difficulties in seeking legal redress; this is primarily due to the fact that current legal processes solely focus on one prohibited factor at a time and are unable to adequately address in tandem complaints on more than one ground.

88. For example, complainants subjected to multiple discrimination may face difficulties in identifying an actual or hypothetical comparator with the same characteristics, as required when proving direct discrimination. As outlined earlier, 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. It also recommends an adaptation of the definition of direct discrimination to provide for disadvantage on any *combination* of grounds.
89. A simplification and harmonisation of definitions, tests, exceptions etc. across equality grounds as proposed by the DLR will also assist the understanding and application of equality law in multiple discrimination issues.
90. It must be recognised however that the experience of a person facing multiple discrimination is different from those facing discrimination on a single ground. For example, research<sup>3</sup> in Northern Ireland has shown that the experiences of disabled women differ from those of disabled men, or women who were not disabled; (e.g. in particular they were less likely to be in paid employment compared to disabled men or women who were not disabled).
91. The research also highlighted the particular difficulties facing young lesbians, gay and bisexual people in Northern Ireland in accessing health services and employment.
92. In addition to addressing inadequacies in the way tribunals and courts handle multiple discrimination cases, it is important that the DLR considers how to encourage employers, service providers and others to, not only identify multiple discrimination issues, but also to effectively take action to address these issues.

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<sup>3</sup> Rethinking Identity: The Challenge of Diversity, Katherine Zappone, commissioned by the Joint Equality and Human Rights Forum, June 2003.

## **Part 3**

### **Modernising the law**

#### **Chapter 8**

##### **The Grounds of Discrimination**

###### **The definition of disability**

93. As outlined in 'Enabled' (copy enclosed), the Commission is aware that there are a number of difficulties with the present definition and is disappointed to note that the Government only proposes to revise the definition by removing the list of 'capacities' from the definition. As stated earlier, although some of the Commission's recommendations as regards the definition of disability as set out in 'Enabled' have been addressed, many remain outstanding.
94. As regards the list of capacities, the Northern Ireland Executive asked the Commission to review and consult on this list with a view to extending that list if necessary to ensure appropriate protection for people with mental ill-health conditions. We proposed that the 'list of capacities' be revised to include the ability to communicate and interact with others. People with severe depression may often lose the ability to communicate with others, which has the same impact on their life as not being able to speak. However this issue remains not adequately addressed in the law.

###### **Addressing the needs of parents and carers**

95. The Commission is of the view that 'persons with dependants' should be protected under the anti-discrimination provisions of the SEA. In addition, under Section 75 of the Northern Ireland Act 1998, public authorities in Northern Ireland are required to have due regard to the need to promote equality of opportunity between persons with dependants and persons without. The Commission recommends the extension of the GB public sector duty to include due regard to the need to promote equality of opportunity between persons with dependants.

96. Although persons with dependants have in the past mounted legal challenges under the indirect sex discrimination provisions to challenge practices that have a disproportionate impact, they have faced substantial barriers in successfully proving such claims and have no legal redress as regards other discriminatory practices or behaviour which amounts to direct discrimination, harassment, etc.

### **Married persons and civil partners**

97. The Commission recommends that the SEA covers 'marital and family status' which should include persons who are married, single, in civil partnerships, cohabiting and with dependants, both opposite and same sex couples.

### **Genetic Predisposition**

98. We note the Department's proposal not to prohibit genetic predisposition discrimination in the SEA. The Commission recommends that protection against discrimination on grounds of genetic predisposition is included, by extending DDA protection to those with genetic pre-conditions.
99. The current definition of disability in the DDA with its dependence on the need to satisfy the long-term and substantial requirement tests would not protect people who do not have symptoms of a genetic dimension. A lack of protection on this ground is also likely to have a greater impact on particular racial groups who, for example, have a higher risk of developing sickle cell anaemia or cystic fibrosis. We also recommend that there should be specific protection against the potential misuse of genetic information.

## **Chapter 9**

### **Age discrimination beyond the workplace**

100. As made clear at the beginning of our response, the Commission is of the view that, other than in exceptional circumstances, the full scope of the SEA should apply across

all the protected grounds. The Commission therefore recommends that the scope of the SEA covers protection on the grounds of age to non-employment areas and that any exceptions should be narrowly construed, appropriate and proportionate.

101. There needs to be a strong legislative driver in terms of clear enforceable rights, in order to effectively address entrenched discrimination on the grounds of age outside the workplace. The Commission is of the view that this cannot be achieved through non-legislative 'voluntary' measures by service providers and others.
102. Examples of potential unlawful age discrimination in non-employment areas include the following:-
  - harassment resulting from stereotypical ageist attitudes which can, for example, impact on access to health and social care;
  - exclusion from social activities (e.g. access to pubs/clubs) on the basis that a person does not fit the 'age profile' of the establishment;
  - discrimination in many areas of financial services (e.g. motor or travel insurance, or applying for mortgages);
  - less favourable treatment in health and social care (e.g. decisions about treatment or preventative care).

### **Exclusion of people under 18**

103. We note the Department's proposal to include a blanket exclusion of children (i.e. people under 18) from the scope of any protection.
104. Historically, the Commission has not supported blanket exclusions under any of the anti-discrimination statutes and the ongoing development of European anti-discrimination law is based on the widest scope of protection to all citizens with limited exemptions that fall outside the general principle of the promotion of equality. The Commission does not therefore support the blanket exclusion of people under the age of 18 from statutory protection against discriminatory acts on the grounds of age in the provision of goods, facilities and services, etc. The Commission assumes that the

Government will take into account views on the extent to which such an exception is considered compatible with human rights legislation and the United Nations Convention on the Rights of the Child (UNCRC).

105. The Commission would stress that there is no equivalent blanket exemption under the Age (Employment) Regulations 2006, which prohibit discrimination on the grounds of age, and the introduction of an age bar on non-employment related provisions would create a 'disconnect' with the Employment Regulations.
106. The Commission also notes that age discrimination as regards the provision of goods, facilities and services and other non-employment related areas is protected under Ireland's Equal Status Act 2000. Although there is a blanket exclusion as regards people under 18, this exemption has resulted in considerable difficulties and its repeal has been repeatedly recommended by Ireland's Equality Authority.
107. The Commission supports the proposed measures that protect the maintenance of services, beneficial conditions, etc. that are applied to promote equality of access to services for people. We also support the inclusion of positive action measures to help address disadvantage more effectively.
108. As regards specific exceptions to the legislation, the Commission would recommend the adoption of a genuine service requirement (GSR) defence, which would rely on the discrimination act being an essential component of delivering a service.
109. In this instance a statutory authority defence may also be acceptable, such as prohibitions on the sale of intoxicating liquor to persons below a certain age, licence to drive and the very limited pool of activities where there is statutory prohibition in place on the age where one is permitted to engage in these activities or services.
110. The Commission would enquire as to the specific nature and extent of the proposed 'significant' number of beneficial or justifiable exclusions proposed as we consider that the

statutory provision defence, specification of health and safety, incapacity to contract, the GSR exception and the positive action measures which we would endorse, should address the justification issue in the majority of cases.

111. The Commission also recommends that the public sector equality duty is extended to cover age; thereby placing age equality considerations at the heart of public policy decision making and delivery of public services. The Department will be aware that public authorities in Northern Ireland and UK-wide public authorities with functions in Northern Ireland are already under Section 75 of the Northern Ireland Act 1998, required to have due regard to the need to promote equality of opportunity between persons of different age.
112. The Commission supports the extension of a reasonable accommodation duty to the ground of age in areas of goods, facilities and services, etc.

## **Chapter 10 – Gender Reassignment**

113. The Commission welcomes the Department's proposal to prohibit discrimination on the grounds of gender reassignment in the exercise of public functions. We note that GB Regulations implementing the Gender Directive (Council Directive 2004/113/EC) due to be implemented on 21 December 2007 will extend protection against direct discrimination on grounds of person's gender reassignment to goods, facilities and services or premises.
114. Although we welcome the Department's proposal to include in the SEA protection against indirect discrimination on the grounds of gender reassignment, we are concerned such provisions are to be included in the SEA, rather than in the GB Regulations implementing the Gender Directive.
115. In addition, we recommend that protection from gender discrimination is extended, in its entirety, to include those who are transgendered. Any exemptions should be narrowly construed and justifiable.

116. A combination of case law in the European Convention of Human Rights<sup>4</sup> indicates that many aspects of gender reassignment could be considered under an extended definition of gender in the SEA. The Commission recommends an extension of the definition of gender to include 'gender identity'.<sup>5</sup>
117. The Department has sought views on whether it is necessary for the SEA to allow for organised religions to treat people differently on the grounds of gender reassignment, and if so, what circumstances would justify such discrimination. The Department will be aware that under the Sex Discrimination Act there is currently an exception from the provision of goods and services at a place occupied or used for the purposes of an organised religion, and the facilities or services are restricted to men/women so as to comply with the doctrines of that religion or avoid offending the religious susceptibilities of a significant number of its followers. We note that it is not proposed that regulations implementing the Gender Directive will extend protection against discrimination in this area. The Commission is currently finalising its response to the Northern Ireland consultation on similar regulations and will forward to the Department shortly its completed response.
118. Although transsexuals do not have explicit protection under the Equality Act (Sexual Orientation) Regulations 2007, they may have rights under these Regulations because of their actual or perceived sexual orientation. It is therefore important that there is a consistency in the approach to any potential exemption for organised religions between the ground of gender reassignment and that of sexual orientation. In particular, if such an exemption on the grounds of gender reassignment is included, it is essential that the SEA provides for the following provisions:-
- religious organisations, that are contracted by a public authority to deliver a service on its behalf, are not allowed to discriminate;

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<sup>4</sup> Case C-13/94, P&S & Cornwall County Council [1996] IRLR 347

<sup>5</sup> *Goodwin v UK* [2002] IRLR 664 (ECUR)



- 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;
- protection against discrimination will extend to 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.

## **Chapter 11 – Pregnancy and Maternity**

119. The Commission agrees with the Department's proposal to make less favourable treatment of a woman on the grounds of pregnancy and maternity unlawful in the exercise of public functions. We note that once the Gender Directive is transposed into GB law, less favourable treatment of women for reasons of pregnancy and maternity will constitute direct discrimination in the field of goods and services.
120. We note that the Department is not proposing to extend protection on grounds of pregnancy and maternity to school pupils and education in schools. Although there is guidance which states that pregnancy is not a reason for exclusion from school, in the Commission's view there should be clear statutory protection in the SEA against such exclusion or other less favourable treatment by a school on the grounds of pregnancy.

## **Chapter 12 – Private Clubs and Associations**

121. We agree with the Department's proposal to retain the current exemptions which allow the existence of private clubs whose *main purpose* is to allow the benefits of membership to be enjoyed by people having a characteristic protected by discrimination law, i.e., people who share a characteristic such as sex, a particular race, sexual orientation, etc.

122. We also welcome the Department's proposal to extend the law to make it unlawful for private clubs with 25 or more members (other than single sex clubs or those set up for members who are of a particular religion or belief) to discriminate on grounds of sex and religion or belief. Similarly, we agree that, as is currently the case on the ground of disability, the SEA should prohibit discrimination by private clubs with 25 or more members against guests on the grounds of sex, race, sexual orientation and religion or belief.
123. Finally, we are of the view that should the Department decide to outlaw age discrimination in the goods, facilities and services, the SEA should provide protection against unjustified age discrimination by private clubs with 25 or more members (other than those whose main purpose is to cater for a particular age range).

## **Chapter 13 – Improving Access to Use of Premises for**

### **Disabled People**

124. The Commission supports the Department's proposal that landlords should be under a duty to make a disability-related alteration to the common parts, where reasonable, and at the disabled person's expense, if a disabled person finds it impossible or unreasonably difficult to use the common parts of their residential premises.

## **Chapter 14 – Harassment**

125. We welcome the Department's proposal to rectify the anomaly which exists under the race equality legislation whereby harassment at work and vocational training does not cover colour or nationality; as well as the similar anomaly which applies as regards harassment on the grounds of goods, facilities and services, education etc. It is vital that the Department also takes this opportunity to address further inconsistencies which have arisen between the grounds of colour and nationality and the grounds of race, ethnic and national origin in the Race Relations Act, as a result of changes made to the Race Relations Act in order to comply with the Race Directive.

126. The Commission supports the Department's proposal to expressly prohibit harassment in schools on grounds of sex, and harassment on grounds of sex and gender reassignment in the provision of goods, facilities and services and in the exercise of public functions.
127. The Commission considers that there should be express statutory protection against harassment on grounds of sexual orientation and disability in the provision of goods, facilities and services, education in schools, the management or disposal of premises and the exercise of public functions.
128. A failure to include a specific definition of harassment on the grounds of sexual orientation and disability in the SEA will lead to the anomalous situation whereby such a definition will exist in the corresponding employment and vocational training legislation but not in the provision of goods, facilities and services, etc. It will also lead 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 the areas of sexual orientation or disability. The Commission considers that effective and clear legislative provision is required in order to ensure maximum protection against such discriminatory conduct.
129. The Commission recognises that a failure to include a definition of harassment in the SEA in these areas 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 a prohibited ground 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 SEA will have to satisfy the comparator test.
130. It also recognises that in respect of disability discrimination, although there is no explicit statutory protection against harassment in the area of goods, facilities and services etc, it is likely that a court would regard harassment as a form of less favourable treatment for a disability-related reason. We are of the view that in the interests of clarity about the

standard and test to be applied in disability harassment cases, that disability harassment in these areas should be expressly prohibited.

131. The Department will note that in Northern Ireland, under the Equality Act (Sexual Orientation) Regulations (NI) 2006, harassment on the grounds of sexual orientation in the provision of goods, facilities and services, the exercise of public functions, by education establishments and authorities, in the disposal or management of premises, is already prohibited.
132. In addition, if a definition of harassment was to be included, it would have to be open to the legislature to permit exceptions in limited circumstances but make it clear that harassment on the prohibited ground was unlawful.
133. The Commission 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 in these areas, the unsatisfactory situation that there will be a lack of consistency, as regards the test of harassment between employment and vocational training provisions and non-employment areas, as well as tests adopted in other equality grounds.
134. Under the Equal Status Acts 2000-2004, harassment in the provision of goods and services, accommodation and educational establishments is prohibited in Ireland across nine equality grounds (gender – including transsexual people, marital status, family status, sexual orientation, religion, age, disability, race and Travellers), with specific exceptions relating to various grounds.

### **Third party harassment**

135. We note the Department's intention to amend the Sex Discrimination Act (SDA) to make it clear that an employer will be held liable for harassment if it fails to take action to protect an employee in the workplace when it is aware that

he/she is being subjected to persistent acts of sexual harassment by a customer or client.

136. We also note that the Department is considering (where there is sufficient evidence to justify it) adopting a similar approach across other equality grounds.
137. The Commission recommends that the SEA adopts a similar approach to that taken in the Equal Status Acts in Ireland. They provide that a person who is responsible for the operation of any place that is an educational institution or where goods, facilities or services are offered to the public or a person who provides accommodation, 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 education institution or a provider of services liable for the harassment of employees by customers/clients on a prohibited ground, unless it took reasonably practicable steps to prevent the harassment occurring.

#### **Further considerations**

138. The Commission is disappointed that the consultation paper did not consult on the possibility of extending the scope of the SEA to include an 'other status' ground'.
139. The Commission recommends the inclusion of an 'other status ground'. This would permit an extension of the SEA grounds either through ministerial order or judicial interpretation, as has occurred in relation to the 'other status' ground in Article 14 of the European Convention of Human Rights.

**4 September 2007**