Equality Commission
FOR NORTHERN IRELAND

RESPONSE TO OFMDFM CONSULTATION PAPER, 'A SINGLE EQUALITY BILL FOR NORTHERN IRELAND'[1]

November 2004

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[1] A working draft of this response to the OFMDFM Consultation Paper was circulated by the Commission during the course of October 2004..

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Introduction

The Equality Commission for Northern Ireland ("The Commission") has a statutory remit for the legislation on equal pay, sex discrimination, disability discrimination, fair employment and treatment, race relations, sexual orientation discrimination in employment and training and the public sector statutory duty, including nine grounds upon which due regard to the need to promote equality of opportunity must be respected. Our key duties are to:

- promote equality of opportunity and affirmative and positive action;
- work towards the elimination of unlawful discrimination;
- promote good relations between persons of different racial groups;
- oversee the effectiveness of statutory duties on public authorities and
- keep relevant legislation under review.

The Commission welcomes the opportunity to respond to the OFMDFM Consultation Paper, 'A Single Equality Bill for Northern Ireland' and welcomes the opportunity to engage in a wide ranging debate on the future structure and content of a Single Equality Act (SEA) for Northern Ireland. The Paper addresses the majority of the vital issues which must be resolved if an SEA is to come to pass in Northern Ireland and the Commission looks forward to continuing to work with OFMDFM to encourage the achievement of an exemplar SEA for Northern Ireland (NI).

Background

The Commission has produced a number of position papers and other documents on proposals for a SEA for NI.[2] They are available on our website: www.equalityni.org under Recent Publications/Single Equality Bill.

- *Position Paper on the Single Equality Bill, published in October 2001(58pp)*
- *Single Equality Bill - Further Considerations: February 2002 (13pp)*
- *Equality Legislative Reform: Implementation of the European Directives, July 2002 (14pp)*
- *Position Paper: Update on the Single Equality Act: Autumn 2002 (43pp)*
- *Response to OFMDFM Consultation Paper on the Implementation of EU Equality Obligations in Northern Ireland: April 2003 (149kb, 40 pages)*
- *Response to Equality and Diversity – The Way Ahead: January 2003 (13pp)*
- *Response to the Odysseus Trust (Lord Lester) Draft Equality Bill 2002: January 2003 (12pp)*
- *Legislative Reform: Commission Powers/Judicial Process: August 2003 (13pp)*
- *Promoting Equality of Opportunity: Prohibiting Age Discrimination in Employment and Training (January 2004) (22pp)*

[2] The Commission, and its predecessors, has also produced recommendations specific to some of the equality regimes within its remit, namely EOCNI, *The Sex Discrimination Legislation Recommendations for Change* (Belfast: EOCNI, 1997); ECNI, *Recommendations for Change to the Race Relations (NI) Order 1997* (Belfast: ECNI, 2001) and ECNI, *Enabled? Recommendations for change to the Disability Discrimination Act in Northern Ireland* (ECNI: Belfast, 2003).

This draft response largely reflects the well-established position of the Commission as articulated in these earlier papers.

Chapter-by-Chapter Response

This response paper follows the chapter structure of the Consultation Document.

Chapter 1: **INTRODUCTION**

1.1 The Commission welcomes the Introduction to the Consultation Paper. As the Minister of State sets out in his Foreword, "Northern Ireland has a long and distinguished history in the field of equality legislation."[3] The Commission therefore welcomes the commitment in the Document to 'non-regression' from existing standards of protection and due process which exists in the Northern Irish equality law system. The Commission would wish this opportunity be taken to amend, harmonise and extend equality law not just through consideration of extending the scope of existing regimes but also through the development of innovative thinking based on nearly 30 years' experience of the existing regimes. This chapter articulates both a 'non-discrimination' approach to equality law and policy and a more positive, proactive approach to the promotion of equality of opportunity. In particular, the Commission would wish to see a universal move beyond the 'anti-discrimination' approach common to all regimes to a more positive, proactive approach.

Chapter 2: **DRAFT PURPOSES AND PRINCIPLES**

2.1 The Commission has consistently argued for a set of principles to be included in a Preamble to the SEA and therefore generally welcomes the Statement of Principles in Chapter 2. The Commission has developed its own set of principles upon which its approach to the SEA is based. There is an obvious coincidence between the Commission's principles and those articulated in the Consultation Document.

[3] *Consultation Paper*, p 2.

2.2 Despite the fundamentally different approaches underlying the statutory equality duty[4] and the development of substantive equality rights, the objective remains the same, namely the 'mainstreaming' of equality into the policies and practices of employers, service providers and others governed by the equality law regimes. The Commission is committed to a 'common template' across all the grounds in the SEA. The means of achieving this common template are through common concepts, but also effective concepts,[5] and through common enforcement, but also effective enforcement.[6] The objective is a statute which provides for the maximum facilitation for those organisations which wish to pursue equality but also the maximum encouragement for those organisations which merely wish to satisfy equality principles. The Commission wishes to bring two positive experiences to the consideration of the SEA. The Commission's experience of the promotion of equality of opportunity through the 'fair employment' (or FETO) model is that it has achieved significant results.[7] The Commission's experience of the statutory equality duty under section 75 is that a participative model towards mainstreaming equality enriches policy-making. The Commission is committed to both a model of monitoring, review and report, as in the FETO model, but supplemented by a consultative model of equality law which would allow employers and providers of services to consult with those affected by discrimination and inequality through representative organisations and those directly affected by inequality.[8] The Commission recognises that each ground of inequality brings with it its own practical issues. In this sense,

[4] Section 75(1), Northern Ireland Act 1998.
[5] The 4th principle in Chapter 2 states, "To provide an effective, efficient and equitable framework of legislation and public policies to help eliminate unlawful discrimination and promote equality of opportunity." (*Consultation Paper*, p 18)
[6] The 5th principle states, "To provide a clear, efficient and effective means of redress".(*ibid*.)
[7] See generally, Osborne and Shuttleworth, *fair employment A Generation On* (Belfast: Blackstaff Press, 2004).
[8] This development of the FETO model is fully discussed in Chapter 8 of this Paper.

some degree of variation on grounds of diversity, described here as 'variable geometry', must be accepted within a single statute.[9]

2.3 The Commission envisages a 'rising floor' of principles below which the standards of the SEA cannot fall. The first is 'non-regression', a concept now familiar in European equality law[10] and recognised in the 4th principle.[11] So also the Commission would wish to see satisfaction of EU and international standards[12] and harmonisation to the 'best standard' in the existing regimes. Implicitly, this is recognised in the Consultation Paper through the principle, "To minimise the tendency for hierarchies of inequalities to develop and to address the multiple identities held by all, which should ease the legal complexities of multiple discrimination cases before tribunals or courts".[13]

2.4 In many ways, 'equality of the inequalities' is a mantra in Northern Irish equality policy, not because there are no meaningful differences between the various grounds (and the scope of their coverage) which may be included within the SEA but because it is difficult to justify a 'hierarchy of inequality', particularly to those who are members of 'protected groups' which do not gain the level of protection enjoyed by others. The equality law regime in NI should not provide that 'some are more equal than others'. The Commission considers that a weakening of the protection for one group weakens the protection for all and causes confusion and difficulties in multi-identity cases. It also causes difficulties for employers and service providers who are

[9] There will clearly be the need for some exceptions which are subject-specific. There may also be arguments that the application of the full scope of the SEA could be 'staged', particularly for any additional SEA grounds.

[10] For example, Article 6.2, Race and Ethnic Origin Directive 2000 (REOD) and Article 8.2, Framework Employment Equality Directive (FEED) which provide, "The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive."

[11] The 4th principle continues, "to demonstrate no regression from existing law" (*ibid*, p 18).

[12] This is also reflected in the 2nd principle, "To ensure compliance with international human rights treaties, which promote equality and prohibit unfair discrimination, as well as compliance with European law".

[13] *Ibid*, p 20.

entitled to have a consistent and coherent framework of law upon which to base their policies and practices. In this regard, the Commission fully approves of the sixth principle, "To acknowledge that equality is good for the community and is good for the economy."[14] There is a clear business case for equality and diversity. The operation of the 'fair employment' model in Northern Ireland has ensured an open and fair labour market in which the abilities of a wide range of workers are brought into play.[15] It is core to the Commission's proposals that this model, suitably adapted, can play a powerful role at the heart of the SEA.

2.5 Hence, at least implicitly, the combination of 'non-regression' and 'equality of the inequalities' leads towards harmonisation to the best standards, although there must be room for 'variable geometry' within the SEA, namely carefully constructed situations in which the differences between grounds must be respected through modest variations on the common template.

2.6 Finally, the Commission is committed to the establishment of 'best practice' on a comparative basis. This involves both examination of other equality law regimes but also analysis of the successes and failures of nearly 30 years of equality law in Northern Ireland, Great Britain and Ireland and a range of other jurisdictions. The development of a SEA presupposes some creative and inventive thinking on what common template is going to carry equality law and policy through the next 30 years.

2.7 Even though the SEA will form the basis of equality law for many years to come, it is still essential that it be kept under review. As with the fair employment legislation, the SEA should be subject to a 5 year review. Issues such as additional grounds, extension of scope and analysis of the continuing value of exceptions would form the basis of such a review.

[14] *Ibid*, p 19.
[15] See generally, *Osborne and Shuttleworth*.

2.8 The Commission is committed to the underpinning of the SEA by international human rights standards and by a Bill of Rights for Northern Ireland. The Commission has positive experience of the promotion of equality of opportunity through the 'fair employment' model and positive experience of the commitment embodied in section 75 of the Northern Ireland Act 1998 towards full participation in decision-making. With this in mind, the Commission is committed to a constructive model of monitoring, consultation and affirmative action at the heart of the SEA. The Commission wishes to see not merely a clear and consistent framework of laws and means of redress but also both effective laws and effective means of redress. It is in this sense that the Commission wishes to see this consultation process embrace lessons from the experience of the last 30 years and comparative experience from other jurisdictions. The Commission accepts that each area of inequality throws up different issues but any variations in the legislation between grounds must be clearly justified. It is therefore committed to the avoidance of hierarchies of inequality and the recognition of multi-identity.

Chapter 3: **GROUNDS**[16]

3.1 Existing Grounds

3.1.1 In relation to **existing grounds** for which the Commission already enjoys a statutory remit, the Commission welcomes the proposed extension of the coverage of the Race Relations Order 1997 (RRO) to include 'nationality' and 'colour'. The Commission considers the exclusion of these grounds from the RRO (Amendment) Regulations 2003 as involving an unnecessarily narrow interpretation of the implementation powers under the European Communities Act 1972.[17] Indeed, the Commission

[16] In its position paper, *Update on the Single Equality Act* (Autumn 2002) pp 2-18, the Commission considered a range of possible additional grounds.
[17] See ECNI, *Equality Legislative Reform: Implementation of European Union Directives* (July 2002), §3.

wishes to see these anomalies rectified as soon as possible, rather than awaiting the SEA.

3.1.2 In relation to other existing grounds,[18] the Commission welcomes the proposals to extend the definition of disability. Leading on from the work of the Disability Rights Task Force, the Commission, in cooperation with the Disability Rights Commission in Great Britain, has agreed wide-ranging and carefully considered proposals for the amendment of the Disability Discrimination Act 1995 (DDA).[19] The Commission would wish to see all its recommendations on the definition of disability being incorporated into the SEA.[20]

3.1.3 In relation to the definition of 'gender', the Consultation Document deals with gender reassignment as an element of the definition of 'gender' and later considers gender identity and pregnancy and maternity as additional grounds.

3.2 Trans issues

3.2.1 Rather than being an entirely new ground, aspects of trans issues are already included in a broadened definition of 'gender'. A combination of case law in the European Court of Justice[21] and the European Convention of Human Rights[22] indicates that many aspects of gender reassignment would be appropriate as part of an extended definition of gender in the SEA. Issues of gender

[18] The issue of political opinions that support the use of violence is considered in Chap 6, 'Exceptions', at fn 7~~8~~9.

[19] The Commission has consistently argued that 'perceived disability' should be included within the disability ground (ECNI, *Position Paper on the Single Equality Bill,* October 2001, §6.17). Indeed, this would appear to be required by the formulation in Article 2(a), FEED.

[20] In particular, Recommendation 12, *Enabled?* (2003) states, at p 30, "The Government should resource a fundamental review of the definition of disability and the 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' with a view to making them more broadly based, covering people who have/had (or perceived to have/had, or associated with a person who has/had) an impairment that limits their participation in society."

[21] Case C-13/94, *P* v *S and Cornwall County Council* [1996] IRLR 347.

[22] *Goodwin* v *United Kingdom* [2002] IRLR 664 (ECHR).

identity raise slightly different issues but, given the Commission's approach towards gender reassignment, the Commission considers it appropriate to extend the definition of gender to include 'gender identity'.

3.2.2 The Commission considers that many issues of gender reassignment are already covered by the SDO and the HRA. In these circumstances, it may be appropriate to extend the definition of gender to include explicit reference to gender re-assignment and gender identity.

3.3 Additional Grounds

3.3.1 In relation to **additional grounds**, it is accepted that the FEED grounds should be included in the SEA. It would also be consistent with a coherent equality law system for all section 75 grounds to be included as SEA grounds, although the Commission would not wish the section 75 formulation of 'persons with or without disabilities' to be included in the SEA. The Commission believes that disability discrimination law should be asymmetrical in the sense that there should only be protection for those with disabilities.[23] The Commission considers that significant discrimination issues arise particularly in relation to carers. Therefore, protection in relation to those with dependants should be included. This should also be asymmetrical, in favour only of those with dependants. So also the Commission would favour inclusion of **'marital and family status'** as outlined in Consultation Document.[24]

3.3.2 One approach towards additional grounds is to adopt a 'long list' approach, including a significant range of grounds in the legislation.[25] The Commission has called for a 'lively debate' on

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[23] The Commission would wish to include those discriminated against on grounds of perception (*First Position Paper*, §6.17) and association, as with other SEA grounds.

[24] "The ground "marital *and* family status" was proposed in the initial consultation, suggesting that this should include persons who are "married, single, cohabiting and with dependants", including both opposite and same-sex couples" (*Consultation Document*, p 27).

[25] See the latest version of the Equality Section of the Proposed Bill of Rights. Section 4(3) provides:-"*Everyone has the right to be protected against any direct or*

some of the potential grounds which might be included in the Bill of Rights for NI but has generally reserved its position on their inclusion in a Single Equality Act. It may be that a 'long list' approach is appropriate for a constitutional document and a shorter list where the entire edifice of an equality law regime, including indirect discrimination, affirmative action and the remit of the Commission, is applicable. In a Bill of Rights, the focus is upon non-discrimination. An equality clause will set out a list of 'prohibited factors', upon which it is not permissible to rely.[26] Although the draft Section 4(3) in the NIHRC Update Paper has included indirect discrimination within the scope of the non-discrimination clause, this is unusual in a human rights instrument, outside of those specifically directed at equality issues.[27]

3.3.3 Equality statutes do adopt a 'prohibited factor' approach towards direct discrimination. However the wider aspects of the statute are largely directed at those in groups who are perceived to be (or to have been) disadvantaged by discrimination. Systemic discrimination is largely considered to be directed at such 'disadvantaged groups'. In this context, the promotion of equality of opportunity, through the utilisation of indirect discrimination and affirmative action principles, can be seen a means of redressing this disadvantage. Admittedly, indirect discrimination is technically symmetrical (although most frequently invoked in relation to perceived disadvantaged groups), but affirmative action is explicitly directed towards disadvantaged groups.

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indirect discrimination whatsoever on any ground (or combination of grounds)such as sex, marital or family status, sexual orientation, genetic features, race or ethnic origin, nationality, colour, language, religion or belief, political or other opinion, disability, possession of a criminal conviction, national or social origin, association with a national minority, property, birth, parentage, age, residence, status as a victim or any other status."

[26] In this regard, intentional indirect discrimination can be seen as a surrogate for direct discrimination.

[27] See, for example, on positive action, Article 1(4), International Covenant on the Elimination of all Forms of Racial Discrimination (CERD) and Article 4, Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). See also the Draft UN Convention on the Protection and promotion of the Rights and Dignity of Persons with Disabilities, Article 7.

Therefore, for inclusion as an SEA ground, a central consideration is whether the potential ground is based upon systemic discrimination suffered by disadvantaged groups.

3.3.4 Consideration must also be given as to whether the application of an equality statute is the most appropriate means of redressing any such disadvantage. It must be considered whether there are any potential repercussions, particularly in the application of the principle of indirect discrimination, which may be difficult to identify when the SEA is being enacted. This is so particularly in relation to grounds which have not been subject to equality law in the past. There is also a danger that new grounds would, at least initially, be subject to limited scope and extensive exceptions until they are seen to have been 'bedded down' into the system. The prospect of a 'common template' across the SEA, with limited 'variable geometry', may be threatened by the addition of a significant range of new grounds. Nevertheless, both this consultation period and any five-year review of the SEA should be opportunities for further consideration of such grounds.

3.3.5 Therefore, in an equality statute, the Commission would wish to see a sense of focus on grounds which would benefit from an equality law approach and would not wish to see that regime diminished, or the focus of the remit of the Commission dissipated, through more widespread litigation and uncertainty over what is lawful and what is not. The Commission is committed to the realisation of the rights of those in this wider list of proposed equality law grounds. It acknowledges that possible additional grounds, such as protection against discrimination for those with 'past convictions' and those who are 'victims', have emerged in the context of thirty years of conflict and the peace process which is highlighted in the Belfast Agreement. The Commission strongly supports and recognises the equality issues surrounding these grounds. It is nonetheless of the view that the significant rights and responsibilities associated with some of these grounds may be better articulated and protected through specific legislation directed at the particular issues which these grounds raise rather than through inclusion in an equality

law statute.[28] The Commission calls upon the Government to address these needs in an open and transparent fashion.

3.3.6 The Commission is therefore of the view that this opportunity should be taken for detailed consideration of the appropriate and effective means of addressing the protection of rights in these areas.

3.4 Pregnancy and maternity

3.4.1 The Consultation Document raises the issue of 'pregnancy and maternity' as a SEA ground. Essentially, the extension of the definition of gender to include pregnancy by the ECJ has ensured that existing discrimination law governs this ground. It may be that existing gender equality legislation, together with specific rights for pregnant workers, already provides adequate protection. Nonetheless, in accordance with the recommendations of the Commission's predecessor, the EOCNI, the Commission would wish to see the SEA, 'for the avoidance of doubt', set out that direct discrimination on grounds of pregnancy is also direct discrimination on grounds of sex.[29]

3.4.2 The Commission would wish to see clarification in the SEA that direct discrimination on grounds of pregnancy is also direct discrimination on grounds of sex.

3.5 Past convictions

3.5.1 Clearly those with past convictions have suffered and do suffer significant disadvantage. However, there may be issues of definition as to who should be included under this ground. In this regard, it may be more difficult to identify a clearly delineated

[28] See *Response Paper to NIHRC Update Paper* (ECNI: July 2004), p 2.
[29] See EOCNI, *The Sex Discrimination: Legislation Recommendations for Change*, (Belfast: 1997) Annex, §1.6. It is further recommended in §1.7 that there should be no need for a comparator in such circumstances. If the Commission's recommendations on comparators being an issue of proof and not necessity is accepted, this recommendation will have been satisfied. See also Article 2.7 of the Amended Equal Treatment Directive 2002 (AETD).

group of or groups of people with past convictions who suffer systemic discrimination on this ground. The implications of applying indirect discrimination and affirmative action to those with past convictions are also difficult to calculate. It may be that this potential ground may be susceptible to a 'prohibited factor' approach but with significant exceptions. It is also the case that reform of rehabilitation of offenders legislation may be a more appropriate vehicle to deal with the rights of those with past convictions than inclusion in the SEA.

3.5.2 This consultation period and the preparation period prior to the drafting of the SEB should nonetheless be an opportunity for a genuine debate on the appropriate protection of the rights of those with past convictions.

3.5.3 The Commission is not satisfied at this stage that the inclusion of 'past convictions' would be appropriate in the SEA although this opportunity should be taken for consideration of the appropriate and effective means of addressing the protection of rights in this area.

3.6 Victims

3.6.1 The appropriateness of victims as an SEA ground raises similar issues to that of 'past convictions'. There will be particular difficulties in identifying which 'victims' should be included under this ground. In this regard, it may again be more difficult to identify a clearly delineated group of or groups of victims who suffer systemic discrimination on this ground. This ground may be susceptible to a 'prohibited factor' approach subject to suitable exceptions. The implications of inclusion of 'victims' in the SEA would therefore have repercussions which are difficult to calculate. It may be that development of the role of a Victims Commissioner would be a more appropriate method of protecting the rights of victims.

3.6.2 Once again, this consultation period and the preparation period prior to the drafting of the SEB should nonetheless be an

opportunity for a genuine debate on the appropriate protection of the rights of victims.[30]

3.6.3 The Commission is not satisfied at this stage that the inclusion of 'victims' would be appropriate in the SEA although this opportunity should be taken for consideration of the appropriate and effective means of addressing the protection of rights in this area.

3.7 Socio-economic status

3.7.1 It is arguable that the inclusion of 'socio-economic status', even on an asymmetrical basis,[31] would place too much of a burden on the SEA by carrying the approach towards 'disadvantaged groups' to a generalised level towards disadvantage *per se*. There would be a consequent danger that the SEA would become a general constraint on policy-making rather than be focussed on the promotion of equality of opportunity for identifiable disadvantaged groups. The repercussions of applying even direct discrimination, let alone indirect discrimination, to 'socio-economic status' are difficult to calculate. The Commission is nonetheless fully supportive of Government moves towards an anti-poverty strategy and is of the view that the measures which the Commission has recommended in its response to The New TSN the Way Forward [32]will contribute towards many of the issues surrounding inequalities relating to socio-economic status.

3.7.2 In these circumstances, the Commission does not consider that of the inclusion of 'socio-economic status' in the SEA grounds would be appropriate.

[30] The rights of victims are already recognised through the activities of the Victims' Liaison Unit of the NIO and responsibility for victims bestowed upon a Minister of State.

[31] i.e. only applicable to lower, rather than higher, socio-economic status.

[32] ECNI, 'Response to the New TSN the Way Forward Towards an Anti-Poverty Strategy' (Belfast: October 2004).

3.8 Language

3.8.1 Some issues associated with language are already covered by the FETO and the RRO. Certainly, there are arguments concerning serious disadvantage being suffered by certain language speakers. It may be easier to delineate disadvantaged groups in relation to language than some of the other potential grounds which are considered here. Language is also an acknowledged ground of non-discrimination in human rights instruments.[33]

3.8.2 Nonetheless, the application of indirect discrimination to issues of language is difficult to calculate. Even the application of direct discrimination would require clear exceptions. Minority language speakers are entitled to protection of their internationally recognised rights. It may be the case nonetheless that a specific language statute, such as the Welsh Language Act, would be a more appropriate vehicle for the protection of these rights. It must also be noted that a major European instrument on language, the European Charter for Regional or Minority Languages, is programmatic and non-rights based. There is reference to language in the Framework Convention for the Protection of National Minorities[34] but that instrument expresses rights in a less focussed fashion than the European Convention of Human Rights. The Commission has no difficulty with the Framework Convention's incorporation into Northern Irish law, as proposed by the NIHRC.[35]

3.8.3 The Commission is not satisfied at this stage that the inclusion of 'language' would be appropriate in the SEA although this opportunity should be taken for consideration of the appropriate and effective means of addressing the protection of rights in this area.

[33] For example, Article 14 , ECHR.
[34] For example, Articles 5.1, 6.1 and 12.
[35] Response Paper to NIHRC Update Paper, §12.

3.9 Genetic predisposition

3.9.1 Serious consideration must be given to the inclusion of 'genetic disposition'.[36] As with trans issues, 'genetic disposition' can be associated with the established ground of disability. It would appear that 'genetic disposition' may be susceptible to a 'prohibited factor' approach. However, it is not clear that there are particular disadvantaged groups associated with 'genetic disposition'. The implications of applying indirect discrimination and affirmative action to it cannot be calculated at this stage. The repercussions may be significant in a range of related fields, such as insurance. Clearly, the rights of those with particular genetic dispositions require protection but it may be that specific legislation may be a more appropriate vehicle to provide such protection.

3.9.2 The Commission considers that 'genetic disposition' must be subject to review as a potential SEA ground.

3.10 Other status

3.10.1 The Commission is committed to the inclusion of an 'other status' ground in the SEA. This inclusion would permit the orderly extension of the SEA grounds, either through ministerial order or judicial interpretation, as has occurred in relation to sexual orientation through the 'other status' ground in Article 14 of the European Convention of Human Rights.[37]

3.10.2 The Commission wishes to see an 'other status' ground in the SEA.

3.11 Equal pay

3.11.1 On equal pay, the Commission retains its view that there are grave difficulties in the operation of the present legal

[36] *Update Paper*, §§3.12.1-8 and, particularly in relation to disability-related genetic disposition, *First Position Paper*, §6.17.
[37] *Salguerio da Silva Mouta* v *Portugal* (2001) 31 EHRR 1055 (ECHR).

framework.[38] It notes the comment in the Consultation Document that "In the Republic of Ireland equal pay claims are not restricted to men/women and can be taken on grounds of gender, marital status, family status, sexual orientation, religious belief, age, disability, race and member of the traveller community. The Republic of Ireland's legislation has been in place since 1992 and seems to be operating without any major problems."[39] The Commission sees issues of unequal pay to be symptomatic of wider issues of systemic discrimination, in this case in payment systems. It would envisage pay audits across SEA grounds as part of the wider process of promoting equality of opportunity through a reformed FETO model.

3.11.2 The Commission supports the extension of the equal pay legislation across the grounds of the SEA and the absorption of the Equal Pay Act into the SEA.

3.11.3 In summary, the Commission welcomes the proposed extension of the definitions of 'racial grounds' and 'disability' but would wish to see all its recommendations on the definition of disability incorporated into the SEA. It would also wish to see the SEA include variations upon the section 75 categories and is of the view that careful consideration must be given to the case for the inclusion of any further additional grounds but that this opportunity should be taken for detailed consideration of the appropriate and effective means of addressing the protection of rights in this area.

Chapter 4: **SCOPE**

4.1 The Commission has consistently argued that the scope of the SEA should be the same for all designated grounds unless there are powerful reasons for it not to be so. The Commission accepts that every area of discrimination is different and hence that there may be reasons to employ 'variable geometry' in terms of

[38] See *First Position Paper*, §9.18.
[39] *Ibid*, p 34.

applying fundamental equality law principles in a fashion which respects diversity while ensuring that each ground of discrimination is applied with sensitivity. In this sense, 'variable geometry' is nothing more than an appreciation that micro-level variations between equality law regimes are permissible. It is not a basis for wholesale differences between the approaches to different grounds, creating a hierarchy of inequality. The same organisation which is an employer is often also a provider of goods, facilities and/or services etc. Hence it is constructive for a provider of services to extend into its other activities the equality policies it already has in place in relation to the employment of its workers.

4.2 Experience in the Republic of Ireland indicates that the complementary scope of both the Employment Equality Act 1998 (EEA) and the Equal Status Act 2000 (ESA)[40] has not brought about any significant difficulties. On this basis, the Commission cannot see any reason as to why the scope of protection should vary from ground to ground. Most of the existing regimes already cover goods, facilities and services (GFS). The Commission does accept that, if a wide range of new grounds is incorporated into the SEA, the case for a chronological 'staging' of the extension of scope is stronger.

4.3 For example, employers will be well used to applying their equality policies to issues of sexual orientation discrimination by the date of coming into force of the SEA. The performance of public functions is already extensively covered by the statutory equality duty in relation to the nine grounds governed by section 75. The extension of substantive rights into this area will underpin the performance of the statutory equality duty.

4.4 The Commission considers that, other than in exceptional circumstances, the scope of the SEA should apply across all

[40] The ESA was introduced two years after the EEA because of a constitutional challenge and not because of any intention to implement a 'staged' approach towards legislative change.

the recognised grounds. Any 'variable geometry' on scope should be clearly justified.

4.5 Employment, self-employment, occupation

In relation to definitions on these matters, the Commission favours the widest approach to the definition of those covered.[41] It would therefore prefer use of the term 'employment relationship' so as to encompass those in such a relationship even if the relationship is not technically contractual and a definition which encompasses the possibility arising of a substitute providing the 'personal execution' in question.

4.6 Volunteers

4.6.1 Recent case law on the applicability of the 'contract personally to execute work or labour' test to voluntary work has been confused.[42] The Commission, in response to the Age Discrimination consultation, has been more explicit in its stance. In particular, it takes the view that "it would be appropriate for the implementing Regulations to make clear that certain 'voluntary' relationships have a sufficient degree of permanence to amount to a form of employment relationship within the meaning of the Framework Directive."[43] Earlier discussion considers that certain relationships may be 'employment relationships' in the absence of a strict contractual nexus. Some voluntary arrangements include 'honorary contracts' or 'voluntary agreements' which are quasi-contractual in content and others may be intricately

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[41] The Commission is aware of recent case law on agency workers and contract workers (*Jones* v *Friends' Provident*, judgment of 30.09.03, NICA, cp *Brook Street Bureau (UK) Ltd* v *Dacas*, judgment of 5 March 2004 (CA)).

[42] In *Murray* v *Newham Citizens Advice Bureau*, judgment of 6 July 2000 (EAT), the EAT was prepared to contemplate a possible contract involving a voluntary worker. In *South East Sheffield Citizens Advice Bureau* v *Grayson*, judgment of 17 November (EAT), the EAT concluded that a voluntary worker had no contract at all, an approach also adopted by the EAT, presided over by the President, Burton J, in *Melhuish* v *Redbridge Citizens Advice Bureau*, judgment of 24 May 2004 (EAT).

[43] *Promoting Equality of Opportunity: Prohibiting Age Discrimination in Employment and Training* (January 2004), p 14.

connected with the labour market, for example, preparatory work as a prelude to an application for employment.

4.6.2 While not wishing to see occasional, transient voluntary work covered by the full ambit of the SEA, the Commission would wish to see a situation in which citizens can take part in substantial, established voluntary work with the legitimate expectation that they will be protected from discrimination.

4.6.3 In this regard, the Commission favours the wide definition of 'employment' set out on option (c).[44]

4.7 Social protection, including social security, healthcare and social advantages

The Commission would wish to see the scope of the SEA include these matters which are at present limited to the RRO, as amended to implement the REOD. The Commission is also satisfied with the two definitions set out in option (b). The Commission is not convinced that 'social advantages' can only be granted by public authorities.[45] In these circumstances, and in light of the definition in option (b), the Commission would wish to see reconsideration of the scope of the equivalent of Article 20A in the SEA.

4.8 Education

The Commission is firmly committed to the bringing of all the sectors of education under the scope of the SEA. In its response to the SENDO proposals, the Commission has expressed its disquiet at the development of a separate disability discrimination regime in relation to education.[46]

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[44] *Consultation Paper*, p 46, that is "employment under a contract of service or of apprenticeship or a contract or other agreement or arrangement to do any work, including voluntary work, where the work is predominantly performed in person."
[45] Article 20A(2) of the RRO as amended.
[46] ECNI, Response to Draft Special Educational Needs and Disability Order (June 2004), §24.

4.9 Disposal and management of small premises

The Commission wishes to see option (c) on this exception, namely an objective justification test based on the GOR/GSR test which is applicable across the SEA.

4.10 Coverage of public functions[47]

The non-discrimination principle in relation to performance of public functions is a significant product of the MacPherson Inquiry through Article 20A of the RRO but is also recognised, at least concerning direct discrimination, in relation to religious and political discrimination.[48] The Commission sees this non-discrimination principle as a vital underpinning of the statutory equality duty. It would also be an important vehicle for unequivocally bringing procurement issues within the SEA.

4.11 'Good relations' duties

4.11.1 Some attention has been paid to the second statutory duty under Section 75 of the Northern Ireland Act 1998,[49] namely that "a public authority shall in carrying out its functions in Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group". However the 'good relations' objective is also defined by Article 67, Race Relations (Northern Ireland) Order 1997[50] whereby a District Council is under a duty "to make appropriate arrangements with a view to securing that its various functions are carried out with due regard to the need to eliminate racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups". The Commission is of the view that this Article 67 duty in relation to 'goods relations' is not entirely subsumed within the duty in section 75(2). Although Schedule 9 and the use of equality schemes establish 'appropriate arrangements' for the promotion of equality of opportunity under section 75(1), they are largely

[47] See also discussion under Chap 7, in relation to performance of public functions.
[48] Section 76, Northern Ireland Act 1998.
[49] Section 75(2).
[50] Race Relations (Northern Ireland) Order, 1997. H.M.S.O. 1997.

silent on appropriate arrangements for the promotion of 'good relations'. So also Article 67 involves a 'due regard' duty in relation to both the promotion of equality of opportunity and the promotion of good relations while section 75(2) involves a weaker 'regard' duty. In this context, the Commission is of the view that the section 75(2) duty[51] must be subject to an analysis as to whether this duty on District Councils can be extended across the equality grounds and to public authorities other than District Councils.[52]

4.11.2 The Commission considers that the consultation period is an opportunity to discuss further the scope and nature of 'good relations' duties and views on how such duties are to be enforced. The extension of the duties to cover other categories, as well as the role of the Equality Commission and others, must also be discussed. It is accepted that section 75 is a reserved matter. Nonetheless, given the overlap with Article 67 of the RRO, some discussion is required.

4.12 Private clubs/voluntary associations

The Commission wishes to see the SEA apply to private clubs/voluntary associations. Once again, it considers the genuine occupational requirement/genuine service requirement (GOR/GSR) forms a model on the basis of which exceptions can be considered.

[51] Although section 75(2) is a reserved matter, it is understood that some reserved matters can be included in a devolved measure with the approval of the Secretary of State or a cross-community vote in the Assembly.
[52] See ECNI, *Recommendations for Change to the Race Relations (NI) Order 1997* (Belfast: ECNI, 2001), pp 5-6.

Chapter 5: **DEFINITIONS OF DISCRIMINATION**

5.1 Direct discrimination

5.1.1 The definitions to be employed in the SEA are the vital bedrock upon which the effective enforcement of equality law can be built. The Commission has reservations about aspects of both the direct and indirect discrimination definitions set out in the REOD and the FEED.[53] They are 'minimum standards' below which implementation should not fall but there is a danger that a floor of European equality rights may become a 'ceiling' above which EU States do not wish to legislate. In relation to the definition of direct discrimination, Art 2(2)(a) ROED/FEED states that "direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1". Although this is based on a British definition of direct discrimination, it grounds the notion of direct discrimination strictly on a 'comparative' basis.[54] The view of the Commission is that a comparator is *evidence* of discrimination but not the *essence* of discrimination. The real rationale for direct discrimination is to prohibit reliance on a discriminatory 'prohibited' factor. Therefore, the Commission would wish to see a definition which provides that direct discrimination occurs when a 'disadvantage is based upon' a prohibited factor.[55] The Consultation Paper, with reference to the Commission's preferred definition, states that it would involve a shift from a focus on 'treatment' to a focus on 'outcomes'. But discrimination is about outcomes. Treatment is merely the 'means' towards the 'end' of the outcome. As stated below, the preferred definition of indirect discrimination explicitly refers to 'particular

[53] See, for example, *Equality Legislative Reform: Implementation of European Union Directives* (ECNI: July 2002), §5 i) and ii).

[54] Some vital European Court of Justice (ECJ) judgments in gender equality law, Case C-177/88 *Dekker* ([1990] ECR I-3941) and *Case C-32/93 Webb* v *EMO Air Cargo (UK) Ltd* ([1994] ECR I-3537), both on pregnancy discrimination and Case C-13/94 *P* v *S* ([1996] ECR I-2143), on gender assignment discrimination, cannot be easily reconciled with a comparative approach at all.

[55] See, for example, *Equality Legislative Reform: Implementation of European Union Directives*, pp 5-6.

disadvantage'. But the Commission's view is that a disadvantage explicitly, or intentionally, directed towards a disadvantaged group should be direct discrimination and that an inadvertent use of an indirectly discriminatory provision should be dealt with under indirect discrimination.

5.1.2 The Commission also wishes to see an adaptation of the direct discrimination definition in the SEA to provide that any disadvantage based upon any ground in the SEA should also include any *combination* of grounds. An inherent difficulty with separate equality law regimes is that it is difficult to address multi-identity issues. This significant issue can be addressed in the SEA but it is essential that the definition provides for situations in which it is the combination of prohibited factors which is the issue at stake.

5.1.3 The REOD and the FEED refer to harassment as a form of discrimination. Until the enactment of a separate definition of harassment, harassment cases were treated as direct discrimination cases. The Commission is uncomfortable with the isolation of harassment as a separate cause of action in the implementing Regulations when the Directives intend its incorporation into the principle of discrimination. The Consultation Paper accepts that, in cases of harassment, a comparator should not be necessary in cases of 'blatant' harassment. It speaks of a comparator as being a question of 'proof', not 'necessity'. So also the definition of victimisation in the Directives refers to "dismissal or other adverse treatment by the employer as a reaction to a complaint" without reference to comparators. In this regard, the Commission agrees that a comparator can be a question of proof but not necessity in a harassment or victimisation case but does not agree that a comparator must be a question of necessity in direct discrimination cases.[56] There is a danger that direct discrimination cases degenerate into a 'game' of finding an

[56] A particular difficulty which the Commission has encountered is when the *same* treatment is applied to a group of workers but which arguably is for the *purpose* of placing particular individuals in the group at a disadvantage. The 'comparative' approach cannot deal with such a scenario.

appropriate comparator[57] instead of seeking to establish whether the disadvantage which the applicant has suffered was on grounds of a prohibited factor.

5.1.4 Given reference to the notion of 'particular disadvantage' in relation to *indirect* discrimination, the Commission would therefore wish to see a definition which provides that direct discrimination occurs when a 'disadvantage is based upon' a prohibited factor. The Commission notes that the Hepple/Lester proposal for a Single Equality Bill provides support for the Commission's proposal that the 'less favourable treatment' approach should be supplemented by a 'disadvantage on the basis of' approach and that this as a possible way forward in avoiding reliance on a purely comparative approach.[58] If a comparative approach is not necessarily appropriate for harassment and victimisation cases, the Commission would wish to see some explanation as to why it is essential for other direct discrimination cases.

5.1.5 The Commission therefore recommends option (c)[59] as the basis for the definition of direct discrimination.

5.2 Reasonable accommodation

5.2.1 The Commission notes the reference under 'Direct discrimination' to the extension of the 'reasonable accommodation'[60] principle to other grounds. The Commission is of the view that disability discrimination should not be treated in a fundamentally different fashion to the rest of the SEA. In particular, it is of the view that 'reasonable accommodation', as a

[57] The Commission has funded litigation to the House of Lords to overturn a convoluted approach towards comparators in the case of *Cartwright-Shamoon* v *The Chief Constable of the Royal Ulster Constabulary*.
[58] ECNI, *Response to the Odysseus Trust Draft Equality Bill 2002*, §2.4.
[59] *Consultation Paper*, p 57-58.
[60] The Consultation Paper refers to 'reasonable adjustment' but the FEED refers to 'reasonable accommodation' (Article 5). The Commission prefers the latter terminology as it reflects a wider obligation to accommodate a person in relation to all the policies of the employer/provider of services rather than only to 'adjust' the physical environment.

complement to indirect discrimination, is a concept of universal application. The Commission notes that the definition of disability involves an 'anticipatory' approach in relation to provision of goods facilities and services.[61] It would wish to see this anticipatory approach taken towards employment and training also.[62]

5.2.2 The Commission would also wish to see the reasonable accommodation duty apply to all the grounds in the SEA. A generalised reasonable accommodation duty is frequently invoked in the Canadian equality law system.[63] It is a more direct and proactive duty than that which emerges from the technicalities of applying the indirect discrimination principle.

5.2.3 The Commission would wish to see an anticipatory 'reasonable accommodation' principle apply to all SEA grounds.

5.3 Indirect Discrimination

5.3.1 The Commission also has reservations with the definition of indirect discrimination provided in the REOD and the FEED. Article 2(2)(b) ROED/FEED provides that "indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary". On the one hand, the Commission welcomes the non-statistical approach towards indirect discrimination encouraged by the use of the

[61] Section 21 of the Disability Discrimination Act 1996, in relation to discrimination in the provision of goods, facilities and services provides for 'reasonable adjustments' for "disabled persons", which is interpreted to involve an anticipatory duty on the part of service providers.
[62] ECNI, *Enabled?*, Recommendation 13, p36.
[63] See Vizkelety B, 'Recent Developments in Human Rights Law', Canadian Association of Statutory Human Rights Agencies, June 2004 (www.cashra.ca/en/presentations/bvizkelety)

concept of ‘particular disadvantage’. In this sense, a finding of indirect discrimination does not degenerate into a ‘game’ of identifying a ‘pool of comparison’ and producing statistics to establish ‘disproportionate effect’ within that pool. On the other hand, the Commission is uncomfortable with the ‘legitimate aim’ element in the definition. As a specialised agency combating unlawful discrimination and promoting equality of opportunity, indirect discrimination is a vital component in the Commission’s armoury against institutionalised or systemic discrimination. A weakened objective justification test compromises that the attainment of that objective.

5.3.2 The ECJ enunciated a ‘necessary aim’ test in the seminal indirect discrimination case, Case 170/84 *Bilka-Kaufhaus*.[64] It is essential that a policy or practice which places a disadvantaged group at a ‘particular disadvantage’ should be justified by a ‘necessary’, as opposed to a ‘legitimate’, aim test. A ‘legitimate aim’ test for objective justification in welfare equality cases in the ECJ has proved fatal to a wide range of indirect discrimination challenges.[65] So also, in relation to statutory employment schemes, as in *ex parte Seymour-Smith*,[66] the invocation of a “legitimate aim” test by the ECJ has set a standard which the Member States have found little difficulty in satisfying. Hence, the Commission recommends that the definition of indirect discrimination includes a ‘necessary aim’ standard in its test for objective justification.[67]

5.3.3 The Commission welcomes the proposal to apply the principle of indirect discrimination to disability discrimination law.

5.3.4 The Commission recommends adoption of the EU Directive definition of indirect discrimination but with the substitution of a ‘necessary aim’ test for a ‘legitimate aim’ test.

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[64] [1986] ECR 1607.
[65] See, for example, Case C-444/93 *Megner* [1995] ECR I-4741.
[66] Case C-167/97 *R* v *Secretary of State ex parte Seymour-Smith* [1999] ECR I-623.
[67] See, for example, *Equality Legislative Reform: Implementation of European Union Directives*, p 7.

5.4 Harassment

5.4.1 In relation to harassment, which is subsumed within the definition of 'discrimination' in both the REOD and the FEED but is considered a separate cause of action in the GB and NI legislation, the Commission has welcomed an explicit definition of harassment.[68] However, the provisions of Article 2.3 require both a violation of dignity *and* the creation of a hostile environment. In keeping with established UK case law, the Government accepted that the principle of 'non-regression'[69] required a disjunctive approach in both GB and NI implementation, so that either a violation of dignity *or* the creation of a hostile environment could be enough to satisfy the definition.

5.4.2 The Commission fully accepts that blatant acts of harassment should not require a comparator. As stated above, the Commission is of the view that comparators are always a question of proof and not a question of necessity in all direct discrimination and in harassment cases.[70]

5.4.3 The Commission is of the view that comparators should be used as a matter of proof rather than necessity in all direct discrimination cases and recommends the same approach in harassment cases.

5.5 Victimisation

5.5.1 The definition of victimisation in Article 11 FEED states, "Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a

[68] ibid, p 7.
[69] Article 8.2 FEED.
[70] The Commission notes that Article 2.2, 4th indent of the Amended Equal Treatment Directive 2002 (AETD) makes provision for a specific definition of sexual harassment, being "where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment."

reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment."

5.5.2 The Commission is satisfied that there is no need for a comparator to satisfy this definition. In this regard, it is not convinced that the inclusion of a comparative approach in the implementing Regulations comes within the terms of the definition in the Directives.

5.5.3 Once again the Commission is of the view that comparators should be used as a matter of proof rather than necessity in victimisation cases.

Chapter 6: **EXCEPTIONS**

6.1 The Commission considers that every exception to equality law principles must be carefully scrutinised. There cannot be the automatic transposition into the SEA of exceptions which might have appeared to make sense 25 years ago and no longer do so. The Commission accepts that the use of 'genuine occupational requirements' can occasionally reflect the need for respect for diversity. The Commission has also consistently held the view that respect for diversity may occasionally justify a 'genuine service requirement' (GSR) in relation to GFS cases, e.g. for female-only swimming lessons or counselling specifically for black and ethnic minorities or gays and lesbians.

6.2 The Commission therefore welcomes the inclusion of a 'genuine service requirement' across the scope of the SEA outside employment and training.

6.3 The Commission accepts that it may be necessary to provide that certain jobs should only be undertaken by people characterised by an otherwise prohibited factor. Indeed, once a solid platform of equality law is established, there may be arguments that diversity must be respected particularly for

previously disadvantaged groups.[71] One controversy addressed in the Consultation Paper is whether to persevere with a 'specified list' approach towards GORs (and other exceptions) as was the case in the sex discrimination and race discrimination legislation or move to a general definition as in the REOD and the FEED[72]. In essence, implementation of the REOD has involved retention of the list approach but supplemented by the general definition. Implementation of the FEED has involved a general definition approach, although in NI, it was determined that the 'essential nature of the job' test in the FETO,[73] being a stronger test than that in Article 4.1, could not be diluted by enactment of either the general GOR or the more specific GOR in relation to 'religious ethos organisations' in Article 4.2.

6.4 The issue which must be confronted is whether the enactment of a general GOR in relation to religious and political discrimination would dilute the protection given by the existing FETO exception, thereby offending the 'non-regression' principle. On the one hand, it would be unfortunate if the FETO GOR test was diluted. On the other hand, a mature equality law regime might be able to give a slightly wider latitude to GORs/GSRs in the interests of respect for diversity. The Commission considers the Article 4.1 definition to be a valuable one. A preferred reconciliation of the Article 4.1 definition and the FETO test would be to replace 'determining' in the Article 4.1 definition with 'essential'. The GOR test would therefore read, "A difference of treatment which is based on a characteristic related to any of the grounds referred to in this Act shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or

[71] One difficulty which the Commission has with the REOD is that it does not explicitly provide for what might be called a 'general service requirement' (GSR), i.e. an equivalent provision to the GOR for the purposes of the provision of goods, facilities and services, e.g. a support service for black and minority ethnic recipients. The Commission would wish to a GSR in the SEA subject to the same stringent requirements as GORs.

[72] Article 4.1 REOD/FEED.

[73] Article 70(3) of the Order provides:- *"(3) So far as they relate to discrimination on the ground of religious belief, Parts III [employment] and V do not apply to or in relation to any employment or occupation where the essential nature of the job requires it to be done by a person holding, or not holding, a particular religious belief."*

of the context in which they are carried out, such a characteristic constitutes a genuine and *essential* occupational requirement, provided that the objective is legitimate and the requirement is proportionate." The Commission would wish to see a complementary definition for the GSR.

6.5 The Commission is not intrinsically opposed to the enactment of specific exceptions either generally or in relation to particular grounds. This is an area in which the diversity of discrimination and inequality may justify 'variable geometry' within the SEA. Indeed, despite the attractions of a GOR/GSR, uncertainty will exist amongst employers and providers of service, and in society more generally, if we have to wait for conclusive interpretation of GORs/GSRs in the courts and tribunals. Therefore, it should be possible to include some exceptions explicitly in the SEA and explain others in a Code of Practice.[74] Other exceptions may be judged to have outlived their usefulness and should be repealed.

6.6 However, the Commission is agreed that specific exceptions should be *examples* of the general GOR/GSR, unless the EU directives explicitly provide for such an exception (and even then the need for an autonomous exception should be carefully scrutinised[75]). Hence, if it is felt necessary to have a specific 'organised religion' exception in the Employment Equality (Sexual Orientation) Regulations, it should be a legislatively approved *example* of the general GOR. This is the effective conclusion of the judicial review of the equivalent provision in the GB Regulations.[76] Nonetheless, the Commission would wish to see a range of examples, avoiding the impression that an

[74] The Commission is not of the view that the modernisation of 'specified list' exceptions in the RRO and SDO is necessarily regressive. Some of these exceptions may have outlived their usefulness. Others may require adaptation to met modern conditions.

[75] For example, permissible exceptions in relation to age discrimination require careful scrutiny, see *Promoting Equality of Opportunity: Prohibiting Age Discrimination in Employment and Training* (January 2004).

[76] In its 'Response to OFMDFM discussions on a proposed Regulation 8, Employment Equality (Sexual Orientation) (Northern Ireland) Regulations 2003' (November 2003), the Commission recommended that the proposed Regulation 8(3) should be made subject to the proposed Regulation 8(2) and couched in terminology mirroring that of Article 4.1.

exception such as the ‘organised religion’ exception was the norm.

6.7 Consultees are asked to address the issue of the ‘teachers’ exemption’. The Commission has had a consistent policy that the exemption should be removed. After a recent review of the exemption,[77] the Commission has come to the pragmatic view that the exemption is not sustainable in relation to recruitment of teachers in secondary schools. If it is to be retained in relation to recruitment of teachers in primary schools, this should be a staging post towards its eventual removal. Given the broad approach towards the SEA in this Response Paper, the question must be asked as to whether any ‘teachers’ exemption’ should be an autonomous exception or subsumed within the general approach of exceptions being articulated as examples of GORs.

6.8 On the one hand, Article 15.2 FEED does provide the opportunity for an autonomous exception in the SEA. On the other hand, it is important to appreciate that the exception is only available in Northern Irish law “in so far as this is expressly authorised by national legislation”. The general approach of the Commission is that all exceptions should be carefully scrutinised and justified. In this regard, the Commission has come to the view that an exception for recruitment of primary school teachers is a manifestation of the general GOR test of a ‘genuine and essential characteristic’ of that employment. The Commission is therefore of the view that a ‘primary school exception’ could be an autonomous exception in the SEA but could also be an explicit example of a GOR.

6.9 More generally, the Commission has consistently held the view that uncertainties surrounding the general GOR/GSR must be alleviated through a Code of Practice on what is anticipated to be included within the GORs/GSRs and what is not. The Commission should therefore be explicitly authorised to produce a Code of Practice, approved by OFMDFM, on what is

[77] Teachers Exception Recommendations, ECNI. June 2004.

understood to be a permissible GOR/GSR and what is not.[78] It would also wish to see any remaining exceptions subject to a five-year review of the operation of the SEA.[79]

6.10 The extensive list of exceptions set out in the Appendix to this chapter on discrimination legislation requires careful analysis.[80] The Commission wishes to see a rigorous examination of all proposed exceptions. The SEA is an opportunity not only to create a 'common template' but also to question the continuing validity of many exceptions which may have appeared necessary in the past but no longer perform a useful function.[81] The Commission accepts that some examples of the general GOR/GSR should be articulated in the SEA. A reworded 'organised religion' exception in the Sexual Orientation Regulations and the 'teachers' exemption' in relation to primary school recruitment could be possible examples. The Commission would also recommend that a Code of Practice on GORs/GSRs be produced.

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[78] For example, in relation to the 'organised religion' exception, the Commission has sought to give authoritative guidance on the scope of the exception, based on ministerial statements in the House of Lords and subsequently vindicated in the judicial review proceedings on the legality of the exception (see ECNI, *Sexual Orientation Discrimination in Northern Ireland: The Law and Good Practice* (March 2004), p 17).

[79] In relation to the definition of 'political opinion' in the FETO, the Commission considers that the exclusion of political opinions that support the use of violence should be treated as an exception to the non-discrimination principle and no longer form part of the definition of 'political opinion'. Its continuing relevance should be reviewed and consideration given to whether it can be accommodated within the 'general GOR' approach, stand alone as an autonomous exception or be repealed.

[80] See the Employment Protection (Sexual Orientation) Regulations, Article 7(3) (GB) and the Employment Protection (Sexual Orientation) Regulations (Northern Ireland), Article 8(3), held, on a narrow interpretation, not to be outside the scope of Article 4.1, FEED (*R (on the application of Amicus-MSF and others)* v *Secretary of State for Trade and Industry* [2004] IRLR 430 (High Ct)).

[81] Indeed, many exceptions in UK sex discrimination law, and now other pre-existing regimes, have been successfully challenged through exploitation of EU equality law. Examples from EU gender equality law include Case 222/84, *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, a case assisted by a predecessor of the Equality Commission, the Equal Opportunities Commission for Northern Ireland.

Chapter 7: **GOODS, FACILITIES AND SERVICES**

7.1 In the Commission's experience, a significant range of issues have been raised in relation to GFS on issues of racial and disability discrimination. Few GFS cases have been brought to the Commission in relation to gender and religious/political discrimination. Certainly, the necessity to bring GFS cases to the County Court rather than the more experienced tribunal system is a contributing factor and the Commission addresses this issue in its proposals for a Single Equality Tribunal in relation to Chapter 10 of the Paper. Another factor has been the focus of the 'fair employment' debate on labour market issues, an agenda which has been significantly achieved through the efforts of the Commission and its predecessor, the Fair Employment Commission.[82] The Commission would not wish to see any loss of focus on employment equality. Nonetheless, it is necessary to ensure respect for non-discrimination and equality of opportunity across the entire range of human activity. In this regard, the Commission considers issues of scope, including GFS, to be central to an equality law regime which will carry Northern Ireland through the next 30 years with the same level of success which the existing regimes have achieved in providing significant advances over the past 30 years.

7.2 Because of access to justice in GFS cases through the ordinary courts and because of a focus on employment equality across all the equality law regimes, insufficient attention has been paid to what constitutes GFS. The existing regimes already provide statutory examples of GFS. The Commission is of the view, in line with its earlier thinking on exceptions, that a list of examples should be provided in the SEA. This would also be an opportunity to provide authoritative guidance in a Code of Practice on the

[82] Osborne and Shuttleworth, *Fair Employment A Generation On* (Belfast: Blackstaff Press, 2004)

scope of GFS. Given some restrictive interpretations of GFS, particularly in relation to the provision of public GFS, the Commission is attracted to the proposal to have a presumption that activities are GFS unless the contrary is established.

7.3 The Commission would wish to see examples of GFS set out in the SEA backed up by a Code of Practice. The Commission supports the proposal that there should be a presumption that an activity is the provision of GFS.[83]

7.4 The Commission has never been convinced of the distinction between GFS which could be provided privately, even by a public body, and GFS which could only be provided by a public body. Even the examples of GFS in the RRO and SDO, as clearly identified by the cogent dissenting judgment of Lord Scarman in *Amin*,[84] indicated that the legislature always intended that the provision of public GFS should be included in the scope of the equality law regimes. Indeed, the approach of the MacPherson Report towards institutionalised discrimination, resulting in the development of a non-discrimination principle in relation to the performance of public functions, was a reaction to this narrow interpretation of public GFS.[85] The Northern Ireland Act provides for the application of this principle to direct discrimination on grounds on religious belief and political opinion[86] and the statutory equality duty already requires equality impact assessment in relation to the performance of public functions.

7.5 The Commission wishes to see the universal application of the principle of non-discrimination in the performance of

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[83] Option 14(c), p 33.
[84] *Amin* v *Entry Clearance Officer, Bombay* [1983] 2 AC 518 (HL).
[85] The Commission considers that the *Amin* distinction is not sustainable in relation to discrimination on grounds of racial or ethnic origin in light of the provisions of Article 3.1(h), ROED, which refers to "access to and supply of goods and services which are available to the public, including housing". Article 1.2 of the Equal Treatment in Access to and Supply of Goods and Services is more explicit, referring to "access to and supply of goods and services which are available to the public, including housing, as regards both the public and private sectors, including public bodies."
[86] Section 76.

public functions. Given the extent of the contracting-out of public functions, the Commission also wishes to see the private provision of public functions included in this measure.

7.6 The Commission has already set out its approach towards GSRs in relation to questions of scope in Chapter 4.

7.7 The Commission is in favour of a GSR, with some examples explicitly set out in the SEA and others articulated in a Code of Practice. Any autonomous exceptions should be clearly justified.

7.8 The Commission is generally unconvinced that there is timing issue for the introduction of GFS protection across all recognised grounds in the SEA.

Chapter 8: ADDRESSING UNDER REPRESENTATION IN EMPLOYMENT

8.1 The Commission is concerned that the issue of affirmative action and positive action is discussed purely in the context of 'under-representation in employment' and not also in relation to promoting equality of opportunity. The Commission recommends that the 'redress of under-representation' measures in FETO are extended to other grounds. In particular, the Commission wishes to see an obligation to undertake monitoring and to conduct reports and reviews, as required in the FETO, apply to all specified grounds.[87] The FETO model has been successful in relation to under-representation on grounds of community background.[88] This success is an aspect of the business case for equality and diversity in the workplace. Given the particular circumstances of some SEA grounds, the Commission would

[87] The Commission notes, in particular, Article 8b.3 of the Amended Equal Treatment Directive 2002 (AETD) which provides, "Member States shall, in accordance with national law, collective agreements or practice, encourage employers to promote equal treatment for men and women in the workplace in a planned and systematic way.

[88] *Osborne and Shuttleworth*, op cit.

wish to see the mechanisms in a reformed FETO model, built on a consultative model based on s75 obligations in the public sector, applied more widely. Employers are already fully conversant with the operation of the FETO model. Public employers are required to undertake monitoring and review of policies under the statutory equality duty. The Commission has undertaken its Article 55 Review across a wide range of grounds and is promoting integrated equality plans across a range of equality grounds. It does not consider the extension of the FETO model to other grounds to be unduly onerous.

8.2 The Commission is firmly of the view that the benefits of promoting equality of opportunity significantly outweigh the extra costs of the extension of existing processes in the FETO model across all the grounds in the SEA.

8.3 If under-representation is not a live issue in relation to some grounds, there may be an apparent argument that the FETO model should not apply to it. But the Commission is of the view that the objectives of the FETO model go beyond redressing under-representation and include the wider goal of promoting equality of opportunity across all aspects of employment. Nonetheless, the Commission is cognisant that each area of discrimination and inequality must be treated in a manner appropriate to the realities of the discrimination and inequality that individuals suffer. The collection of quantitative data is a vital ingredient of the FETO model and will form a significant source of information in relation to other SEA grounds.[89] In this sense, the Commission is aware, from its experience of the operation of the statutory equality duty, that qualitative monitoring has much to offer in the diagnosis of inequality as quantitative monitoring. In this sense, the Commission is proposing[90] that a consultative model, built on experience of both the statutory equality duty and of extensive statutory requirements to consult in the workplace,[91]

[89] See Draft UN Convention on the Protection and promotion of the Rights and Dignity of Persons with Disabilities, Article 6.
[90] Commission Position Paper, 'Commission Powers/Judicial Process' (August 2003).
[91] For example, the Framework Health and Safety Directive 1989 and Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002

is the appropriate model to be developed in Northern Ireland both in relation to employment but also, if suitably adapted, the provision of goods, facilities and services. The EU Directives explicitly provide for 'social dialogue' and encouragement of collective agreements on equality issues.[92] Each Directive also requires Member States to encourage dialogue with non-governmental organisations.[93] This is a central proposal of the Commission in relation to a 'reformed' FETO model. The outcome of these consultations could be included in Article 55-type reviews and an obligation could be imposed to consider mitigation of and alternatives to adverse impacts which emerge from these consultations. In this manner, a variation of the statutory equality duty could be applied to the private sector.

8.4 The Commission would wish to see the development of a consultative model in relation to grounds set out in the SEA. It would wish to see the FETO model adapted so that the outcome of these consultations could be included in the processes of monitoring, report and review and an obligation introduced, modelled on the statutory equality duty, whereby the adverse impact of employment policies should be alleviated.

8.5 Positive/Affirmative Action

8.5.1 More generally, the Commission would wish to see a more innovative and creative approach towards positive action than is discussed in the Consultation Paper. The Commission does not consider positive action to be a narrow exception to the non-discrimination principle but rather a major vehicle for the promotion of equality of opportunity. Article 7.1 FEED provides that "[w]ith a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds

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establishing a general framework for informing and consulting employees in the European Community.

[92] Art 11.1-2, REOD, Art 13.1-2, FEED, Art 8b.1-2 AETD.

[93] Art 12, REOD, Art 14 , FEED, Art 8c AETD.

referred to in Article 1".[94] This formulation, already well tested in ECJ case law,[95] provides a significantly wider scope for positive action, albeit short of quotas, than is permitted at present in NI equality law. The Commission would wish to see a significantly expanded role for positive action in line with the permissive limits of the EU definition.

Employers (and service providers and others) should be able to introduce, on a voluntary basis, positive measures to include previously disadvantaged groups in employment and the receipt of services without the danger of an indirect or a direct discrimination action being taken against them. Such measures would lead on from the implementation of equality plans and the outcome of 'Article 55' reviews, as part of a process of culture change and the tackling of systemic discrimination. There may well be a role for the Commission in approving such schemes.

8.6 Government contracts and grants?

8.6.1 The Commission considers that the use of Government contracts and grants and the wider issues of procurement deserve specific consideration. In its *First Position Paper*,[96] the Commission recommended that:-

- positive duties on employers to practise equality actively by monitoring, regularly reviewing practices and assessing the provision of fair participation be extended to all grounds of discrimination. Compliance with these duties should become a contract condition in all procurement.

- implementation of the duties on public authorities to have due regard to the need to promote equality of opportunity in carrying out all their functions in relation to procurement and grant giving

[94] Article 5 REOD is couched in similar terms.
[95] See, for example, Case C-450/93 *Kalanke* v *Bremen* [1995] ECR I-3051 and Case C-409/95 *Marschall* v *Land Nordrhein-Westfalen* [1997] ECR I-6363.
[96] §9.41.

- extension of the present provisions for the disqualification from Government contracts and grants of a non-compliant employer in the Fair Employment and Treatment Order to operate in respect of the extended positive duties on employers in sex, race and disability.

8.6.2 The Commission considers that the effective operation of the statutory equality duty and of the non-discrimination in performance of public functions principle will go some way towards dealing with procurement questions. However, there is also a need for a lively debate on the future development of contract compliance, in the context of an effective system of enforcement of the SEA.[97]

8.6.3 The Commission considers that the consultation period is an opportunity to ensure that an effective regime in relation to public procurement is put in place.

8.6.4 A core objective of the Commission is "maximum facilitation for those organisations which wish to pursue equality as well as maximum encouragement for those organisations which merely wish to satisfy equality principles". It is not enough to pursue equality by merely avoiding direct and indirect discrimination cases. Organisations should be free to introduce suitably approved 'positive inclusionary measures' short of quotas in order to redress inequality in employment and provision of services.

Chapter 9: **ECNI - FUNCTIONS AND POWERS**

9.1 General duties

9.1.1 The Commission would wish to see a review of its general duties in light of the advent of the SEA. Some of these duties are specific to the original regime in question. It may be possible to subsume some of the regime-specific duties under the more general duties which should be harmonised as much as possible.

[97] *Update Paper*, §7.8.

The Commission notes that, given the asymmetry of the DDA regime, the general duty refers to 'the promotion of the equalisation of opportunities for disabled persons'.

9.1.2 The Commission wishes to see a harmonisation of its general duties, with accommodation for its duties in relation to disability.

9.1.3 Given the approach of the Commission towards the extension of the FETO model and its much broader approach towards the availability of voluntary positive action, the Commission would wish to see a general duty to promote affirmative or positive action applied across the full scope of the SEA. Consideration should also be given to a duty to respect diversity.

9.1.4 In particular, the Commission has a 'good relations' duty in relation to race and section 75(2) of the Northern Ireland Act places a duty on public authorities to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

9.1.5 The Commission is satisfied that its general duty on good relations has significant potential across all the SEA grounds.[98] For example, the need for hate crime legislation reflects the extreme breakdown of good relations. Hate crime law in NI now encompasses disability and sexual orientation as well as religion, politics and race. There is therefore ample evidence that good relations on grounds other than race are a vital consideration in the promotion of equality and respect for diversity.

9.1.6 The Commission wishes to see its good relations duty apply to all the SEA grounds.

[98] See also the earlier discussion of the 'good relations duties' on public authorities and District Councils.

9.2 Codes of Practice

9.2.1 The general approach of this Response Paper is to promote harmonisation to the 'best standard' in the existing regimes. The Commission would therefore wish to see a consistent approach across all grounds. Given that OFMDFM approves draft Codes of Practice, the Commission is not convinced that there is a need for the EDO approach whereby matters in a Code may be specified by OFMDFM. The formulation in the RRO and SDO, "*to include such practical guidance as the Commission thinks fit as to what steps it is reasonably practicable for employers to take for the purpose of preventing their employees from doing in the course of their employment acts made unlawful by this Order"*, is negative in tone and adds nothing to the guidance which a Code of Practice would, in any event, give.

9.3 Legal assistance

9.3.1 In relation to issues of legal assistance, the Commission has been content to leave the existing criteria in place. As a strategic enforcement body rather than a legal aid body, the Commission would wish the 'legal assistance' criteria to focus on this strategic role. The Commission is not calling for the removal of the 'unreasonable to proceed unaided' criterion but rather for a greater sense of balance between strategic criteria and the 'unreasonable to proceed unaided' criterion. Nonetheless, the Commission considers it to be essential that this clarification of its legal assistance powers must be preceded by a review of the provision of legal aid and resources for vulnerable applicants in equality cases. It should also involve an intensified consideration of alternative dispute resolution mechanisms.

9.3.2 In its position paper, 'Legislative Reform: Commission Powers/Judicial Process', the Commission proposed that it should have a 'general equality mandate', particularly in relation to legal assistance.[99] At present, it can only assist cases 'under

[99] ECNI, 'Legislative Reform: Commission Powers/Judicial Process' (August 2002), pp 2-3. See also, ECNI, 'Response to Fairness for All: A New Commission for Equality and Human Rights' (August 2004), §§6.1-6.6.

the' Orders and Acts. First, there is the practical issue of equality law cases including ancillary matters, particularly in other aspects of employment law. The opportunity should be taken to clarify that the Commission may give advice and assistance on these ancillary matters to the extent that this is necessary in order to pursue a suitably strategic SEA case. Secondly, the Commission is of the view that a more general mandate would allow it to pursue highly strategic legal cases which are central to the achievement of its general duties but not necessarily within the scope of the SEA. For example, many highly significant developments in the promotion of equality of opportunity have been achieved through exploitation of the European Convention of Human Rights.[100] As a body with limited resources, the Commission can only assist highly strategic cases but it should have the power to assist cases in pursuit of its general duties, for example, under the Human Rights Act.[101] This might be achieved through reference to the Commission being able to act in matters which are 'reasonably incidental' to the performance of its general duties.

9.3.3 The Commission considers the opportunity should be taken to clarify its powers of legal assistance both in terms of a focus on strategic cases and on assistance in matters ancillary to such cases. In particular, the Commission would wish to have a more explicit power to assist cases which are significant to its pursuit of its general duties but outside the scope of the SEA.

9.3.4 In relation to legal assistance, the Commission would wish to see the RRO time limit for consideration of applications for assistance applied to all SEA grounds. It would wish to see its power to provide assistance across all grounds authorised by a Commission officer as in the DDA. The Commission wishes to see a revised system of recovery of expenses introduced whereby those who fail to cooperate with the Commission may

[100] Indeed the Commission has assisted cases to the Strasbourg Court in order to clarify aspects of the equality statutes (eg *Tinnelly and Sons Ltd* v *UK* (1998) 27 EHRR 249 (ECHR).

[101] For example, in *Fitzpatrick* v *Sterling Housing Association*, it was established that a same–sex couple enjoyed rights under housing legislation.

be subject to recovery of expenses incurred by the Commission. The Commission's grant-awarding powers are generally subsumed within its functions in relation to research and education.[102] Its specific power under Article 43, RRO, to grant assistance to organisations 'concerned with the promotion of equality of opportunity, and good relations, between persons of different racial groups', being linked to two proposed general duties of the Commission across all SEA grounds, should also be applicable across the SEA.

9.3.5 The Commission has the power under FETO to undertake investigations, in relation to employment-related matters, in any case in which it is seeking to 'promote equality of opportunity'.[103] This power predates the introduction, in 1989, of aspects of the FETO model, such as monitoring. Today it is linked to other aspects of the FETO model as the power of investigation acts as a significant incentive on employers to undertake their responsibilities under the model. The FETO approach towards investigations is a less confrontational, more 'cooperative' model than is found in the other equality law regimes, in which the Commission can conduct general investigations across sectors or the entire economy but can only conduct a formal 'named person' investigation if it has formed a belief that an act of unlawful discrimination has been committed. This latter approach has proved to be a more adversarial process, on occasion open to judicial review against the Commission. The more recently introduced formal investigation system under the EDO has advantages over the long-standing approach in the sex and race discrimination legislation, for example in relation to undertakings in lieu of an investigation. The Commission wishes to see formal investigations across the SEA at least to be based on the EDO model. However, it is of the view that the FETO model, adapted to take the EDO developments into account, offers the best possibilities for Commission investigations which will produce genuinely constructive outcomes in relation to the promotion of equality of opportunity. In any event, the more cooperative Article 11 investigative model provides greater opportunities for the

[102] See, for example, Article 44, RRO.
[103] Article 11, FETO.

promotion of equality of opportunity than formal investigations under the SDO and RRO.

9.3.6 Given its proposal to extend the FETO model across the SEA, the Commission also wishes to see the FETO approach towards investigations applied across the SEA. In any event, the Article 11 investigative model possesses clear advantages over the SDO/RRO/EDO model. To the extent that that model is retained, the Commission wishes to see the 'formal investigation' process reformed in light of developments in the EDO.

9.3.7 The Commission considers that the FETO investigative model is also applicable to GFS and related matters. The Commission considers that the investigations can be conducted in private although it should retain the discretion to make its reports public. The Commission would not wish to be constrained by precise 'terms of reference' which are a product of the adversarial approach under the SDO/RRO/EDO model. It should nonetheless be required to identify the 'scope and purpose' of its investigations.

9.3.8 The Commission should enjoy wide powers to collect information, subject to privacy law limitations which should replace more specific restrictions.

Chapter 10: **TRIBUNALS AND COURTS**[104]

10.1 A significant aspect of the Commission's proposals on enforcement is the merging of the jurisdiction of the tribunal system and the ordinary courts into a Single Equality Tribunal. There is a natural progression from a Single Equality Commission to a Single Equality Act including a Single Equality Tribunal. On the one hand, traditional 'simple justice' models of judicial process, frequently set up to provide dispute resolution in employment and welfare cases, are not suited to cope with the complexities of equality law, given that they are underpinned by the distinctive legal system of the European Union. Hence, it is

[104] See generally 'Legislative Reform: Commission Powers/Judicial Process' paper.

necessary to develop a system of judicial process which can manage the complexities of equality law. Northern Ireland already has a specialist equality tribunal in the FET, which has played a vital role in the development of the fair employment model in NI.[105] Rather than see the FET merged back into a general tribunal system, the Commission wishes to see the expertise in the tribunal system applied across the full range of SEA cases. The issues of law and evidence raised in GFS and other cases are very similar to the issues raised in employment equality cases. Indeed, the Commission has already indicated that the extension of GFS across the SEA merely requires employers to treat their customers in the same manner in which they are expected to treat their workers.

10.2 The Commission approves the establishment of a High Court Division to hear appeals from Industrial Tribunal cases. Although an Employment Appeal Tribunal would largely be concerned with employment law cases, the Commission considers that it should have within its remit any appeals from the Single Equality Tribunal.

10.3 The Commission proposes that a single Equality Tribunal be established to handle all SEA cases and that an Employment Tribunal should hear appeals from the Single Equality Tribunal.

10.4 Although the question of legal aid is a reserved matter, the Commission considers it essential that it be available in the Equality Tribunal. The Commission cannot act as a legal aid body. It can only assist the most strategic cases in order to clarify the law or change practices. Given the complexities of equality law, many vulnerable applicants could not possibly have the expertise to bring cases unrepresented or the resources to employ legal representatives. The Commission is also deeply concerned at the growing incidence of costs being awarded against applicants in tribunal proceedings. Any extension of legal

[105] See Fitzpatrick B, 'Review of Fair Employment Case Law', in *Osborne and Shuttleworth*, *op cit*.

aid must coincide with a widespread review of the provision of legal services in equality cases.

10.5 The Commission proposes that legal aid should be available for applicants in the tribunal system.

10.6 The Consultation Paper does include some discussion of 'representative claims and class/group actions' but the Commission is committed to its proposal that the Commission itself should have autonomous standing to bring cases in its own name and other groups, particularly trade unions and suitably qualified interest groups should enjoy this standing also.

10.7 A crucial element in the debate upon effective enforcement concerns the extent to which the system of judicial process should move beyond one predicated upon an individual bringing his or her own case. The Commission is convinced that, although it and its predecessors, have assisted many highly significant cases, with ramifications well beyond the facts of the particular case, there are still many examples of discrimination and inequality which are never addressed because individuals, frequently in highly vulnerable positions, do not wish to, or cannot afford, to litigate. The Commission has two stances upon this issue of standing for itself and other organisations, such as trade unions and interest groups, to bring cases to the courts and tribunals.

10.8 First, Article 7.2 REOD/ Art 9.2 FEED provides that "Member States shall ensure that associations, organisations or other legal entities which have … a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either *on behalf* or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive" (emphasis added). The Commission is of the view that it supports individuals who bring cases in their own name but it would act 'on behalf of' a complainant if it brought the case in its own name but with the consent of the named complainant. Although such a formulation would still require the naming of complainants, the Commission takes the view that some of the pressures of

bringing a case in the complainant's own name would be removed. Standing to bring a case would also give the Commission control over the proceedings. Given the terminology used in Articles 7 REOD and Article 9 FEED, such standing should also be open to trade unions and suitably qualified interest groups.

10.9 The Commission proposes that it should have standing to bring cases on behalf of named individuals and that this standing should also be granted to trade unions and other suitably qualified organisations.

10.10 In addition, the Commission would wish the SEA to go further. In highly strategic cases, the 'victim' almost becomes a bystander. The issue at stake is whether the policies and practices of an employer or service provider exhibit evidence of institutionalised or systemic discrimination. In such cases, the Commission is of the view that standing should be available even in the absence of a named 'victim'. The European Parliament, during the passage of the Revised Equal Treatment Directive, proposed an amendment to allow for genuinely autonomous standing for organisations, as follows, "[associations, organisations and other legal entities] may, where national law permits, bring a collective action, in any judicial and/or administrative procedure, on their own initiative and aside from the particular circumstances of an individual case, in order to determine whether or not the principle of equal treatment … is applied". The Commission is convinced that it is only with such a formulation that some of the most entrenched aspects of discrimination and inequality can be tackled.

10.11 The Commission proposes that it should also have standing, in cases of systemic discrimination, to bring cases in its own name. It would wish to see this standing extended to trade unions and other suitably qualified organisations.

10.12 At the other end of the judicial process, it is equally important to have effective remedies both for individuals but also where organisations are given standing either to act either on behalf of

named complainants or in their own name. Article 15 REOD/ Article17 FEED provides that “Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive”.

10.13 The Commission is unconvinced that remedies in NI courts and tribunals are “effective, proportionate and dissuasive”. It would wish to see creative and imaginative thinking on issues such as exemplary compensation in some individual cases, reinstatement and re-engagement for dismissed workers and proactive remedies to require changes to policies and practices, to require equality audits and to require liaison with the Commission. 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.

10.14 The Commission wishes to see a more proactive approach towards remedies in the tribunals and courts, with a focus on the changing of policies and practices, as well as effective compensation for acts of discrimination.

Chapter 11: **ALTERNATIVE DISPUTE RESOLUTION**

11.1 Very many equality law disputes are capable of ‘alternative dispute resolution’ (ADR) through conciliation, mediation and arbitration. The timely use of ADR may prevent cases becoming complicated, allow for an informal setting in which they can be resolved and provide meaningful outcomes in reasonably close proximity to the events in question. The objective of any equality law regime is the production of durable solutions to discrimination and inequality. The pursuit of a strategically important case does not reach a satisfactory conclusion by a payment of compensation without any resultant change in policies and practices. So long as conciliation and mediation produce durable outcomes, the Commission would welcome greater use of these

alternatives.[106] Indeed, the Commission is able to insist upon terms in negotiated settlements such as undertakings to change practices, to carry out equality audits and to liase with the Commission. The Commission wishes to see these outcomes amongst the remedial options open to the Single Equality Tribunal. However, the Commission also wants to see these outcomes achieved through ADR.

11.2 The Commission is not opposed to the possibility of arbitration in equality cases, so long as it is not an attempt to develop another 'simple justice' model for what are often complicated cases. There may be sensitive cases, for example harassment cases, in which a more informal system of dispute resolution may be more attractive than any traditional form of judicial process. So also, it may be easier to extract a proactive remedy out of arbitration proceedings, conducted in close proximity to the alleged act of discrimination. However, the private nature of the outcome is not conducive to maximisation of the potential of assisting cases and there are dangers that vulnerable applicants will not necessarily receive the level of protection which would be expected in judicial process. Therefore the Commission is in favour of arbitration in some circumstances.

11.3 The Commission welcomes discussion of alternative dispute resolution. It would particularly like to see the promotion of conciliation and mediation in SEA cases and considers that there may be circumstances in which arbitration would be an appropriate method of dispute resolution in SEA cases.

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[106] It would particularly wish to see examination of mediation processes undertaken under the auspices of the Office of the Director of Equality Investigations in the Republic of Ireland.