

Equality Commission

FOR NORTHERN IRELAND

Equality Commission for Northern Ireland

Response to ‘Promoting Equality of Opportunity’

Implementing EU Equality Obligations in Northern Ireland

A Consultation by the Office of the First and Deputy First Minister

April 2003

**Equality House
7- 9 Shaftesbury Square
Belfast
BT2 7DP**

**Telephone: 028 90 500 600
Fax: 028 90 331 544
Textphone: 028 90 500 589
Email: information@equalityni.org
Website: www.equalityni.org**

EQUALITY COMMISSION FOR NORTHERN IRELAND

RESPONSE TO

'PROMOTING EQUALITY OF OPPORTUNITY'

Implementing EU Equality Obligations in Northern Ireland

A Consultation by the Office of the First and Deputy First Minister

1.0 Introduction

- 1.1 The Equality Commission for Northern Ireland (“The Commission”) has responsibility for the legislation on equal pay, sex discrimination, disability discrimination, fair employment and treatment, race relations and the public sector statutory duty. The aim of the Commission is to promote respect for diversity, eliminate discrimination and achieve equality of opportunity for all.
- 1.2 The Equality Commission has a general duty to keep equality legislation in Northern Ireland under review and to advise Government on recommendations for change. As such we hope that Government will give our views important consideration.
- 1.3 The Commission welcomes the opportunity to respond to the proposals contained in the consultation document ‘Promoting Equality of Opportunity: Implementing EU Equality Obligations in Northern Ireland’
- 1.4 The Commission has produced a number of recent documents on the proposals for a single Equality Act for Northern Ireland. These should be read together with this response. They are available on our website: www.equalityni.org
 - *The 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)*

1.5 In addition, the Commission has produced two other papers, also on our website, which address related issues.

- Response to Equality and Diversity – The Way Ahead (13pp)
- Response to the Odysseus Trust (Lord Lester) Draft Equality Bill 2002(12pp)

2.0 Background

2.1 The Northern Ireland Executive in its first *Programme for Government*¹ committed itself to consult on a Single Equality Bill, with a view to introducing this in 2002. The Commission is aware that a number of factors made this timetable unrealistic. These included the need for more detailed information and further debate on issues, as requested by many of those who responded to the earlier consultation² by OFMDFM, the fact that all the EU equality Directives had not been finalised and that an Assembly election was timetabled for May 2003, which would have created great difficulties in the passage of primary legislation. Whilst the Commission is aware that these impediments to progressing with a single Equality Act resulted in the Government having to revise the timetable and make use of Regulations under the European Communities Act 1972 (ECA), we would not wish to see these alternative approaches take away from the need ultimately to achieve a harmonised, best practice approach to a single Equality Act for NI.

2.2 The Equality Commission is also aware, from the introduction to the consultation, that the current proposals by OFMDFM to use ECA Regulations are, with some notable exceptions,³ to bring in ‘minimal’ changes to existing protections so as *to effect the*

¹ Programme for Government: Making a difference 2001-2004. Northern Ireland Executive, 2001.

² Promoting Equality Of Opportunity. Office of the First and Deputy First Minister. 3 May 2001.

³ For example extending the changes to include political opinion and national origins.

*changes required*⁴ by the Directives. It is the Commission's view that the Directives raise many potentially useful examples which could be developed, so as to extend the overall framework for the protection from discrimination⁵ in our community. These we consider should have been addressed in the Regulations, thus taking a best practice approach to them.

- 2.3 The Commission specifically welcomes the Minister's commitment to continue the work to develop proposals for a single Equality Act and that this will involve full and inclusive engagement with interested parties.⁶ We also welcome the Minister's reference to both harmonisation of existing law and his assertion that the implementation of the revised strategy will ensure that a firm foundation is laid upon which to build a comprehensive body of law dealing with unfair discrimination in all its forms.⁷
- 2.4 The Commission, in recognising that the timetable for the review of the framework for the protection from discrimination in Northern Ireland has been unavoidably changed, is concerned that the intervening period, before a single Equality Act comes into force, will add to the confusion over existing safeguards in our society. We believe that these can be minimised through some amendments to the current draft regulations, by ensuring that a tight timescale for the introduction of a single Equality Act is followed and, that some intervening legislation is passed, where a clear need is demonstrated. In particular we recommend that the disability proposals contained in the draft regulations are instead carried forward by primary legislation in 2004. We believe that as the timescale for disability is different for that of religion & belief, political opinion, race and sexual orientation, it would allow for the development of protection via the primary legislative route, which of course would allow for a more detailed consideration of the issues involved.
- 2.5 The Commission welcomes the commitment to bring in disability changes, in 2004, in advance of the 2006 imperative contained in the EU Framework Directive. We are, however, disappointed that

⁴ See paragraph 5, page 6.

⁵ These include: social protection and social advantages in the Race Directive and social dialogue, new positive action measures and defence of rights in all the Directives. We have dealt with these issues throughout the report.

⁶ See para 1, page 5.

⁷ See para 2, page 5.

the Government seems to be content to leave 'age' until later in the legislative process. We are aware that OFMDFM intends to consult on age later this year. At the same time we are concerned about leaving legislation upon age discrimination until the end of the implementation period date allowed by the Directives. This may lead to a perception that age is not as urgent or important as other areas. This may therefore create the perception of a hierarchy of rights. Indeed, in our contact with age organisations we have been continually reminded that they consider the fact that 'age' is being left to the last as an indication of such a hierarchy.

- 2.6 The Commission recognises that the draft Regulations do, in some instances, go beyond a strict compliance approach to the Directives. We note, accordingly, that the Regulations propose to amend the law in relation to political opinion and national origins. The Commission cannot, however, understand why such an extension could not be made for 'colour' and even, though specifically excluded in the Directive, 'nationality'. It is of particular importance to include 'colour' in the Regulations as in our opinion 'colour' is more often the reason used, or articulated, in racial harassment of minority ethnic people. So also the Commission is concerned that Travellers have not been explicitly included as an 'ethnic group' within the draft RRO Amendment Regulations.
- 2.7 The Commission welcomes the inclusion of some functions concerning sexual orientation in relation to advice, promotion and the issuing of Codes of Practice. It is gravely concerned that it is not being given functions in relation to legal assistance for complainants, the right to bring cases on behalf of complainants, the power to conduct formal investigations of acts of alleged discrimination and functions in relation to discriminatory job adverts. The failure to give the Commission functions in relation to legal assistance for complainants sits strangely with the power to be given to the Commission in respect to discriminatory job adverts in DDA cases. It is clear that OFMDFM considers this to be a 'related matter' under s2(2)(b) ECA 1972. The Commission therefore does not understand why the range of enforcement powers in relation to sexual orientation has not also been treated as a 'related matter' in the Employment Equality (Sexual Orientation) Regulation (Northern Ireland) 2003.
- 2.8 The Commission notes that OFMDFM has carried out initial work on an Equality Impact Assessment (EQIA) of the draft Regulations

under the duties arising from s75 and Schedule 9 Northern Ireland Act (The Public Statutory Duty). The Commission notes that OFMDFM has stated that in line with the approved Equality Scheme OFMDFM is committed to adhering to the principles of s75 when reviewing and developing policy. We also note that specific questions have been asked as to the impact that the draft Regulations will have on any of the 9 grounds included within s75 and whether there are any alternative approaches to the promotion of equality of opportunity in the Regulations. We have addressed issues in relation to the EQIA later in this report (see Para 38.0).

- 2.9 Finally, the Commission notes the implementation deadline in the REOD as being 19 July 2003. The Commission is gravely concerned that, four years after the programme for Government proposed a single statute by 2003, there is a possibility that the RRO (Amendment) Regulations may not be enacted by the implementation deadline. The Commission urges OFMDFM to ensure that the RRO (Amendment) Regulations are enacted by that date even if there is some delay in the enactment of the other Regulations.

3.0 The Consultation Process

- 3.1 The Equality Commission has some concerns over the approach taken by Government to this consultation. We are particularly concerned in respect to accessibility issues for disabled people. In particular we believe:

- The font size for consultation documents should be Arial 14 – the Department of Education took this advice on board for their consultation on SENDA to good effect
- Greater prominence should be given to the availability of the document in other formats. This should ideally be on the front page, or very close to it. The document refers to other formats on page 48 and the back page.
- The consultation document is held on the OFMDFM website as a PDF file, which cannot be read by assistive technology - a Word version should have been used.

- The consultation document could have carried the European Year of People with Disabilities logo – as OFMDFM are the lead Department and this could have set an example to others by taking this to publicise the Year.

The Commission would be pleased to advise OFMDFM on accessibility issues in relation to consultations and engagement with disabled people.

4.0 General issues concerning implementation⁸

4.1 Concept of discrimination (Article 2 REOD & FEED)

4.2 Direct discrimination (Article 2.2(a) REOD & FEED)

4.3 We note that the approach of the Government is to take the comparative ‘less favourable treatment’ approach to direct discrimination. In its advice to OFMDFM, the Commission recommended that the legislation should take a non-comparative approach. It is guided by the parallel developments in NI of a draft Bill of Rights. The preliminary draft Bill of Rights is adapted from the provisions of the REOD and FEED but takes a deliberately ‘non-comparative’ approach, ie:

“Direct discrimination shall be taken to occur when a person has suffered, will suffer or would suffer disadvantage on the basis of any of the grounds in clause 4(4) (the non-discrimination clause).”

4.4 The Human Rights Commission justifies this approach as follows:-

*“The definition of direct discrimination makes it clear that illegal discrimination occurs when the source of disadvantage is a personal or group characteristic, such as one of the protected grounds in the non-discrimination clause set out above. The definition also minimises the need to find a comparator when establishing the existence of inequality and relies instead on proof of disadvantage.”*⁹

⁸ This section deals with issues common to both Directives and across all the Regulations. Issues that are specific to one set of draft Regulations are dealt with in the Regulations specific sections below.

⁹ NIHRC, *Making a Bill of Rights for Northern Ireland*, Belfast: NIHRC, 2001, 32.

- 4.5 The Commission prefers to argue that comparison is *evidence* of inequality, not the *essence* of inequality, which is better expressed as ‘disadvantage by reason of ...’. It is significant to note that the Equal Treatment Directive 1976, upon the basis of which much EU gender equality law has been developed, defines the ‘principle of equal treatment’ as meaning “that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.” There was no attempt in EU gender equality law to define ‘direct discrimination’ as ‘less favourable treatment’. The REOD, Article 2.1 and the FEED, Article 2.1, define the principle as meaning that “*there shall be no direct or indirect discrimination whatsoever [on the prohibited grounds].*” (emphasis added) and then proceed to define ‘direct discrimination’ in terms of ‘less favourable treatment’.
- 4.6 Some vital ECJ judgments in gender equality law, Case C-177/88 *Dekker*¹⁰ and Case C-32/93 *Webb v EMO Air Cargo (UK) Ltd*,¹¹ both on pregnancy discrimination and Case C-13/94 *P v S*,¹² on gender assignment discrimination, cannot be easily reconciled with a comparative approach at all.¹³ It is arguable that some situations, such as those in these cases, are *intrinsically* discriminatory and that *evidence* of discrimination through comparison is otiose. So also the Commission has encountered its own difficulties with a rigorous application of the ‘comparative’ approach in *Shamoon v Chief Constable of the Royal Ulster Constabulary*.¹⁴ This case has recently been decided in the House of Lords. Their Lordships addressed the narrow comparator approach by the NI Court of Appeal and decided that the particular comparison preferred by the applicant was inappropriate, reinforcing a narrow view of appropriate comparators. The House went on to assert that the issue of a less favourable comparator can be treated hypothetically and not restrictively, as had been the approach of the NI Court of Appeal. Lord Nichols, in his speech, suggested that ‘Employment

¹⁰ [1990] ECR I-3941.

¹¹ [1994] ECR I-3537.

¹² [1996] ECR I-2143.

¹³ In the 2nd and 3rd mentioned cases, the UK courts had significant difficulties in interpreting the ‘less favourable’ provisions of the SDA in conformity with the ECJ’s interpretation of the ETD. See, in particular, the HL in *Webb (No 2)* [1995] IRLR 645, a construction of the ‘less favourable treatment’ test in the SDA/SDO which the commentators, Simon Deakin and Gillian Morris, doubt was sustainable as even a ‘benevolent’ interpretation of the statute, Deakin S and Morris G, *Labour Law* (3rd ed), London: Butterworths, 2001, 648.

¹⁴ [2001] IRLR 520 (NICA), [2003] UKHL 11.

Tribunals should avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was'.¹⁵ This supports the Commission's view that, whilst for most cases the use of the comparator approach will be the obvious approach to take, in some cases, where the facts of the case themselves point to discrimination or where it is not easy to identify a comparator, such a reliance on a comparator or hypothetical comparator may not always be appropriate. The Commission is unconvinced that a comparator is necessary in order to establish discrimination and urges OFMDFM to use the Commission's preferred approach which adopts a 'disadvantage' approach towards both direct and indirect discrimination definitions in such a way as to focus upon the reason for the discrimination in direct discrimination cases rather than an 'arid' quest for real or hypothetical comparisons.

- 4.7 It is the Commission's view, therefore, that the introduction of even a relatively generous comparative approach in the REOD and the FEED which allows for hypothetical comparators, as has been approved in *Shamoon*,¹⁶ is still a narrower approach than has been taken in EU gender equality law and a weaker definition than that in the preliminary draft Bill of Rights.¹⁷ On this basis, the Commission affirms its support for the draft Bill of Rights definition, based on a concept of 'disadvantage on grounds of' a prohibited criterion.

5.0 Indirect discrimination (Article 2(b) REOD & FEED)

- 5.1 The Commission notes that, as with the Commission's proposals, the draft Regulations adopt the 'particular disadvantage' approach to indirect discrimination as set out in the REOD and the FEED. In terms of justification the Directives' approach is to consider if the action was objectively justified by a 'legitimate' aim and the means of achieving it were 'appropriate and necessary' The Commission notes however that the draft Regulations adopt a 'proportionate

¹⁵ *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11. per Lord Nicholls at 11.

¹⁶ [2001] IRLR 520 (NICA), [2003] UKHL 11.

¹⁷ It is also arguable that, since the indirect discrimination definition is based upon a concept of 'disadvantage', there would be a greater consistency between the two definitions if the direct discrimination definition was based on 'disadvantage' also.

means' of achieving a 'legitimate aim' test. Both of these approaches are significantly different from the Commission's approach to 'objective justification' which is based upon existing ECJ case law on gender employment equality law, namely a 'necessary aim' test¹⁸ (at least outside welfare equality¹⁹ and some statutory scheme cases²⁰). A "legitimate aim" test for objective justification in welfare equality cases has proved fatal to a wide range of indirect discrimination challenges. So also, in relation to statutory employment schemes as in *ex parte Seymour-Smith*,²¹ the invocation of a "legitimate aim" test by the ECJ has set a standard which the Member States have found little difficulty in satisfying. However, the ECJ has re-asserted the 'necessary aim' test in 'non-statutory scheme' employment cases.²² The Commission is also unconvinced that the terminology in the draft Regulations in relation to 'proportionate' means satisfies the Directives' requirement for an 'appropriate and necessary' means test. Indeed, in conjunction with a 'legitimate' aim test, it would appear that 'proportionate' means would also only have to be 'legitimate', hence incurring a double diminution of the breadth of the indirect discrimination principle. Ultimately, it is only through strong anti-discrimination provisions that institutionalised discrimination can be challenged. As a strategic enforcement agency, the Commission believes that the definition of indirect discrimination should not be compromised and hence would wish to see a 'necessary aim' test for objective justification maintained throughout the draft Regulations and is of the view that an 'appropriate and necessary means' test is the minimum permissible within the terms of the Directives.

6.0 Harassment (Article 2.3)

6.1 The Commission welcomes the approach adopted in the draft Regulations in taking a disjunctive approach towards harassment as being either the violation of a person's dignity or the creation of an intimidating etc environment. We recognise that the definition in

¹⁸ The ECJ enunciated a "necessary aim" test in the seminal indirect discrimination case, Case 170/84 *Bilka-Kaufhaus* [1986] ECR 1607.

¹⁹ Case C-444/93 *Megner* [1996] IRLR 25.

²⁰ Case C-167/97 *R v Secretary of State ex parte Seymour-Smith* [1999] IRLR 253.

²¹ [1999] IRLR 253.

²² Case C-281/97 *Krüger* [1999] IRLR 808.

the Directives would have led to a regression in the current protection and as such would have been contrary to the non regression clauses of Article 6, REOD and Article 8, FEED. The Commission notes with interest the approach adopted by the draft Regulations in relation to the ‘unwanted conduct’ test in harassment cases. The Regulations state that the test should be “having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect”. The Commission is concerned that this test may involve a shift from a purely subjective approach adopted in current case law and, as a result, confer less rights on individuals. The Commission recommends below that the Regulations include a separate Regulation e.g. entitled ‘safeguarding existing protections’, which states that the Regulations are not to be used to confer less rights in any area of law than would have been the case prior to the Regulations coming into force.

6.2 The Equality Commission deals annually with a significant volume of complaints about discrimination in the field of employment. A disturbingly significant number of these are concerned with harassment. In our experience harassment cases are often very difficult and stressful for the individual complainant. In the case of sexual harassment our experience is that harassment cases often involve allegations which amount to degrading and humiliating treatment of the individual. We are very concerned with the continued pattern of harassment despite the widespread publicity afforded to it in the media and through training provided by the Commission and individual employers. The Commission is of the opinion therefore that we need the strongest possible anti-harassment laws to tackle this menace which pervades peoples’ employment and social lives.

7.0 Scope (Article 3 REOD & FEED)²³

7.1 Occupation

The Commission notes that the draft Regulations do not address the EU Directives’ inclusion of ‘occupation’ within them. We note from the draft Employment Equality (Sexual Orientation)

²³ The issues relating specifically to the Race Directive (REOD) are dealt with under the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003 section below.

Regulations (Northern Ireland) 2003 that the issue of office holders, post holders, Regulation 11 is 'blank', although there are provisions in Regulation 7 for those who have a statutory power to select employees for others. The Commission would wish to see this issue comprehensively addressed in a way which satisfies the Directives and that it is included in all the Regulations.

7.2 Occupational Pensions and Insurance Services

The Commission notes that there is the potential for the inclusion of separate occupational pensions and insurance services coverage in the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, although the specifics are blank. According to the notes to the draft Regulations, these are to cover trustees of occupational pension schemes or a provider of an insurance service on behalf of an employer. The Commission believes that anti-discrimination legislation should cover all employment or service delivery relationships and as such protection should be made as wide as possible. We have additionally made reference to concerns regarding occupational and other married related benefits in the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 section below.

7.3 Occupational requirements (Article 4 REOD/Article 4 FEED)

The Commission notes that the draft Regulations make use of the term 'requirement', as used in the REOD and the FEED. In terms of a 'general occupational requirement' (GOR) we have considered whether a long-list approach would be feasible in a Single Equality Act and, on balance, the Commission is satisfied that a 'general' GOR be introduced on the basis of an "essential nature of the job" test as set out in Article 70(3), FETO which should be supplemented by Codes of Practice produced by the Commission. We note with interest that the draft Race Relations (Amendment) Regulations adopt both approaches, namely retaining the 'long list' in Article 7 of the 1997 Order while supplementing it by a 'general clause' in what would be Art 7A(2) of the Order.

The Commission welcomes the omission of any new GOR in the draft Fair Employment and Equal Treatment (Amendment) Order Regulations as an acknowledgement that to reduce the level of protection by way of a 'general clause' would contravene the 'non-

regression' clause in the FEED. However, it notes with concern that an opportunity has been missed to harmonise the GOR standard across all the fields covered, by way of an "essential nature of the job" test.

The Commission notes that there may be concerns about the extent to which the general GOR test in both Directives can be used in relation to concerns about GORs in particular contexts. We have in mind the potential use of more specific GORs in certain contexts, eg issues of pregnancy or sexual orientation, in relation to religious ethos organisations. This matter is dealt with in more details under the Sexual Orientation Regulations.

7.4 **Positive action** (Article 5 REOD/Article 7 FEED)

The Commission has had a constructive experience of the use of positive action in advancing equality and diversity in the workplace.

In Northern Ireland we have recommended a broader approach to positive action which we believe underpins the spirit of the European Directives. We believe that a new model for positive action can be developed which makes greater use of other positive inclusionary methods. These would allow the use of seemingly neutral criteria which would in effect favour an underrepresented group. This we believe would assist in the pursuit of affirmative action and its use should, on the whole, be voluntary. We have addressed in detail the issue of affirmative/positive action in our latest report to Government.²⁴

- 7.5 We note in relation to sexual orientation that certain aspects of the FEED have been adopted in the draft Regulations, which allows for actions which 'prevents or compensates for disadvantage' No similar changes have, however, been made to the other grounds in the draft Regulations and therefore there exists a different and stricter test in fair employment, sex and race relations legislation. This should be rectified at the earliest moment in the interests of harmonisation and clarity. Importantly, the Directives allow for 'Member States to maintain or adopt specific measures to prevent or compensate for disadvantages...' As such we would wish to see

²⁴ Position Paper: Update on the Single Equality Act: Autumn 2002 (43pp).

a broader approach taken in the Regulations, as advocated in our previous report²⁵ to OFMDFM on the Single Equality Act.

8.0 Minimum Requirements (Article 6 REOD/Article 8 FEED)

- 8.1 The Commission notes that both Directives allow that Member States “may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in [each] Directive.”
- 8.2 The Commission believes that as NI has always had a tradition of having similar levels of protection against discrimination, apart from the employer duties under FETO, Government should have considered using the Regulations to maintain existing protections, yet extend the provisions of the Race Directive (i.e. matters other than employment) to the other grounds as ‘related matters’. This would have avoided much of the confusion that the draft Regulations will create if enacted unchanged.
- 8.3 The Commission acknowledges that there are some examples of the maintenance of ‘more favourable’ treatment, for example, the retention of the “essential nature of the job” test in FETO. However, the Commission is concerned that few opportunities are taken to introduce more favourable provisions in any of the draft Regulations.
- 8.4 More particularly, the Commission notes that Articles 6 REOD and 8 FEED provide that the “implementation of [each] 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 [each] Directive” (emphasis added). The Commission is concerned that minimalist implementation of the Directives will, in the context of single equality legislation, involve a reduction of protection compared to gender equality law, e.g. in relation to the definition of direct discrimination, and more generally, may also involve a reduction in the level of protection in existing law on religious and racial discrimination, e.g. in relation to the definitions of indirect discrimination and harassment. Courts and tribunals in England and Wales, Scotland and Northern Ireland have always been

²⁵ *ibid.*

under a duty to interpret national law in conformity with Community law and this duty is reproduced, in the context of the European Convention of Human Rights, in the Human Rights Act. Therefore, the Commission considers it imperative that the 'non-regression' clauses in the Directives are reproduced in the Regulations. Indeed, the Commission has doubts over whether even the strongest non-regression clause would protect pre-existing levels of protection from the obvious meaning of some of the provisions in the draft Regulations. Nevertheless, it proposes that each set of Regulations should contain the following:-

“Under no circumstances should the interpretation of any provision in these Regulations constitute grounds for a reduction in the level of protection against discrimination already afforded by [the relevant legislation] as interpreted prior to the enactment of these Regulations.”

- 8.5 This may help avoid unnecessary litigation arising from the new Regulations. For the new areas, i.e. sexual orientation, this could include a differently worded Regulation which states that ‘these Regulations are in no circumstances to be interpreted to confer less rights on individuals than those enjoyed in relation to equivalent provisions of the Sex Discrimination (Northern Ireland) Order 1976, as amended, the Race Relations (Northern Ireland) Order 1997 and the Fair Employment (Northern Ireland) Order 1998.’ This would avoid any potential for two approaches to develop in relation to equivalent provisions of each set of Regulations in the tribunals/courts.

9.0 Defence of Rights(Article 7 REOD/Article 9 FEED)

9.1 Single Equality Tribunal (Article 7.1 REOD/Article 9.1 FEED)

- 9.2 Whilst the Directives state that ‘Member States shall ensure judicial and/or administrative procedures ... for the enforcement of obligations’ the draft Regulations have not proposed any changes to the tribunal system in NI.
- 9.3 The Commission would wish to see a single Equality Tribunal to ensure effective judicial protection in all areas provided for in the Directives. This should deal with the broad scope of protections in

existing legislation including employment, goods, facilities and services, the new grounds including sexual orientation and ultimately age and the new scope provided for in the Race Directive to cover social advantages and social protections.

9.4 **Standing for Associations, Organisations and other Legal Entities (Article 7.2 REOD/Article 9.2 FEED)**

9.5 The Commission has argued that the wording of the REOD and the FEED²⁶ means that agencies and associations have a right to take cases in their own name on behalf of named complainants. In this sense, it might be said that the Commission is acting “in support of” a named complainant when the complainant is the party to a case and the Commission is either providing legal representation or, in another way, is assisting the complainant. However, once the Commission has the power to act “on behalf of named complainants”, it could go much further in achieving its strategic objectives.²⁷ Situations could be envisaged in which vulnerable individuals would not wish to litigate in their own name but would be prepared to ‘put their names to’ an action taken by the Commission, which would incidentally retain more control over a case in such circumstances. Such a power to litigate would provide a valuable addition to the Commission’s enforcement powers and a stronger vehicle for equality litigation without incurring the procedural complexities of the ‘formal investigation’ system. Many of the cases which the Commission supports are increasingly ‘test cases’ in which the Commission is effectively the complainant. The Commission would be in a stronger position to choose the basis upon which to conduct strategic litigation in relation to institutionalised discrimination with at least the power to litigate on behalf of named complainants. The Commission is therefore disappointed to note that there are no provisions in the draft Regulations to give standing for associations, organisations and other legal entities, especially the Equality Commission, trade unions and Non-Government Organisations (NGOs).

9.6 The Commission is also concerned that it is not being given the statutory function of acting “in support of” complainants in sexual orientation cases. Given that the Commission has been given

²⁶ E.g. Article 9.2 FEED requires that associations etc may “engage, either *on behalf* or in support of the complainant ...”

²⁷ So also unions and interest groups would be able to bring cases on behalf of a range of named complainants.

some statutory functions in relation to sexual orientation discrimination, it must “have ... a legitimate interest” in that area of discrimination.²⁸ On that basis, it must follow that that implementation of Article 7.2 FEED in relation to assistance “in support of” complainants is a Community obligation which has not been implemented through the draft Regulations. The Commission is of the view that that to act “in support of” named complainants, the Commission must be given the statutory function of having legal assistance functions in conformity with its functions in the other statutory regimes for which it has responsibility. In this context, the Commission is satisfied that there is a Community obligation upon OFMDFM to give it a statutory function in relation to assistance for complainants and would view a failure to provide it with that function as a breach of the implementation of FEED.

9.7 The Commission believes that it is important to ensure that an ‘equality of the inequalities’ in NI exists so that a perception of a hierarchy in rights is avoided. Under the current proposals, a breach of sexual orientation legislation will result in a different route for complainants to take, with limited involvement of the Equality Commission. Such a different approach may lead to the evolvment of a perception that certain ‘discriminations’ may be seen as more serious/less serious. If the Commission is not given a legal assistance role for sexual orientation, this may invariably be the result and a culture of taking sexual orientation discrimination less seriously may be the outcome. It could be said that NI society is less advanced in its awareness of sexual orientation issues compared to GB and Ireland and, as such, the Commission is disappointed that the Government has sought to create a different and weaker model for the protection against this form of discrimination, in particular in relation to a new and contentious area of law, within which highly vulnerable members of society need the maximum assistance in assertion of their rights.

9.8 In addition a legal assistance role brings with it a strategic function, in both clarifying the law and raising employers’ awareness of the need to protect against unlawful discrimination. If the Commission is to have the duty to keep the sexual orientation legislation under

²⁸ In any event, the Commission already has functions in relation to the statutory duty to promote equality of opportunity between persons of different sexual orientation and an interest in the extent to which discrimination on grounds of sexual orientation may also be discrimination on grounds of sex.

review and advise on recommendations for change, the lack of involvement in assistance of cases makes this somewhat more difficult in practice (as we will not be able to develop the expertise as we have done for other areas of discrimination law).

10.0 Burden of Proof (Article 8 REOD/Article 10 FEED)

10.1 The Commission notes the burden of proof tests set out in the draft Regulations. It considers that burden of proof is one of the most sensitive issues in discrimination law and is vital in many direct discrimination cases. The Commission is acutely aware, as recognised in many decisions on this issue, that discrimination is often difficult to prove. In these circumstances, the Commission is satisfied that the implementation of these Articles in the draft Regulations more than satisfies the requirements of the Directives and strikes a proper balance between the difficulties which an applicant will encounter and the right of a respondent not to have an unreasonable evidential burden placed upon it.

10.2 Victimisation (Article 9 REOD/Article 11 FEED)

The Commission considers that the Directives, in legislating upon victimisation issues, properly reflect developments in EU gender equality law and that the draft Regulations, in turn, provide a sensible basis upon which victimisation cases can be addressed.

11.0 Dissemination of information (Article 10 REOD/ Article 12 FEED)

11.1 Both the REOD and FEED state that ‘Member States shall take care that the provisions adopted...are brought to the attention of the persons concerned by *all* (emphasis added) appropriate means...’ The draft Regulations appear to give some additional functions to the Commission in respect to sexual orientation, similar to those in the other areas of the law, but with notable exceptions. The draft Regulations do not, however, commit Government, or to place any additional duties on the Equality Commission or other organisations, to ensure that the dissemination of information is brought about by *all* appropriate means. In considering what ‘by all appropriate means’ implies, the Commission is aware of the approach taken by the European

Commission in relation to the EC Recommendation and Code of Practice for the Protection of the Dignity of Women and Men at Work.²⁹ This approach encouraged awareness raising of sexual harassment, encouraged the public sector to lead on the issue, thus setting an example to the private sector and importantly it recommended the development of measures to implement the Recommendation and the Code. The Equality Commission would welcome a discussion with OFMDFM and others, as to how such an awareness campaign, with measures to implement the Directives' requirement for the dissemination of information, could be developed.

12.0 Social dialogue (Article 11 REOD/Article 13 FEED)

12.1 The Directives place a duty on Member States to take adequate measures to promote dialogue between social partners³⁰ with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct and through research or exchange of experiences and good practice.

The Commission notes that the draft Regulations are silent as to this duty. The Commission believes that an imaginative approach from Government in regard to this duty could foster closer links and partnerships between the social partners so as to tackle discrimination in our society. This model envisages both public and private involvement and could include the provision of goods, facilities and services.

13.0 Dialogue with non-governmental organisations (Article 12 REOD/Article 14 FEED)

13.1 Both the Directives include an imperative to 'encourage dialogue with appropriate non-governmental organisations which have a legitimate interest in contributing to the fight against discrimination... [on any of the grounds covered by the Directives] ... with a view to promoting the principle of equal treatment'. The Commission believes that this offers the Government an ideal

²⁹ 92/131/EEC.

³⁰ Article 11 REOD uses the term 'two sides of industry'.

opportunity to develop an imaginative approach to tackling discrimination in our society in partnership with, and between the range of, NGOs in NI and to develop solidarity between the various constituencies that make up society. There are interesting models of dialogue with NGOs in other jurisdictions including the Women's National Commission in GB and the National Women's Commission of Ireland. In addition in Ireland there is a National Plan for Women which provides a focus for developing initiatives to tackle inequality issues. This in our view could be a model to be followed in NI but involving the wider constituencies. We are mindful of the potential role for the Civic Forum but, if this avenue was followed, its function and relationship with Government would have to be such that it satisfied the imperative placed upon Government by the Directives. The Commission is fully aware that NI has the most comprehensive public sector consultative model through the implementation of the statutory equality duty on public authorities and is, of course, fully supportive of that model. Nonetheless, these provisions of the Directives also require consultative models between OFMDFM and trade unions and NGOs and we would wish to know how OFMDFM intends to achieve these objectives.

14.0 Sanctions (Article 15 REOD/ Article 17 FEED)

14.1 The Commission has taken up a strong position on remedies. It has relied upon seminal judgments of the ECJ such as Case 14/83, *von Colson*³¹ on "real deterrent" and Case 68/88, *Commission of the European Communities v Greece*,³² on principles of effectiveness, comparability and proportionality. These principles are, to a large extent, reflected in Article 15 REOD and Article 17 FEED,³³ but the Commission has resisted any assertion that the existing remedies regime satisfies these criteria. The Commission wishes to promote in other areas the reform in FETO whereby tribunal recommendations may be made in relation to others than the complainant and for a statutory system of exemplary damages in situations in which only such damages would be genuinely dissuasive. In tandem with a more 'public interest litigation' approach on the part of the Commission,

³¹ [1984] ECR 1891.

³² [1989] ECR 2964.

³³ "*The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.*"

with or without reform of the rules on standing, the Commission wishes to promote a more proactive regime, based on a stronger system of recommendations or tribunal orders in relation to matters such as employer/organisation policies and practices, equality audits, liaison with the Commission etc.

14.2 In these circumstances, the Commission is again disappointed that the draft Regulations fail to address the extent to which the existing remedial regime satisfies the tests of effectiveness, proportionality and dissuasiveness set out in the REOD and the FEED. So also, by failing to address the issue of standing for associations, organisations and other legal entities, the draft Regulation do not consider what would be ‘effective, proportionate and dissuasive’ sanctions in such cases.

14.3 It is often in the Commission’s interest to achieve a settlement in discrimination cases as it allows the inclusion of such matters as liaison clauses with the Commission. However given that these clauses are not subject to control by the Tribunal, it is often difficult to maintain settlement terms. If a tribunal could make such orders, it would greatly strength the Commission’s insistence upon them. In line with this, the Commission believes that there needs to be a review of the remedies available to a tribunal beyond mere financial compensation. The reform of tribunal remedies would encourage a wider range of interest groups and individuals to bring strategically important cases to tribunal and the courts. The Commission has a strategic function in relation to funding discrimination cases. We are not a legal aid organisation and cannot fund a disproportionate number of cases. As such we need to consider how to motivate others to take actions in support of those who allege they have experienced unlawful discrimination. We believe that reform of the remedies available to tribunal could assist others to take a greater role in the funding of cases. This we believe would encourage others to assist cases and further help mainstreaming equality responsibilities within those organisations.

15.0 Other General Issues

15.1 Exemptions

15.2 The Equality Commission welcomes the proposals for repeal of a number of exceptions³⁴ to the RRO 1997, FETO 1998, and the SDO 1976, as amended and listed in the consultation document.³⁵ The Commission has however argued for a wider review of the exceptions in the anti-discrimination statutes in force in NI.³⁶ The Commission believes that the number of exemptions to the legislation should be limited and that they should not be based on stereotypical assumptions about appropriate roles for members of particular groups.

16.0 Specific ground issues

16.1 The Disability Discrimination Act 1995 (Amendment) Regulation (Northern Ireland) 2003

16.1 The Equality Commission recommends that primary legislation should be considered, as an alternative to Regulations, to implement the disability aspects of the EU Framework Equality Directive. In particular, without prejudice to general equality issues which should be dealt with under single equality legislation, the Commission is of the view that certain disability-specific matters can be dealt with, by way of primary legislation to maintain parity with the bulk of GB disability legislation. In this way, we believe the Government can:

- honour its Disability Rights Task Force (DRTF) commitments, particularly in respect of the definition of disability, which cannot be changed by secondary legislation;
- implement the EU Directive; and
- take on board the recommendations from the Equality Commission's Legislative Review of the DDA.

³⁴ The changes to exemptions under the DDA 1995 are dealt with later in this submission, as too is the revision to the teachers' exemption in FETO.

³⁵ These include: Employment and training for those not ordinarily resident in NI, employment by charities, charities as providers of goods and services, seamen recruited abroad, partnerships with less than 6, disposal and management of small dwellings, acts done under national security, the small employers exemption for the DDA.

³⁶ *Position Paper* October 2001, Chapter 7.

16.2 The Commission considers that this is important, as we do not wish provisions in Northern Ireland to fall behind GB.³⁷ We believe that employers and service providers need to manage the changes that will be forthcoming and that there is a real danger of drip-feeding change in a piecemeal way. This could cause confusion and create additional and nugatory work for the Commission and Government.

16.3 In respect of timing of implementation, we believe that disability specific changes should be introduced with effect from October 2004 to coincide with the DDA physical access duties, and allow time for the Commission to revise the relevant Codes of Practice and raise awareness of the changes to the DDA - a significant task, given that the DDA does not currently apply to 80% of Northern Ireland's employers.

16.4 Whilst the Commission is of the view that Regulations should be reconsidered as a means to give legislative effect to the disability aspects of the FEED for the reasons given above, we have responded to the specific disability aspects, as follows:

- Draft Reg 4A - we would like to see the reasonable adjustment duty strengthened through an 'anticipatory' duty on employers to mirror that which is in place for GFS. Extending this approach to employment would encourage employers to think in advance about the ways in which their practices or premises might be made more accessible to disabled people, rather than relying on individual employees requesting adjustments. All that would be required are reasonable steps. Thus, employers would not be expected to make expensive changes to their premises in case a disabled person applied for a job, but would be expected to consider access improvements when refurbishing. The Commission would also wish to see a 'reasonable adjustment' principle applied across all the grounds in single equality legislation and would not wish to see a Disability Bill pre-empt the scope of a 'reasonable adjustment' principle in the SEA.
- Draft Reg 6 - whilst the proposals remove the small employer threshold, it needs to be clear that the DDA applies to

³⁷ The Department of Works and Pension has already announced that they will bring forward a Disability Bill in 2003 for GB

organisations recruiting their first employee. Otherwise, an organisation with no employees (e.g. an owner/manager) could, technically, argue that they are not an employer and, therefore, their recruitment process need not be DDA compliant.

- Indirect discrimination (Paragraph 69 – Consultation Document)
- we believe that indirect discrimination should apply to disability, in addition to the duty to make reasonable adjustments. This will harmonise the DDA with other anti-discrimination legislation and help prepare it for eventual integration into single equality legislation. Moreover, we feel that it is potentially a useful - and arguably more powerful - measure to tackle institutionalised discrimination, which continues to exist. An example of how this might help concerns taxis. Once the transport exemption has been removed from the DDA, it could still be possible for taxi operators to justify charging a higher fare to wheelchair users, because they use a larger taxi. Taxi operators could argue that non-disabled people who use that same taxi are charged the same higher rate and therefore the policy does not constitute discrimination. However, in terms of outcomes, non-disabled people have a choice of taxis and, therefore, would generally pay the lower rate. Similar examples exist in respect of blanket requirements (eg driving licences, educational qualifications), which may not easily be tackled through the reasonable adjustment duty.
- Perceived disability is not mentioned in the consultation - we believe that the FEED requires protection on this ground. Article 2(2) of the Directive defines direct discrimination as occurring where “one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the [discrimination] grounds referred to in Article 1 [which includes disability]”. Under the DDA only people who have or have had a disability may claim protection from discrimination (with the sole exception of the victimisation provisions). By contrast, under the Directive the right to equal treatment is not limited to the person who is disabled. The wording of the Directive is modelled on the Race Relations Act 1976 in Great Britain which states that “A person discriminates against another in any circumstances relevant for the purpose of any provision of this Act if-(a) on racial grounds he treats that other less favourably than he treats or would treat other persons”. It is the Commission’s view that, in light of the broad

interpretation of “on grounds of” in Race Relations Act cases, the DDA must be extended to cover discrimination by association and most likely to cover perceived disability in order to comply with the Directive.

17.0 Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003

17.1 We welcome the proposal to include ‘political opinion’ in the draft Regulations. We note the approach taken by the Regulations to define ‘belief’ within the term ‘religious belief’. Article 2, FETO (general interpretation) states that “references to a person’s religious beliefs include references to his supposed religious beliefs and the absence of any or particular religious belief”. The recent GB consultation on its draft Regulations defined ‘religion or belief’ to mean ‘any religion, religious belief or similar philosophical belief’. In his working paper to the review of anti-discrimination legislation, Choudhury referred to the ECHR case of *Campbell and Cossons v UK*³⁸ which said that to come within the ambit of Article 9, views had to have a certain level of cogency, seriousness, cohesion and importance. The Equality Commission is still considering its advice to Government on the definition of ‘belief’ but sees some benefit in the legislation defining the term ‘belief’ rather than leaving it to the judiciary. The Commission has addressed these issues in more detail in our various Single Equality Act papers listed above. The Commission recommends that the Government adopt the GB version of a definition together with maintaining the political opinion inclusion as there may be some danger in not defining ‘belief’ within the parameters of a ‘philosophical belief’. The danger is that the courts could decide that the Regulations did not address the issue of ‘belief’ within the Directive and give it another meaning similar to ‘other opinion’. Our concerns regarding other opinion were highlighted in our previous advice to Government.³⁹

³⁸ Judgement of 25 February 1982 A.48, p16.

³⁹ Update on Single Equality Act: Position Paper. Autumn 2002 para 3.4 page 5.

18.0 The ‘religious ethos’ exemption (Article 4.2 FEED)

18.1 The Commission notes that the draft Regulations leave undisturbed the GOR in Article 70(1) FETO. In consequence, there is no opportunity to invoke the ‘religious ethos’ exemptions which, in the Commission’s view, were not appropriate to the legal situation in Northern Ireland. The Commission has taken an unequivocal view that the ‘religious ethos’ exceptions only apply to GORs in relation to ‘religion or belief’. Given the existing the GOR in FETO, there is no room to invoke Article 4.2 FEED in any context in NI. There is nothing in the FEED which could justify the invocation of ‘religious ethos’ in relation to any other ground in FEED. We note with interest the approach advocated by Lord Lester in the original draft of his recent Private Member’s Bill introduced into the House of Lords. Lord Lester originally advocated an exclusion clause in his Bill based upon a requirement that a person be of a particular sex or sexual orientation which is necessary to comply with the doctrines of the religion or avoiding the religious susceptibilities of significant number of its followers.⁴⁰ It would be patently contrary to the Directive to seek to utilise ‘religious ethos’ or any other form of words to justify exceptions to the non-discrimination principle in relation to any other ground. Indeed, Article 4.2 FEED provides that even the use of a ‘religious ethos’ exception in relation to ‘religion or belief’ “should not justify discrimination on any other ground”.

18.2 In particular, the Commission rejects any distinction between ‘sexual orientation’ and ‘sexual practices’. Such a distinction is unsustainable. It is equivalent to making a distinction between ‘religious belief’ and ‘religious practice’, eg you are not being dismissed because you are a Catholic/Protestant but because you go to church on Sunday. We are satisfied that the FET would not entertain such a distinction in relation to ‘religious belief’ and hence are satisfied that it is unsustainable in relation to sexual orientation. Applying the accepted ‘but for’ test in case law on direct discrimination, the Commission is satisfied that any attempt to invoke religious ethos in relation to ‘sexual practices’ as opposed to ‘sexual orientation’ will fall foul of the direct discrimination prohibition in the FEED and strongly seeks to

⁴⁰ It should be noted that this proposal was excised from the Equality Bill eventually proposed by Lord Lester in the House of Lords, see Schedule 2, para 14.

dissuade the OFMDFM from seeking to invoke such an exception in the Sexual Orientation Regulations.

19.0 School Teachers' Exemptions

19.1 The Commission notes that the draft Regulations amend FETO so as to narrow the teachers' exemption to the recruitment of teachers. The Commission is of the view that the teachers' exemption should be removed. It retains the duty to keep it under review and will continue actively to consider ways of promoting equality of opportunity in education and teachers' employment.

20.0 Indirect Discrimination and Religious Belief or Political Opinion

20.1 The Commission notes that the proposals for changes to the existing legislation are not uniform in that there will be a different definition for indirect discrimination in employment to that in goods, facilities and services. In addition the new definition will not apply to all employment related areas as the Regulations have not made full use of the scope of the Directives to include occupation or trade organisations. It would have preferred OFMDFM to have taken fuller advantage of ability to use of s2(2)(b) ECA 1972 to extend the Regulations to include 'related matters'. In not doing so the Regulations will cause additional confusion. Whilst the Commission is aware that it may have caused difficulty to extend the provisions to include GFS they should at least cover all employment relations as 'related matters'.

21.0 Trade Organisations

21.1 The Commission notes that the draft Regulations do not extend coverage to trade organisations apart from the proposals in relation to sexual orientation and disability. In the interest of clarity and uniformity this should be rectified in relation the religious belief, political opinion and race.

22.0 Race Relation Order (Amendment) Regulations (Northern Ireland) 2003

22.1 We note that the draft Regulation extend protections to race, ethnic and national origins. We also note that 'national origins' is not included in the REOD. We presume therefore that a decision has been taken to include 'national origins' as a related matter under s2(2)(b) of the European Communities Act 1972. The Commission has stated previously that the Single Equality Act approach will not support the exclusion of 'nationality' from a harmonised regime. The Commission believes that, although the Directive states that it 'does not cover difference of treatment based upon nationality', 'nationality' can still be considered a 'related mater' under the ECA 1972.⁴¹ We believe that the inclusion of 'nationality' in any Regulation is necessary to ensure clarity and coherence within race relations legislation. It may be that Member States which do not have 'nationality' discrimination law may be inclined not to use the implementation of the REOD to introduce such legislation. However, discrimination on grounds of EU nationality is already extensively covered by Article 39 of the Treaty of Rome and Regulation 1612/68 EEC to which the United Kingdom subscribed upon its membership of the then EEC in 1972. In these circumstances the RRO largely applies to non-EU nationality but the Commission considers it unacceptable that non-EU nationals, given that the RRO protects them to a considerable extent, should not enjoy the additional protections of these Amendment Regulations. There is nothing in Article 3.2 REOD, which states that the REOD "does not cover difference of treatment based on nationality", to justify the exclusion of 'nationality' from the scope of the draft Regulations. Such an exclusion only perpetuates yet more incoherence in Northern Irish race discrimination law at a time when there is a political commitment to comprehensive, coherent and consistent equality legislation.

22.2 The Commission is deeply concerned that 'Irish Travellers' have been excluded from the scope of the draft Regulations. It acknowledges that an English decision has accepted 'Irish

⁴¹ Article 3(2).

Travellers' as an 'ethnic group'.⁴² Nonetheless, it was a significant advance in Northern Irish equality law that Irish Travellers were included in our race relations legislation. Irish Travellers are amongst the most disadvantaged groups in Northern Irish society. OFMDFM has to implement the PSI Report on Travellers.⁴³ In these circumstances, the failure to include explicitly Irish Travellers as a 'related matter', given that they might well be an 'ethnic group' and hence in any event governed by the Directive, is a serious flaw in the draft Regulations. The Commission considers the explicit inclusion of Irish Travellers in the RRO to be a mere articulation of a recognition of that group as a separate 'ethnic group' and hence, in any event, governed by the REOD. Hence the Commission is of the view that it is a Community obligation, in the context of the 'non-regression' clause in the REOD, to include explicitly Irish Travellers in the Amendment Regulations.

22.3 With the rise in racial harassment towards refugees and asylum seekers, they potentially could be discriminated against on the grounds of their nationality and/or national origin. There has been a rise of anti-refugee and asylum feeling across Europe, particularly evidenced on the Island of Ireland. Should we not extend protection to this class of people on the grounds of nationality, it could lead to at least the perception of a system of institutionalised discrimination in society towards them. This could be seen especially in relation to a lower level of protection against harassment in the provision of goods, facilities and services and in small dwellings (where many refugees/asylum seekers are housed). In addition the burden of proof changes will again underline the different institutional treatment of those who are discriminated against on the grounds of colour, nationality or Irish Travellers, should the draft Regulations remain unchanged,

22.4 Another important issue is the exclusion of 'colour' from the Regulations. We note that the Regulations propose to amend the law in relation to political opinion and national origins. The Commission cannot, however, understand why such an extension could not be made for 'colour' As stated above, it is particularly important to include 'colour' in the Regulations as, in our

⁴² *P O'Leary & Others v Allied Domecq & Others*, judgment of the Central London County Court, 29 August 2000.

⁴³ OFMDFM A response to the PSI Working Group Report on Travellers. 2003

experience, 'colour' is often the reason used, or articulated, in racial harassment cases

23.0 Social protection and social advantages (Article 3.1(e), (f) REOD)

23.1 The Commission is also deeply concerned that the draft Regulations have not covered the issue of social protection and social advantages explicitly referred to in Article 3.1(e) and (f) of the REOD. The Commission notes that the Race Relations (Amendment) Act 2000 includes, in the Race Relations Act 1976, section 19B which makes it "unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination". The Act was amended following the murder inquiry into death of Stephen Lawrence in order to reverse the case of *Amin*.⁴⁴ Hence the Commission is not surprised to find, in the draft Race Relations Act 1976 (Amendment) Regulations 2003, a draft Regulation 18 which extends this prohibition of discrimination by public authorities to harassment, consistent with the inclusion of harassment within the definition of discrimination in the REOD.

23.2 But the draft NI Regulations are silent on these points. No attempt is made to implement Article 3.1 (e) and (f) of the REOD, let alone extend the definition of discrimination to include harassment in these circumstances. The Commission is at a loss to understand how these significant elements of the REOD are not to be implemented in Northern Ireland. These are grounds in the REOD which are not in the FEED. They represent an appreciation at EU level that the challenge of racism and xenophobia across Europe must be met by strong legislative provisions. In particular, the provisions on social protection and social advantages reflect the long standing protection for EU nationals in other Member States (see, for example, Regulation in Regulation 1612/68 EEC). Regulation 7.2 of that Regulation states that a national of a Member State [... in the territory of another Member State] shall enjoy the same social and tax advantages as national workers." It is clear from ECJ case law on 'social advantages' that they are not

⁴⁴ *R v Entry Clearance Officer, Bombay, ex parte Amin* [1983] 2 AC 818 (HL). (This case limited the scope of the protection against discrimination in the area of goods, facilities and services in the public sector to those services which were similarly provided in the private sector).

necessarily restricted to advantages provided by public authorities. In this sense, the Commission is unconvinced that the GB approach, in presuming that section 19B of the RRA meets the full requirements of Article 3.1(f) of the REOD. In any event, the Commission cannot accept that the Amendment Regulations should not implement these provisions at all and calls upon the OFMDFM to include explicitly both 'social protection' and 'social advantages' in the Amendment Regulation.

23.3 The Commission further considers it important that the provision of an exclusive range of examples of what constitutes social advantages and social protections could be included in the Regulations. There exists considerable research in NI as to the difficulties that minority ethnic communities face in accessing a range of social services. These include the 'Out of the Shadows' report⁴⁵ and the recent PSI report on Travellers.⁴⁶ In defining social advantages and protections the Regulation would have a dual impact. Firstly it would alert providers of these social protections and advantages to their duties and assist the Commission in its duty to promote equality of opportunity and work towards the elimination of discrimination. Secondly, it would stimulate debate as to the proper scope for the single Equality Act in these areas and across other grounds. There may be the possibility for the Commission to be given powers to produce guidance in respect to this.

23.4 The Commission considers that the REOD and the draft Regulations offer the opportunity to bring in changes to NI that were brought in to GB by Section 19B of the Race Relations (Amendment) Act 2000, namely the extension of the legislation to cover all public functions. This in the Commission's view is a requirement of Article 3 of the Race Directive which states 'this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies'. We therefore advocate a specific Regulation in the Race Regulations to extend the scope of the legislation to cover all public authorities. This would reverse the decision in the *Amin* case. We are also mindful of the view taken by the Commission for Racial Equality in GB, that the Directives do not make express reference to public functions such as

⁴⁵ Mann-Kler, *Out of the Shadow* Barnardo's 1997.

⁴⁶ OFMDFM *A response to the PSI Working Group Report on Travellers*. 2003.

enforcement or regulatory functions.⁴⁷ It would be helpful if the Regulations made clear that, in their interpretation, the Regulations covered all public functions.

24.0 Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003

24.1 The Commission welcomes the granting of some functions in the draft Employment Equality (Sexual Orientation) Regulations but notes with concern that two vital functions, that of legal assistance in support of complainants and the power to undertake formal investigations, have not been included. The Commission has argued for the extension of its own functions to govern sexual orientation and, eventually, age discrimination, at least in relation to employment matters as governed by the FEED. It is a well-established principle in EU law, established through the work of the EOCNI in *Johnston v Chief Constable of the Royal Ulster Constabulary*,⁴⁸ that enforcement of EU law involves a principle of “effective judicial protection”. It is also well-established from the earliest case law of the European Court of Justice on these matters that the implementation of Community law in the national legal systems must be “no less favourable” than the enforcement of comparable national law and should not make it “impossible or excessively difficult” to enforce Community rights.⁴⁹

24.2 In these circumstances, the Commission takes the view that certain aspects of the functions which it performs under existing statutory regimes, most obviously ‘legal assistance’, ‘formal investigations’ and enforcement of discriminatory advertising are governed by the principle of ‘effective judicial protection’. It follows that, on grounds of comparability in a jurisdiction where there is already a single Equality Commission, these are actually matters governed by ‘Community obligations’ and therefore to be enacted through s2(2)(a) ECA. The Commission would also argue that

⁴⁷ Commission for Racial Equality. *Equality and Diversity: The Way Ahead. Response by the Commission for Racial Equality* February 2003. Examples of these are given as health and safety enforcement, prison discipline functions, licensing or planning.

⁴⁸ Case 222/84 [1986] ECR 1651.

⁴⁹ See, for example, Case 33/76 *Rewe-Zentralfinanz v Landwirtschaftskammer für das Saarland* [1976] ECR 1989 and Cases 46,48/93 *Brasserie du Pêcheur/Factortame III* [1996] ECR I-1029.

other functions of the Commission, which it enjoys under the other statutory regimes, are 'related matters' under s2(2)(b) ECA. In any event, all these functions can be viewed as 'related matters' under s2(2)(b) ECA.

24.3 On this basis, the Commission has recommended that the powers under ss 2(2)(a) and 2(2)(b) ECA be utilised to grant it the full range of functions in relation to sexual orientation discrimination which it already enjoys under the SDO, the FETO and the RRO.⁵⁰ The Commission therefore considers it disconcerting that the functions included in the draft Regulations concern "related matters" of advice, promotion and the issuing of Codes of Practice, whilst what the Commission considers to be functions relating to "Community obligations" of 'effective judicial protection', equivalent to pre-existing regimes, have been excluded. In addition, the Commission has argued above that the function of providing legal assistance 'in support of' named complainants is an obligation under Article 7.2 which has not been implemented.

24.4 The Commission believes that we should be given powers to act on behalf or in support of complainants. We are conscious, as a new area of law, that it may be difficult for individuals to take cases without the support of the Commission. Gays and lesbians make up a particularly vulnerable group in society and may be deterred from litigating at all on grounds of confidentiality. It would also be sending out a strong message that discrimination on the grounds of sexual orientation did not command the involvement of the Commission, yet other types of discrimination did, thus again raising the issue of hierarchies of rights.

25.0 Sexual orientation and the Exception for Benefits Dependent on Marital Status (Draft Regulation 30)

25.1 The Commission is concerned that the draft Sexual Orientation Regulations include a general exception from the provisions which can deny access to a benefit by reference to marital status. The Commission is aware that employers and providers of vocational training will not be able to discriminate directly on the grounds of

⁵⁰ To the extent that it is perceived that ECA Regulations cannot be used for any of these purposes, the Commission maintains that primary legislation, based on the model of the Equality (Disability etc) Order (NI) 2000, would be required in relation to functions to which the 'Community obligation' of 'effective judicial protection' apply.

sexual orientation but that the marital status exception opens up the possibility of abuse by using 'marital status' as a proxy for discrimination against gays and lesbians. We could envisage a situation where an employer may wish to narrow the eligibility rules to qualify for a benefit by placing a requirement that persons are married so as to deny gays and lesbians who are in otherwise stable relationships from certain benefits. This would obviously deny single and cohabitating heterosexuals and single (i.e. non cohabitating) gays and lesbians from a similar benefit but by that fact could create work place tension and allow for the potential scenario where 'gays and lesbians' are held responsible for others' denials. The Commission is aware that the impact of exemption of this draft Regulation could include otherwise unlawful discrimination in the area of occupational pensions.

25.2 The Commission recognises that the Sex Discrimination (Northern Ireland) Order 1976, as amended, is asymmetrical in that it outlaws discrimination against married persons and not on the basis of marital status⁵¹. We are conscious that the new Gender Directive covers 'marital status' generally. As such we would wish to see the draft Regulation 30 removed from the proposals and for all discrimination based upon marital status to be outlawed in the forthcoming Single Equality Act to comply with Gender Directive.

26.0 Equal Pay (Amendment) Regulations (Northern Ireland) 2003

26.1 The Commission welcomes the publication of draft Regulations to amend the Equal Pay Act in light of the European Court of Justice (ECJ) decisions in *Levez*⁵² and *Preston*⁵³. The Commission notes that the changes are to extend the six-month time limit in some circumstances, a change to the limitation on back pay in the Act and to modify tribunal procedure, giving greater discretion to the tribunal to disregard an employer's job evaluation scheme.

26.2 The Commission notes that the Government has followed the 'principle of equivalence' in extending the period for remuneration of back pay to six years in accordance with the Statute of

⁵¹ The Order states that married persons are protected, thus does not protect against discrimination on the grounds of being single or divorced.

⁵² Case C-326/99 *Levez v TH Jennings (Harlow Pools) Ltd* No2 [1999] IRLR 36.

⁵³ Case C-78/98 *Preston and others v Wolverhampton Healthcare NHS Trust and others (No2)* [2000] IRLR 506.

Limitations. We note in the case of concealment and/or disability this can be extended. The Commission, however, considers that the limitation may have the effect of preventing successful claimants enjoying the ability to recover lost pay during the whole period that they were being discriminated against. In line with the requirement to give proper effect to European Community law, Member States must allow such remedies that are required to give 'real and effective judicial protection'. The remedy 'must also have a real deterrent effect on the employer.'⁵⁴ As such we would recommend that the limitation be governed by the employment relationship. We believe that this could avoid undue litigation.

26.3 The Commission notes that the draft Regulations do not define 'stable relationships' in relation to the time limit extension. The Commission recommends that the Regulations define what is meant by stable relationship in employment and that these consider the reference by the ECJ in *Preston* to 'a succession of short-term contracts concluded at regular intervals in respect of the same employment'.

27.0 Sex- Equal Treatment Directive

27.1 The Commission notes that OFMDFM has requested initial views on the Directive. The Commission is in favour of the SDO specifically prohibiting discrimination on the grounds of pregnancy, maternity and paternity.

28.0 Other Issues

28.1 Office holders

28.2 The Commission notes from the explanatory notes to Regulation 10 of the draft Fair Employment and Treatment Regulations (office holders) that at this point there is no clear provision to extend the legislation to cover office holders. The Commission wishes to point out the recent NI Court of Appeal case *Perceval-Price*⁵⁵ in

⁵⁴ Case 14/83 *Von Colson and Kamann v Land Nordrhein Westfalen* [1984] ECR 1891, 1919, at paragraph 23.

⁵⁵ *Perceval-Price v Department of Economic Development* [2000] IRLR 380 NICA.

which office holders were held to be covered by Equal Pay legislation.

28.3 In relation to the transfer of matters relating to employment and barristers, the Commission welcomes the move from the jurisdiction of the County Court to that of the Industrial Tribunal/Fair Employment Tribunal. This move we believe is a sensible and practicable one. In our previous reports to OFMDFM we have called for a single equality tribunal to hear all cases that are currently heard in the FET/IT and County Court. We believe that this should be addressed in the current review of tribunals and the single Equality Act.

29.0 Resourcing

29.1 The draft Regulations have significant resourcing implications for the Commission. We will have to revise and publish a number of Codes of Practice in addition to new ones in the area of sexual orientation. We will have to embark on a major awareness raising and information/advice giving campaign as the Regulations will extend the scope of the coverage of the legislation and in relation to disability bring the 80% of NI employers current excluded from the DDA into coverage. In relation to the last point we have given OFMDFM resourcing estimates for this exercise, which mirrors those put in place when the FETO threshold was removed. The Commission would therefore wish to discuss in full detail the expected work programme for the Commission and the timetable for achieving these additional pieces of work.

30.0 Equality Impact Assessment

30.1 The Commission has throughout this report called for a more imaginative, in-depth and best practice approach to the implementation of the Directives through the use of ECA 1972 Regulations. We believe that all of our recommendations will separately and together provide an improved legal framework for the protection against discrimination for many of the s75 groups. We have addressed the most important issues:

- OFMDFM should use s2(2)(b) of the ECA 1972 to bring in wider protection against discrimination to cover 'related grounds'. We

believe this will advance the protection from discrimination across all the grounds covered by the Directives and promote equality through having clearer protections through greater uniformity of protections

- OFMDFM should extend the Race Regulations to cover nationality. In any event it is our opinion that the failure to extend it to cover 'colour' and 'Irish Travellers' cannot be justified and will lead to a negative impact as there will be a lower level of protection from discrimination on these grounds.
- The Commission believes that the proposed new protections from discrimination based upon sexual orientation are significantly weaker than those in existing legislation. As such we would expect that OFMDFM, in line with their commitment to the equality duties of s75, will take alternative approaches to ensure that protection is afforded to this class of person similar to that in the other areas of law.
- The definitions should be in line with the highest standard in existing equality law and therefore the Regulations should follow the EU gender law approach of a 'necessary aim' and an 'appropriate and necessary means' test in indirect discrimination. Any departure from this will have a negative impact on the system for the protection from discrimination.
- A non-regression Regulation will avoid any doubt that the Regulations will not reduce existing protections. Should this not be included, then vulnerable people covered by the s75 grounds could face increased legal problems in taking legal action as cases may have to consider the new definitions against existing protections.
- The failure to give the Commission and others standing will limit the protections for a number of s75 groups.
- The Commission considers that the failure to address adequately a new role in the provision of information, dialogue with social partners and dialogue with NGO's will take away from an integrated partnership approach to tackling inequality in society. We have recommended new approaches which will foster greater co-operation, understanding and partnership, which would advance equality in society across all s75 grounds.

- OFMDFM should consider developing specific primary legislation for disability as it will enable an increase in the changes that could be brought forward in advance of the single Equality Act, thus promoting equality of opportunity for people with disabilities.
- OFMDFM should review the failure to address the issue of social advantages, social protections and the inclusion of all public functions in the Race Regulations, to extend the protections for racial groups and promote their equality of opportunity.
- The Equal Pay changes could be strengthened by the recommendations made by the Equality Commission, thus promoting greater equality of opportunity between men and women.

31.0 Conclusion

31.1 The Equality Commission is committed to coherent, comprehensive and effective equality legislation in Northern Ireland. We are, however, conscious that an unavoidable change to the timetable for the Single Equality Act took place and that there are imperatives on Government to comply with the EU Directives by July and December 2003. This has meant that Government has had to make use of Regulations under s2 European Communities Act 1972 to meet these requirements. We are pleased to see however that a commitment remains to progress the work on the Single Equality Act. We would not wish to see the use of Regulations take away from the need ultimately to achieve a harmonised, best practice approach to a single Equality Act for NI.

31.2 The Equality Commission has a general duty to keep equality legislation in Northern Ireland under review and to advise Government on recommendations for change. In addition to this we have, including the experience of the predecessor bodies, over 25 years' experience of working with equality legislation. We feel, therefore, it is important that due consideration be given to the views expressed throughout this document.

31.3 Although welcoming many of the proposals, we are however disappointed that the Regulations are to be used to, in most

circumstances, comply with the bare minimum of the obligations arising from the EU Directives. The Commission, in recognising that the Directives were drafted in context of achieving unanimous agreement by the existing Member States of the EU and having regard to the impact they would have on applicant countries, is aware that they do in some instances set out some very positive and interesting opportunities to develop EU equality law. We would have hoped that the Regulations could have been used to bring in such positive changes, some of which we have highlighted in the text of this report.

- 31.4 The Commission is concerned that the narrow use of the ECA 1972, in particular the limited use of ‘related matters’, has led to the situation where the Regulations in their current state will cause confusion when implemented. We would therefore recommend that the Regulations are written in a sufficiently wide fashion to ensure conformity across existing and new areas of the law and that, following the implementation of the Regulations, sufficient focus will be given to ensure the Single Equality Act comes into force to rectify these anomalies.
- 31.5 We are conscious of the impact that the Regulations will have on the work of the Commission and on employers and service providers. We would request that OFMDFM address this impact and ensure that sufficient resources are made available to implement the changes smoothly.
- 31.6 In the Commission’s approach, it has advocated a different approach to OFMDFM’s proposals, in relation to the definitions of discrimination and the permissibility of the use of positive action. We have noted some interesting examples within the proposals in dealing with occupational requirements and welcomed the disjunctive approach to the definition of harassment. We do note, however, that we differ in relation to the standing for associations and others, in what we would wish to see in relation to sanctions and the OFMDFM approach in including ‘national origins’ yet excluding ‘nationality’, ‘colour’ and importantly ‘Irish Travellers’ from the Regulations. We have also called for the Regulations to include non-regression clauses to ensure that current protection is not weakened and/or to avoid potentially costly litigation.
- 31.7 We have addressed the important issues in relation to the Equality Impact Assessment and will look forward to reviewing what

alternatives were considered by OFMDFM as a result of the EQIA and the consultation responses by the Commission and others.

April 2003