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*F*ederation of *S*mall *B*usinesses



A Single Equality Bill for Northern Ireland

FSB Response to the Consultation by the Office of the First and Deputy First Minister

Contents

- 1. Executive Summary**
- 2. General Perspective**
- 3. Grounds of Protection Under the Single Equality Bill**
 - 3.1 General Comment
 - 3.2 New Grounds of Protection
 - 3.3 Concerns Relating to Specific Grounds
- 4. The Scope of a Single Equality Bill**
 - 4.1 Employment, Self-Employment and Occupation
 - 4.2 Membership and Involvement in Organizations of Workers and Employers
 - 4.3 Volunteers
 - 4.4 Goods, Facilities and Services
 - 4.5 Disposal and Management of Small Premises
- 5. Discrimination**
 - 5.1 Direct Discrimination
 - 5.2 Indirect Discrimination
 - 5.3 Disability and Indirect Discrimination
- 6. Goods, Facilities and Services**
- 7. Addressing Under-Representation**
- 8. Alternative Dispute Resolution**

The FSB

The Federation of Small Businesses (FSB) is the UK's largest lobby organisation representing the self-employed and owners of small businesses. Founded in 1974, it now has over 185,000 members across all industries, trades and services. It is a non-party political lobby group that exists to promote and protect the interests of all those who own and manage their own businesses. FSB members together employ 1.25 million people and turnover £10 billion a year. The FSB is a member of the European Small Business Alliance, (ESBA). This is a major independent free membership based organisation representing small business entrepreneurs and self-employed in Europe.

The FSB's Northern Ireland Policy Unit was formed in 1998 as a direct response to the establishment of the Northern Ireland Assembly. We provide a voice for the Small Business Community in Northern Ireland and lobby government on issues of key concern to the small business sector.

1. Executive Summary

I. Grounds of Protection:

The FSB accepts that there is a need for the provision of some flexibility regarding the range of groups which receive protection under equality legislation, in recognition of the dynamics of social, economic and political change. However, the FSB cautions that such changes must be carefully considered in the light of a broad range of factors. In particular, it should be established that there is an empirically demonstrated inequality, which can actually be effectively addressed through legislation before further regulation should be considered. Furthermore, there should not be a presumption that the nature or scope of coverage regarding any additional ground need replicate that which already exists in relation to existing grounds.

Regarding the idea of leaving additional grounds to the discretion of the courts, the FSB believes that the limitations of the judicial process also need to be recognized. In the main, the appropriate forum for the determination of such questions is in the legislature, in light of a full consideration of all of the relevant social, political and economic factors.

The FSB has specific concerns regarding two proposed new grounds, *marital or family status and the existence of dependants* and *socio-economic status*. These grounds do not lend themselves to focused definition, and potentially presage a range of problems concerning the depth of legislative provision in respect of each. Moreover, there is limited scope for a GOQ framework to alleviate these concerns.

II. Scope of a Single Equality Bill

The FSB believes that it is important that there is, insofar as possible, a consistent approach to the individuals who fall within the ambit of equality legislation. We therefore advocate a consistent definition of employment, self-employment and occupation under equality legislation.

The FSB also believes that clarification is necessary concerning the position of volunteers. In recognition of the diversity of this group a voluntary approach should be adopted whereby volunteers and organizations can determine the appropriate framework relative to the nature and responsibilities which are inherent in their position.

Alteration of the law concerning the disposal and management of small premises is liable to have an incidental but not significant impact on small business. While we accept that as a result of EU law developments, among other things, there may be a need for reconsideration of this area, nevertheless scope for objective justification must be maintained.

III. Discrimination

Current definitions of direct discrimination are satisfactory and do not need to be amended. Indirect Discrimination is an area of considerable complexity for small

businesses and a single approach to indirect discrimination across the relevant grounds would therefore be highly desirable. Notwithstanding the latter point, on the specific question of burden of proof the FSB believes that a nuanced approach to this area ought to be maintained which, of course, ensures compliance with relevant EU Directives, but also recognizes that the Burden of Proof approach is not appropriate in all situations.

Indirect discrimination framework should not be extended to disability discrimination. The reasonable adjustment approach is operating relatively satisfactorily at present and is better tailored to the needs of disabled people. Further change in this area would create unnecessary confusion and cost.

IV. Goods, Facilities and Services

For purposes of simplicity and logical consistency GFS coverage may be usefully harmonized among the few categories not already covered. This would obviously not be unproblematic, and grounds of objective justification would need to be given prudent attention. However, these challenges are likely to impact to a much greater extent on the public rather than private sectors.

A definition which seeks to exhaustively set out the full range of GFS coverage is attractive but probably not realistic, given the dynamic market place. A better approach would be to have a broad definition with an extensive indicative list. Adjudicatory bodies could then proceed by appropriate analogy and increment.

V. Addressing Under-Representation

The requirements in FETO should not be extended to other grounds of discrimination. The obligations in FETO represent a response to the particular political and social circumstances which pertain in Northern Ireland, and consequently it would be neither an effective nor a proportionate response to the equality challenges facing other groups to introduce such legislation in respect of them.

VI. Structures for Adjudication

The FSB strongly supports greater use of ADR. We believe that any new legislation in this area needs to be supported by government to the fullest extent possible. We recognise the difficulties inherent in all of the various forms of adjudication and so propose that a preliminary assessment scheme be established which recommends an appropriate form of adjudication for the parties. If the case eventually goes before a tribunal the panel can be informed of the recommendation as to the form of adjudication recommended by the assessor.

2. General Perspective

The Federation of Small Businesses (FSB) warmly welcomes this opportunity to engage in the consultation process concerning a Single Equality Bill (SEB) for Northern Ireland. This legislation will undoubtedly have a significant impact on both the small business sector and on the wider economy of Northern Ireland.

The FSB recognizes the great importance of ensuring non-discrimination and equality of opportunity in the work place, both from a social and an economic point of view¹. While the social significance of appropriate and responsible equality legislation is widely recognized, the economic importance of such legislation is often understated.

It is worth highlighting at the outset that in a region, with a relatively small economy and workforce, such as Northern Ireland, it is particularly important that the talents and skills of all sections of the workforce are utilized to the maximum and most beneficial extent possible. It is our firm conviction that the great preponderance of small businesses are ardently committed to these goals and, indeed, are eager to comply in good faith with legislation and good practice designed to promote equality.

It is the belief of the FSB that, if implemented appropriately, the SEB can make an important contribution to the achievement of these goals. However, given the effect which such legislation will inevitably have on the small business sector it is vital that the concerns of small businesses are carefully considered so that the legislation can be implemented in a way which satisfies the shared desire for equality in the workplace, while, at the same time, not imposing unrealistic or unmanageable burdens on small businesses which form the basis for much of the economic and social life in Northern Ireland.

To this end the FSB emphasizes the importance of legal clarity in respect of equality law. In view of this we strongly welcome the proposals aimed at increasing the clarity and accessibility of the legislation. In particular we endorse the emphasis placed upon clarity in the drafting of the legislation. A detailed explanatory document would also be of great assistance in promoting legislative accessibility for small business.

A further issue which should be raised at the outset is that of the form of legislation and, as a corollary, the form of the legislative process used to promulgate it. Inevitably, much will depend on the existence of a legislatively operative Northern Ireland Assembly. Unquestionably, this would be the optimum forum to review, scrutinize and eventually pass this legislation, as it would maximise the opportunity for accountability, transparency and accessibility in the legislative framework. In the

¹ We note in particular the review of Hepple *et al* and the analysis presented there outlining the need for a new framework. See *Equality: A New Framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, Bob Hepple QC, Mary Coussey and Tufyal Choudhury. University of Cambridge Centre for Public Law (2000)

absence of this forum, clearly an Order in Council would not be an appropriate means to bring into force such a significant and wide ranging legal framework. If an Act of Parliament is therefore to be adopted, we believe that government should seek, to the maximum extent possible, to ensure that the views of all stakeholders are taken into account. Indeed, this process of consultation is an important step in that direction.

In broad terms the FSB endorses the statement of purposes and principles which provide the policy framework in which this equality legislation is to operate. However, we also note that there is potential for conflict, both at a conceptual level and also in respect of the implementation of this legislation. Indeed, a key test as to the effectiveness of this legislation will be the extent to which it reconciles the competing demands and concerns raised by these competing policy aspirations. For the small business sector in particular the key test will be whether an equality bill promotes greater equality in the workplace while recognizing that for small businesses to flourish it is essential that they operate in a legal environment which legislates for equality in a manner commensurate with the scale of the challenge, and proportionate to likely success of the proposed solution. This is especially important given the fact that regulation has a disproportionate impact on the small business sector². In short, equality in the workplace must be seen as a cooperative endeavour for employers, employees and government alike.

3. Grounds of Protection under the Single Equality Bill

3.1 General Comment

In respect of the general scope of an Equality Act the FSB believes that, although clarity in equality law is important, it is also vital that the temptation to adopt conceptually homogeneous legislative provisions which fail to recognize more nuanced differences in the various grounds must equally be avoided. Such an approach may be attractive in theory but would fail to meet the challenge posed by everyday practicalities. It is important that the legislative response is carefully calibrated to meet the challenges which present themselves in respect of each particular ground. For example, and without detailing here issues that will be discussed shortly, an indirect discrimination framework – appropriate for sex or religious discrimination- is not suited to the disability discrimination context given the different challenges facing this group. This was recognized through the creation of the more appropriate mechanism contained in the Disability Discrimination Act (DDA). These mechanisms include Article 5(1) justification of less favourable treatment and also the reasonable adjustment provisions.

3.2 New Grounds of Protection

Should the Single Equality Bill extend the range of groups protected by equality legislation beyond those covered by existing legislation?

² For a careful and extensive analysis of the disproportionate impact which regulation has on small business see Baldin, *Better Regulation: Is it Better for Business?* Federation of Small Businesses (FSB), Sept. 2004. Available at www.fsb.org.uk/policy/archivePubs/

In principle the FSB recognizes that the number and nature of groups who require the protection of equality law should not be seen as hermetically sealed. The constantly evolving social, political and economic structure of society means that this would be neither realistic nor desirable³. However, we also believe that very careful consideration needs to be given before the range of groups subject to legislative protection is extended in accordance with the principle that legislative regulation should only be promulgated where it is empirically shown to be required.

This process to determine whether and how new groups ought to be protected should involve an examination of a range of factors. In this regard we believe that it is important that there is not a presumption at the outset that the nature and scope of protection conferred upon a new group need of necessity be similar to that offered to other grounds. For a new ground to be established we believe that it needs to be demonstrated that substantive inequality confronts those who are the subject of a proposed new ground.

There also needs to be an examination of both the precise nature of the inequality or disadvantage affecting the proposed ground and the reasons which underlie it. A further important question is whether a legislative response is appropriate, in the sense that the type of legislation proposed must be shown to actually be capable of addressing the apparent inequality or disadvantage in question. To give one example, an empirical finding that a certain group, not within the scope of existing equality legislation, is under-represented in the workplace may be due to a range of factors which may not necessarily include discrimination in employment practices. In this context the imposition of further legislation relating to employment practices would be both futile, in failing to actually address the under-representation, and also potentially counter-productive.

It is important to reinforce the point that there are a broad range of factors that can result in inequality in the workplace. Many of these factors are not within the control of the business sector and therefore care must be taken not to assume that increasing regulation in respect of various employment practices or social groups will lead to greater equality in the workplace; resources and legislative time may well be more effectively allocated to tackling economic, educational, training, skills or other such challenges which militate against equality of opportunity.

It has been suggested that a residual category should be included in the SEB to allow adjudicatory bodies some flexibility in dealing with emergent grounds in the future. In view of the earlier discussion of groups which should be afforded protection, the FSB recognizes that there is a need for the law not to become ossified and unduly rigid.

However, we also believe that the creation of a SEB affords government a unique opportunity to thoroughly consider factors, such as those discussed above, which are relevant in a determination as to whether a particular group requires further protection. If such potentially broad ranging interpretations were to be left to judicial interpretation there is ample scope for a significant lack of clarity in the law and possibly for discrepancies to emerge. Moreover, for reasons already discussed, such a determination involves a complicated and detailed socio-economic calculus involving

³ For a discussion of some of these changes at a UK level see *Hepple at al*, at p.s 10 -20 *supra* 1.

analysis of a range of social indicators. We respectfully suggest that this is not a function which is apt for judicial determination, and it is therefore better, for the most part, if such matters are given the fullest consideration during the formulation of the legislation.

3.3 Concerns Relating to Specific Grounds

As regards the specific grounds suggested in the consultative paper for consideration for further protection we have several specific concerns. The first of these proposed grounds is discrimination on the basis of marital or family status or the existence of dependants. In our view the fact that this ground falls within the ambit of Section 75 of the Northern Ireland Act 1998 does not necessarily imply the suitability of this group for broader regulation under the SEB. The key distinction being that Section 75 is a general and important tool of social policy, whereas broader regulation under the SEB connotes a series of very specific obligations in respect of this potentially vast and amorphous group. To justify the regulation of such a group, as discussed earlier, it would need to be demonstrated that there exists elevated levels of discrimination or disadvantage in respect of marital or family status/ dependant *per se*. We are not satisfied that this is, in fact, the case.

A further problem generated by the rather amorphous nature of this ground is that potential scope of indirect discrimination claims. Very many widespread and legitimate employment and working practices could be argued to adversely affect this group, and although such claims may in the end prove unsuccessful a significant amount of an employer's time and resources may be required to deal with such a challenge. An unreasonable amount of uncertainty may also result for employers.

Furthermore, we believe that this ground is overbroad as it includes several different types of person with varying needs and concerns. It appears to us that this ground in real terms consists of various sub-groups and that, for the most part, where it is arguable that these sub groups are subject to disadvantage in the workplace, legislative provision already exists to deal with this. Perhaps the most obvious example of this is that of working mothers who are protected by sexual discrimination law, in particular the Sexual Discrimination NI Order 1976 (SDO).

If it is empirically demonstrated that there is a need for increased protection of a specific category of individuals, for example, carers, which could be seen as forming a sub-set of this ground more generally, we advocate a targeted approach directed at that group specifically, rather than an all encompassing categorization which may prove inapt to fulfil its purpose.

We also have similar concerns in respect of socio-economic status as an additional ground within the ambit of the SEB. We believe it is important that policy objectives should not be conflated with legislative objectives. Clearly socio-economic disadvantage is of great significance in reducing equality of opportunity whether in respect of employment or a whole range of other aspects of life⁴. It is, of course, right that such inequality be dealt with through policy strategies such as New TSN.

⁴ We note that this has already been clearly recognized in government strategy. The Northern Ireland Executive, *Draft Programme for Government*, Sept. 2002, states that, "inequality is closely correlated to deprivation" at p. 13.

However it is more questionable whether the addition of socio-economic status as an additional ground would be an effective way to promote greater equality, especially when such an approach is not cost free.

From the perspective of the small business sector we note in particular the problem of definition. The South African Prevention of Discrimination Act 2000 cited in the OFMDFM discussion paper includes “low educational qualifications” as part of this definition. Clearly such an approach would mean that the extent of protection afforded to such a ground would by necessary implication be very limited. If significant legal uncertainty and a proliferation in unmeritorious claims are to be avoided it is hard to see what role, if any, indirect discrimination could play. Indeed, similar problems would exist even in respect of a direct discrimination framework, particularly given a definition which included low educational attainment as a constituent element.

Although problems such as these could be dealt with to some extent through the reconsideration of Genuine Occupational Qualifications in respect of proposed new categories, accurate and comprehensive GOQs which are fair to both the employer and employee would be very difficult to draft because of the range of practices that would have to be covered. This could generate further uncertainty in the application of equality law to certain groups. There is therefore limited scope for problems in the application of these grounds to be resolved by a GOQ framework.

4. The Scope of a Single Equality Bill

4.1 Employment, Self –Employment and Occupation

Legislation emanating from the EU institutions has highlighted the problems posed by the extent to which these groups are covered by equality law. Through interpretative developments in both the ECJ, on one hand, and national courts, on the other, there is significant potential for a spectrum of coverage to develop, whereby a particular category of “employee” is subject to equality legislation in one context but not in another. This would be an unhelpful eventuality.

The FSB believes that it would be better if the legislative provisions of an Equality Act were to apply as consistently as possible to a given class of individuals to help ensure that all parties are fully aware of their legal rights and obligations. Given the development of EU law in this area, the net effect of the above position means that EU law categorization and interpretation would have to be taken as the baseline for a broader range of grounds than those to which it applies in the first instance. We believe that such a position would be workable in practice.

4.2 Membership and Involvement in Organizations of Workers and Employers

We believe that the current legal regulation of this area is satisfactory and that the SEB should reflect these established principles.

4.3 Volunteers

The proposals concerning volunteers are of particular concern to the FSB. We are an organisation with over 4,500 members many of whom provide services in a voluntary capacity. This contribution significantly enhances the work of our organization and is greatly appreciated. We also note the significance of volunteers at the level of the wider economy of Northern Ireland. The Volunteer Development Agency estimates that there are around 921,000 people involved in volunteering in Northern Ireland in both a formal and informal capacity.

Once again we believe that the diversity of this group should be recognized and that the legislation should be formulated accordingly to reflect the resultant diversity in the needs and challenges facing the individuals who make up this broad group. The concept of a “volunteer” includes a very broad spectrum of individuals ranging from those who undertake voluntary work in an essentially charitable capacity, to those who undertake voluntary work as an indispensable part of attaining vocational or professional qualifications.

We note with some concern the degree of uncertainty in the current legal position. Key areas of uncertainty involve the concept of “mutuality of obligation” as part of the wider concept of a contract involving mutual consideration. The absence of clear criteria against which it can be judged whether an individual falls within the framework of legal regulation, is evidently not a satisfactory situation. It is also unclear whether volunteers must be included within the ambit of various EU Directives. In the light of the above, we therefore believe that it is essential that the opportunity which the SEB affords to establish clarity in this area is seized. In addition to clarity in the legislation we believe that detailed guidance as to the implications of the legislative provisions would be of significant use.

On the substantive question of the scope of protection which should be conferred upon volunteers we believe great care must be taken before broadening the law applicable in this area. We believe that much depends on the precise nature of the voluntary work in question. For example, those engaged in work which is an indispensable part of vocational or professional training will, to a significant, extent fall under the auspices of legislation pursuant to EU Directives relevant to this area.

We also believe that it is important to recognize that voluntary work is, in a real sense, mutually voluntary –both for the organization and for the volunteer. We therefore advocate an approach whereby organizations can, in consultation with their voluntary workers determine the appropriate framework for their type of position. This seems to make particular sense where there is already an agreement which regulates the relationship between the parties. A crucial advantage of this approach is that it would allow greater flexibility for both parties to decide upon the most appropriate framework in the context of the particular responsibilities, authorities and duties which pertain to their position. This approach would therefore allow a voluntary opt-in to a legislative framework and could be helpfully supplemented by a Code of Practice.

4.4 Goods, Facilities and Services

The question of scope of the provisions concerning goods, facilities and services will be dealt with in the wider discussion of this matter.

4.5 Disposal and Management of Small Premises

The FSB Membership survey 2004 reports that home based business is becoming a key trend among the small business owners, with almost a quarter of businesses (22%) being run from home. It is also noted that home-based businesses are more likely to be new firms⁵. The implication of this is that they are more likely to move premises after expansion following the initial set-up period. Therefore any change in the legal position concerning the disposal or management of small premises could impact on the small business sector. It is clear that there is significant potential for overlap where an individual wishes to divest themselves of premises which are both commercial and residential in make-up.

The FSB does not object in principle to the reconsideration of the rules relating to the disposal and management of small residential premises, especially given the fact that the Race Directive has already compelled the abrogation of the exception in respect of this ground. Moreover, we note in respect of other grounds, exceptions, such as that in Article 32 SDO, may have to be reconsidered in the light of the interpretative obligation in Section 3(1) of the HRA. Nevertheless we urge careful consideration of this issue, mindful of the fact that there are bona fide reasons for treatment which may otherwise be considered discriminatory concerning the disposal or management of small premises. We would therefore suggest an approach which in general terms removed the exception but allowed objective justifications be raised. For example, the absence of a requirement for reasonable accommodation in the relevant DDA provision is appropriate and should be retained.

5. Discrimination

5.1 Direct Discrimination

The FSB believes that the current definition of direct discrimination is working effectively and we see no reason to alter these well established principles with the confusion which that would entail.

5.2 Indirect Discrimination

This is an area of equality law which at times seems to the small business community to be of labyrinthine complexity. The varied forms of indirect discrimination whether emanating from EU Directives or indirect discrimination as defined in national anti-discrimination law only serves to exacerbate the problem.

⁵ *Lifting the Barriers to Growth: The FSB Biennial Membership Survey 2004* at P. 6

A single definition of conduct or inaction which constitutes indirect discrimination would be most welcome. Clearly the starting point for such a singular definition must be that provided by the various EU Directives. Indeed, as the definition of indirect discrimination contained in the Directives already operates to regulate aspects of domestic law, widening this to a single definition of indirect discrimination should minimise transitional confusion.

In respect of the question of burden of proof, the FSB is concerned at the amount of confusion which exists. The principles set out in the case of *King*⁶, later confirmed by the House of Lords in *Zafar*⁷ are, in theory, controlling. However, the more recent EAT case of *Barton*⁸ appears to adopt a more stringent approach with a clear burden of proof being on the respondent, rather than the potential for inference from established fact. Moreover, *Barton* appears to be more in keeping with the relevant EU Directives. The picture is therefore evidently one of some considerable opacity for employers.

In light of this we have two points. A Single Equality Act can, and indeed, should be used to definitively clarify the legal situation in this area to ensure both compliance with EU law but also fairness for employers. Secondly, the burden of proof shift should not be extended more widely than is currently the case. We recognize that there are normative and practical arguments concerning the nature of Sex discrimination and evidential problems in such cases which provide the basis for the burden of proof shift. These same considerations do not apply to the same extent, if at all, to other grounds not already covered by this approach. This situation should not be amended in the Single Equality Bill.

We agree with those who contend that the reliance of statistical evidence in the Burden of Proof definition can be difficult to operate in some cases. On occasion there is little empirical data available regarding certain groups, and at times such information can be difficult to accrue. However, we also believe that the current approach whereby such evidence is considered useful, but not essential, works satisfactorily in practice, whatever the theoretical problems may be. In light of this we do not see a significant need for additional regulation in this area.

5.3 Disability and Indirect Discrimination

There is little doubt that disability is a factor which can significantly affect equality of opportunity in the workplace, and in society more generally. We reiterate the point that this is not simply a challenge which confronts business. Many difficulties which impact upon equality of opportunity in the workplace occur prior to employment. One area which is of vital importance in this regard is education and training. For example, unlike other areas in the UK, there is little facility in Northern Ireland for residential training for disabled children between the ages of 16 and 18. As noted earlier, it is crucial that the talents and skills of all in our community are used to fullest extent possible, and many sections of society, including the business sector, have an important role to play in this.

⁶ *King v. GB China Clay Centre* [1992] ICR 516

⁷ *Zafar v. Glasgow City Council* [1998] IRLR 36, HL

⁸ *Barton v. Investec Henderson Crosthwaite Securities Ltd* [2003] IRLR 33

In terms of what is the best legal framework to address the equality challenges faced by those with a disability, the FSB believes that it would be inappropriate to extend the indirect discrimination framework to the ground of disability discrimination. Such an approach would not serve the best interests of either employers or those with disabilities. The DDA is a piece of legislation which was finally promulgated after a considerable gestation period. This pre-legislative phase involved considerable research, analysis and consultation among a wide spectrum of interested parties and produced legislation which represents a careful balance between the needs and interests of the various stake-holders concerned. Moreover, it is only in recent months that the small firms' threshold has been removed and it would therefore be unhelpful for small businesses to be faced with the potential for uncertainty and confusion which further legislative change in this area would be apt to generate.

The framework of reasonable adjustment in particular is suited to the challenges which face those with a disability in that the requirement for a reasonable adjustment means that practical solutions can often be tailored to the needs of the person with a disability. The imposition of an indirect discrimination approach would by contrast lack the precision and focus of the former with the individual only having a series of negative rights against which they would have to assess the actions or omissions of their employer.

If the reasonable accommodation framework is retained, a further point arises. Article 5(2) of the DDA contains a justification defence for failure to make a reasonable adjustment. We believe that this provision is, in fact, superfluous as there are realistically likely to be few circumstances conceivable in which a failure to make an adjustment which is reasonable would be regarded as justified. In any event this provision is likely to receive a particularly narrow statutory interpretation. In light of the foregoing we would accept the removal of the DDA Article 5(2) justification defence.

6. Goods, Facilities and Services

GFS anti-discrimination protection already extends to a wide range of grounds including race, gender and disability. In addition, although the EU Employment Framework Directive does not apply to GFS, it does require the establishment of two new grounds- sexual orientation and age. It therefore appears fairly uncontroversial, and certainly more consistent to, in principle, extend GFS protection to all those grounds covered by equality legislation. Notwithstanding this, it is also evident that if such an expansion in GFS coverage does occur, the role of objective justification will need to be assiduously considered particularly in respect of age, the provision of health care and aspects of social security.

6.1 The definition of goods, facilities and services

A list which seeks to exhaustively define goods, facilities and services has some attractions for small businesses, in particular the potential for easy comprehension. However, given the nature of the rapidly changing marketplace, it is questionable whether such a goal may in reality prove illusory. A better approach may be to set out

a list which is extensive but does not purport to be exhaustive and then enable adjudicatory bodies to proceed by increment and appropriate analogy.

Similar problems may also exist in relation to exceptions to GFS coverage. Again a similar approach could be adopted which sets out a general justification that the conduct in question was necessary and appropriate in pursuit of a legitimate aim. Several specific indicative defences could be set out some of which could relate to potentially borderline cases. This would act as a workable basis for employers and courts alike. It should also be noted that courts will have a body of jurisprudence in the form of justification defences to employment discrimination from which appropriate analogies can be drawn.

7. Addressing Under Representation

The point that legislation and its resultant administrative and financial burdens should only be imposed where it has been shown to be demonstrably necessary has been emphasised on several occasions in this submission. The rational basis for the promulgation of the Fair Employment and Treatment Order, 1998, was the history of religious division within Northern Ireland and in particular the prominent role which questions of fair employment played within that narrative. This is what provided the justification for the significant burdens, most notably the requirements of monitoring and review, imposed on employers in respect of religion and political opinion. However, the FSB does not accept that the same impetus exists to mandate the general extension of FETO obligations to other grounds of discrimination.

We also note practical difficulties with the extension of FETO type requirements to other grounds. Although the FETO model is largely regarded as being an effective, if not an entirely unproblematic, means of achieving goals concerning equality in terms of religious and political opinion. We believe that the imposition of this framework to other grounds would not be as well suited to the achievement of similar goals in respect of these other grounds given the different nature of the demographic, social and practical factors which affect participation among these groups. In short, an approach which is effective in relation to one particular ground will not necessarily be as effective in relation to other grounds.

There are also further practical problems which impact to a different extent on the various groups respectively. Data collection could prove especially troublesome. For example, there could be significant difficulties in relation to the collection of data concerning disability and most obviously where that related to mental health. Although such difficulties are not unknown, even under the current legislative framework, the extension of FETO requirements would undoubtedly exacerbate the situation. In addition there is also scope for confusion about how such legislation would appropriately interact with the Data Protection Act. A further point concerning the collection of data and its utilization, is that in terms of small businesses the function of comparing its workforce profile with data pertaining to the composition of the local workforce may have limited, if any, real meaning- in particular when this is considered against the backdrop of the very real problem of collecting accurate and reliable information in regard to certain groups.

8. Alternative Dispute Resolution

The FSB believes that ADR is an area in which there is potential for significant progressive development in Northern Ireland. However, if this potential is to be realized then legislation alone will not be enough; government will have to ensure that ADR structures have sufficient resources, expertise and powers to carry out their functions effectively. In addition, there is a need for a greater culture of mediation and conciliation to develop as a means of resolving disputes. Without such a culture it will be difficult for alternative structure of adjudication to achieve their full potential.

It is also important that the strengths and weaknesses of the various alternative forms of ADR are realistically assessed. Some forms of adjudication will not be appropriate in certain cases whether because of the complex or novel nature of the issues raised or because of the absence of any form of constructive relationship between the parties. The key to successful ADR structures is to identify the appropriate form of adjudication given the nature of each individual case.

In this context we believe that consideration should be given to some form of compulsory statutory preliminary dispute assessment. We note that the idea of preliminary assessment can be found in several other jurisdictions, notably in several states in the USA. The assessor would make a recommendation as to whether ADR is potentially useful in a given case, and, if so, which form. This recommendation need not be mandatory. However, if the case then goes before a tribunal, the panel can be informed of the assessor's recommendation as to the form of ADR (as opposed to any substantive determination arrived at during ADR) and whether the recommendation had been followed. The panel could then make appropriate use of such information for example when examining an argument that a given claim was vexatious. Although there may be bona fide reasons for declining a form of ADR, an arbitrary or unreasonable refusal may well be taken as indicative of a vexatious claim. In this way the role of ADR would be very much to complement that of traditional structures of adjudication. Both structures have an important role to play and the FSB believes that it is time this potential is realised.