

**A RESPONSE TO THE PROPOSED
SINGLE EQUALITY BILL
FOR NORTHERN IRELAND**

2. PURPOSE & PRINCIPLES

2.1 – Have you any comments on the Purpose and Principles set out in this chapter?

Chapter 2 clearly states that one key principle of the proposed Single Equality Bill is "*to promote respect for the equal dignity and worth of all, and to facilitate full participation and good relations in society*". While this aim is commendable, I am concerned that many proposals put forward within this document undermine this principle. If all individuals are deserving of equal respect and dignity then it is a flawed approach to single out particular classifications of person and emphasise special measures to promote their "equality" while leaving other classifications of person unmentioned. In effect your proposals create a hierarchy of discrimination! Someone who is discriminated against in a job interview on the basis of his / her gender (for example) is provided with greater legal protection than someone who is discriminated against in a job interview on the basis of his / her physical appearance. This is inherently unjust in that while all are victims of discrimination, not all are provided with equal levels of legal recourse. This undermines genuine equality, and instead of judging cases on the nature of the crime (i.e. discrimination) the law creates disparities. A person who discriminates on the basis of religion, age, gender etc is effectively deemed a greater criminal than a person who discriminates on the basis of physical appearance or social/economic status. Such situations will always arise when legislation singles out certain classifications of person or personal attributes for "protected" status instead of seeking to promote equality for all before the law. Equality is best served when law judges the nature of the crime committed against the victim rather than the perceived motives of the perpetrator.

The proposed Bill must also give recognition to the fact that there are cases where wise and informed discrimination is commendable and desirable. Not all discrimination is wrong – your proposals need to acknowledge this explicitly. For example, a charity would be wise to discern carefully who it appoints as its treasurer – it would be justified in discriminating against individuals with a track record of embezzlement. Providers of child care services would be right to discriminate against those with convictions of child abuse when appointing staff to look after children.

The final principle in Chapter 2 states that the proposed Bill is being brought forward in order "*to acknowledge that legislation should be fair to everyone with a balance struck between the demands of the right to equality and human dignity and the right to liberty and other broader social interests*". In promoting equality and diversity, the proposals focus disproportionately on employees and service users with little protection for employers and service providers. If employees / service users are legally permitted to adopt a religious or political affiliation, acquired gender or sexual orientation of their choice, then surely employers / service providers also have the right to run their organisations according to a particular ethos (religious, political etc)? This must be recognised within the proposals and employers granted

rights of discernment in the recruitment (and retention) of staff and the particular users they admit to their services / facilities.

Employers in organisations with a particular ethos must have the freedom to recruit staff whose beliefs and conduct are compatible with that ethos. They must also have the freedom to dismiss staff whose conduct or practices are inconsistent with the ethos. For example, the Vegetarian Society should have the freedom to refuse to employ meat-eaters, and the RSPCA should have the right to dismiss an executive found to be investing in the fur trade. This principle must apply not only to churches and charities but to all organisations / service providers with a particular ethos. An important precedent is set by the case, in England, of O'Neill versus the Governors of St Thomas More Roman Catholic School in Bedfordshire¹. In this case an unmarried woman who taught religious education in a Roman Catholic school became pregnant by a priest who visited the school. The teacher was lawfully and fairly dismissed by the school governors, and this decision was upheld by an employment tribunal. Your proposals must recognise the responsibility of staff / service users to act in accordance with the ethos of the employer / service provider (if it has a particular ethos), and must protect the right of employers to dismiss staff whose conduct undermines the ethos and the right of service providers to prohibit users whose practices go against the ethos. These rights must be protected in any future proposals put forward as a result of this consultation.

3. GROUNDS

The existing "grounds" for discrimination as outlined in Section 75 of the Northern Ireland Act (1998) create a hierarchy of discrimination victims and thereby promote inequality. Personal appearance is often a more innate personal attribute than sexual orientation, and can be a source of discrimination. Those with attractive looks may find themselves in an advantageous position in terms of employment prospects. But, by virtue of Section 75's singling out particular classifications of discrimination victims, the law is currently provides extensive legal recourse for those who are discriminated against on the basis of sexual orientation but scant protection for those discrimination against on the basis of physical appearance. This is essentially unjust and leaves victims of the same crime (i.e. discrimination) unequal before the law. An all-or-nothing approach should be taken by the law – either list every possible classification on which people can be discriminated against, or single-out no class of persons and instead emphasise the merit principle for all.

If the provisions of this Bill are going to single out certain particular classifications of persons (regardless of the points just made) then these must be limited to classifications that the individual has absolutely no control over. Is it fair to group race / ethnic origin, age, and gender alongside religion, political affiliation, sexual orientation, and acquired gender? An individual has no choice or control over his / her age, gender, disability and ethnic origin these are entirely innate characteristics, whereas with religion, political affiliations and sexual orientation there is an element of control and nurture. A person may be predisposed towards a particular religion, political persuasion or sexual orientation, and his / her life circumstances may have influenced him / her towards a particular identity, but there still is an element of personal control. A person disposed towards a particular religion, political persuasion, or sexual orientation does have control over the extent to which they express and practise that religion, political persuasion or sexual orientation. An individual may be physically attracted to persons of a particular gender, but that does not give him / her the right to engage in sexual intercourse with that person. If the provisions of this Bill are going to single out certain particular classifications of persons then that must not include sexual orientation or acquired gender.

If (regardless of the above comments) the proposals are going to include sexual orientation then please record my dissent when reporting the findings of this Consultation. Please also give an explicit definition of what is meant by sexual orientation. Does it simply mean physical attraction or does it refer to sexual practice? How many sexual orientations are there? Is paedophilia a sexual orientation? Current definitions of sexual orientation are very open-ended and need to be more tightly defined within your proposed Bill in order to protect employers and service providers with a particular ethos.

POLITICAL OPINION

3.1 – In relation to the potential loophole in the "political opinion" ground, do you consider we should:

The existing definition should be amended to exclude all political opinions / affiliations that support the use of illegal violence, whether or not these are connected with the affairs of Northern Ireland.

3.2 – please explain the reasons for your preference:

Political opinions and affiliations supporting illegal violence and terrorism should not be offered protection in the terms of equality legislation. Those organisations whose main methods / aims are to intended to overthrow the law (through illegal means), should not be protected by that law. Northern Ireland society has suffered much at the hands of terrorism and paramilitarism over the last 30 years, this behaviour must not be legitimised nor must legal recognition be granted to those organisations that have perpetrated violence.

POSSIBLE NEW GROUNDS

3.3 – Should a new ground of "marital or family status / dependants" be included in the Bill?

No

3.4 – If "Yes", should such a ground:

I do not believe that this new ground should be included, but if it is going to be included (regardless of the previous answer) then it must follow the lines of Option B and reflect the definition as included in the Republic of Ireland's Employment Equality Act. It must not include cohabiting couples.

3.7 – Please explain the reasons for your answer:

I do not believe that "marital or family status / dependants" should be included in this Bill, but if it is going to be included then it must reflect the definition laid out in the Republic of Ireland's Employment Equality Act. It must apply to married couples only and not cohabiting couples, those in so-called civil partnerships, or any other relationship aside from monogamous heterosexual marriage. The State should not be legitimising any other type of relationship or awarding legal rights and privileges to those who have not made a life-long legal commitment to their spouses in marriage.

Couples must make the legal commitment of marriage before they can expect the legal benefits and rights that are extended to married couples. To move away from this standard would create injustice – why award rights and privileges to cohabiting couples and not to two people who share a house in a non-sexual relationship? Do two friends sharing a house need to be sexually active in order to qualify for these legal entitlements and privileges? If we shower legal benefits and privileges on some relationships outwith marriage, then surely the law must extend these to all relationships outside of marriage or treat citizens unequally!

3.8 – Which specific new ground or grounds do you consider should or should not be included in the Bill?

Should be included:

This Bill (and other Equality Measures) should not single-out out classifications of person. By highlighting specific grounds of discrimination this Bill creates a hierarchy of victims and thereby undermines the principle of equality. If your proposals are going to single-out grounds of discrimination (regardless of my feedback) then both "sexual orientation" and "gender reassignment" must be removed from the categories laid out.

If your proposals are going to continue to include these two categories, then please record my dissent when the findings of this Consultation are reported. Also, if sexual orientation is going to continue to be included in the proposals then why are the proposals excluding the following grounds of discrimination:

- PHYSICAL APPEARANCE
- SOCIAL / ECONOMIC STATUS
- MANNERISMS
- PERSONALITY

Surely Equality Legislation cannot include sexual orientation and yet exclude physical appearance, mannerisms and personality when they are also potential grounds of discrimination in employment and the provision of goods, facilities and services?

Should not be included:

No single groups should be identified when implementing so-called equality legislation. Either all people (whatever their innate characteristics & identity) are equal, or there is a hierarchy of 'more' and 'less' protected groups. The latter scenario promotes inequality. However if, as seems likely, groups are going to be singled out, then only those characteristics that are completely innate should be covered. "Sexual Orientation" and "Gender Reassignment" should be removed from existing legislation and "Gender Identity", "Past Convictions", and "Genetic Predisposition" must not be included as new grounds.

3.9 – If you listed a ground or grounds, please explain why you consider this ground or grounds should or should not be included in the Bill?

If sexual orientation and / or gender reassignment are to be included as grounds within this Bill, then how can the following personal attributes be excluded? In these circumstances the following grounds must also be included in the Bill:

PHYSICAL APPEARANCE

A person's physical appearance can have as serious an impact on a person's life chances and opportunities as can ethnic origin, political affiliation, religion, sexual orientation, gender etc.

This is not a far-fetched statement, and many people do experience discrimination and prejudice as a result of their physical appearance. Until 1994 Chicago-based United Airlines discriminated against female flight attendants by requiring them to stay thinner than their male colleagues. Some female attendants lost pay and while others were sacked for being overweight. Although United Airlines had "maximum weight requirements" for both male and female flight attendants, stricter requirements were imposed on the women compared to the men².

This issue has been taken so seriously in the USA that job discrimination laws now remove all legal rights from potential employers to request information about the "age, gender, race, religion, marital status, health, physical appearance, or personal habits" of job applicants³.

Historically, many countries had laws prohibiting "ugly" or "unsightly" people from appearing in public⁴. Such a law would be unthinkable today. But in many aspects of life today great emphasis is placed on appearance. Image consultancy, spin doctoring, and cosmetic surgery are up-and-coming industries. There is thus an increasing danger that those whose physical appearance does not meet the expected standard of the majority can, and do, find themselves discriminated against.

It is not paranoia to suggest that employers can discriminate on the basis of looks – cases of this have been identified. In November 1994, the ABC news program "20/20" used hidden

cameras to expose looks discrimination in hiring decisions⁵. The "20/20" crew sent two men and two women – one member of each team better looking than the other member – on job interviews with identical experience and resumes. In five cases out of five, the more attractive woman got the job; in three chances out of three, the more attractive man was hired.

Good looks often exert a "halo effect" on others – the notion that everything that comes in such an attractive package must be good. Studies indicate this preference is unconscious and is displayed even by infants, who tend to gaze longer at a picture of a more attractive face than at a less attractive one⁶. But discrimination does not have to be intentional to be unlawful.

Given the above, if legislation is being established and consolidated to prohibit discrimination on grounds of ethnicity, religion, political affiliation, sexual orientation, gender then physical appearance must be added to this list. There is evidence of discrimination in society on the basis of physical appearance and from school age people face bullying and harassment because they are perceived to be too fat, or too thin, or too ugly by their peer group. According to recent research, 21% of people in Britain are clinically obese⁷ and surely measures must be set in place to protect this minority from discrimination in employment and public services, goods and facilities.

SOCIAL / ECONOMIC STATUS

In addition to physical appearance, there are other grounds on which discrimination can, and does, take place. Social / economic status (and place of residence) is another factor which can lead potential employers to discriminate against fully qualified applicants. Research carried out by a Centre for Social Policy & Research in Australia identified discrimination both by potential employers and an educational institute against applicants from a particular neighbourhood⁸. Employers may be prejudiced on the basis of an applicant's address – applicants living in certain neighbourhoods may be disadvantaged because their particular housing estates are perceived to have a bad reputation. This may partially explain why unemployment rates are higher in many inner-city housing estates than the national average. As persons are expected to give their address on job application forms and application forms for educational institutions, legal measures should be introduced to outlaw discrimination on the basis of this information.

MANNERISMS

Further factors that can lead to discrimination against people in employment and the provision of public goods, facilities and services are personal habits and mannerisms. Employers may be "turned off" by someone with a nervous twitch and may (unintentionally) discriminate against such a person on this basis. Likewise employers or service-providers may have a personal aversion to nail-biting, or the wearing of make-up and if faced with the choice of two equally qualified applicants may discriminate on the basis of personal habits. A person's bitten nails may be the outward expression of stress within

their life circumstances. They may find themselves orientated towards this habit and therefore should discrimination be allowed on such grounds? Accent should be included within this ground of discrimination. Individuals often have little control over the way they speak and employers can have aversions to particular accents. Some people prefer what is termed a 'public school' accent and others detest it. Similarly some people find a broadly spoken accent attractive while others find it repugnant. In the scenario of a job interview it is hard for a candidate to disguise their accent and this can lead to discrimination in the selection and recruitment of staff.

PERSONALITY

What about personality – employers and service providers may look more favourably on individuals with a lively, more effervescent and dynamic personality, than on those with a quiet and reserved nature! Arguably people have less control over their personalities than they do over their sexual orientation. Personality is an innate characteristic that can impact upon one's life chances and opportunities. It ought to be included in anti-discrimination measures if the law is going down the route of singling out particular groups and classifications of person.

3.10 – Please state why you consider that other legislation and / or other mechanisms that currently exist offer inadequate protection for any new ground or grounds that you feel should be covered in the Bill?

There is currently no specific legislation in place in Northern Ireland to prevent discrimination on the basis of (1) Physical Appearance, (2) Social / Economic Status, (3) Mannerisms, and (4) Personality and yet these attributes can be the grounds of discrimination within society and particularly in the labour market.

3.11 – Should we extend the existing provisions on equal pay (currently restricted to men and women) to another ground or grounds in the Bill?

No

3.13 – Should we repeal the Equal Pay Act (NI) 1970 and re-enact the provisions in this Bill?

No

4. SCOPE

4.1 – Which option should be used in determining the scope of the Bill?

It should be limited to the scope of the EU Directives and existing NI anti-discrimination legislation – Option A

4.2 – Please explain the reasons and outline any possible implications (advantages and disadvantages) for your choice

The scope of the Bill should be limited to that of existing directives and anti-discrimination legislation. Sections 75 and 76 of the Northern Ireland Act 1998 should not be included in the terms of this Bill. It is right and desirable that the scope of protection should differ according to the individual grounds of discrimination. This is because with some of the 'grounds' of discrimination there is a greater element of personal control than with others. Also, there may be greater need for exemptions in regard to discrimination on the basis of certain 'grounds' compared with others. For instance a person cannot alter their ethnic origin, race or age, however they do have control over the extent to which they practice their sexual orientation. In cases of gender reassignment there is a significant degree of individual decision-making and choice – therefore it must not be treated on the same basis as race or age, or afforded the same level of protection in regard to all goods, facilities and services.

4.3 – Should the Bill define "employment", "self employment" and "occupation"?

Yes

4.4 – If you answered "YES", should "employment" be defined using the definition in current legislation, namely "employment under a contract of service or apprenticeship or a contract personally to do any work"?

Yes

4.5 – If you answered "YES", should the Bill define the concepts more broadly to include relationships, which do not technically constitute a contract to allow for the inclusion of some marginal workers and volunteers?

No

4.6 – If a broader definition is to be used should it exclude volunteers?

Yes

4.7 – Should the Bill **not** define the above concepts but leave it to the Tribunals to decide on a case-by-case basis?

No view

4.8 – We would welcome your views on any other way of dealing with these employment concepts

Employers / Service Providers should be allowed discretion when dealing with volunteers. They should not be forced to accept particular volunteers, especially when the beliefs or conduct of those volunteers is not compatible with the ethos of the organisation.

Employers operating to a particular ethos must also be allowed to discriminate in the recruitment / retention of staff against those whose beliefs, affiliations or practices undermine the Organisation's ethos. A key precedent is set by the case, in England, of O'Neill versus the Governors of St Thomas More Roman Catholic School in Bedfordshire⁹. A single woman who taught religious instruction in a Roman Catholic school became pregnant by a local priest. The teacher was lawfully and fairly dismissed by the school governors, and this decision was upheld by an employment tribunal. The rights of employers to operate to an ethos and the responsibility of staff not to contravene that ethos must be laid forth in the proposed Bill.

MEMBERSHIP AND INVOLVEMENT IN ORGANISATIONS OF WORKERS OR EMPLOYERS

4.9 – Should the Bill extend these provisions to some of all of the other grounds?

No

4.10 – If 'Yes', which grounds?

Employer and Worker Organisations should have the freedom to develop their own ethos (political, religious or other), and so should be free to refuse membership to an individual or group whose beliefs or conduct undermine that ethos. This already applies to a political party and a church, and must apply to professional organisations to.

If extending this provision to other grounds, these must not include sexual orientation, gender reassignment, gender identity, past convictions, or genetic predisposition.

VOCATIONAL GUIDANCE AND VOCATIONAL TRAINING, INCLUDING PRACTICAL WORK EXPERIENCE

4.11 – Should the Bill extend this provision to some or all of the new grounds?

No

4.12 – Are you content that the associated exceptions are carried through to the Bill?

Yes, all existing exceptions must be carried through to the Bill

4.13 – Please explain the reasons for your answers and if you answered "Yes" to question 4.11 list the new grounds to be covered.

It is vital that Training and Educational Service Providers are granted the liberty to operate according to their ethos – they should not be forced to accept staff or students who openly contravene the ethos of those bodies, or whose conduct is incompatible with the views of the Service Provider / Employer. For example a Theological Training Institute or Bible College ought to be able to discern whom it accepts as students on the basis of religious beliefs and conduct (including sexual practice). Political Parties are permitted to bar from membership those whose conduct is detrimental to the overall ethos of the Party, or those who openly support other parties. The same must hold good for Educational / Vocational Training Service Providers who operate to a particular ethos.

SOCIAL PROTECTION, INCLUDING SOCIAL SECURITY AND HEALTHCARE AND SOCIAL ADVANTAGES

4.14 – Do you consider that the Bill should:

Not define these concepts but leave it to the courts to decide on a case-by-case basis? (paragraph 27 option a)

Yes

Define the concepts along the lines set out in paragraph 27 option (b)?

No

4.15 – Please explain the reasons for your answer:

There may be circumstances in which it is wise for a healthcare provider to discriminate in the allocation of limited medical / healthcare resources. Some people knowingly engage in risk-taking behaviour in relation to their health. In so doing they should forfeit the guarantee of equal healthcare provision with someone who has been careful to avoid risk-taking behaviours – especially where medical resources are limited. It is fundamentally unjust to treat those who are persistently reckless in the same manner as those who are consistently prudent. The proposed Bill must make provision for this.

Cigarette smoking has a detrimental affect on an individual's health and well-being. This fact is well documented and publicised. A smoker is 2.24 times more likely to develop cancer than a non-smoker¹⁰. Cancers of the lung, throat, mouth, oesophagus, kidney, pancreas, cervix,

and bladder are more common among smokers than non-smokers. 30% of cases of coronary thrombosis are caused by smoking and 9 out of 10 in the UK who require heart bypass operations are either current or former smokers¹¹.

Similarly, so serious are the health risks associated with homosexual practice that men who have engaged in sexual intercourse with other men are banned for life from giving blood in the UK¹². In Britain, 72% of all male HIV infections are contracted through homosexual intercourse¹³.

Even if the law does not wish to make moral pronouncements, surely it has a responsibility to take into account the medical facts relating to the above practices? An element of personal responsibility must be built into this legislation, and those who persist in risk-taking behaviours should not be given precedence over those who refrained from such practices when it comes to the allocation of scarce medical resources.

EDUCATION

4.16 – Should we bring all sectors of education under the scope of the Bill with specific exceptions where appropriate e.g. single sex schools?

No

4.17 – Should we incorporate existing legislation, with its varying coverage of education, and include disability provision, which are due to be made before the Bill becomes law?

No view

4.18 – Please explain the reasons for your answer:

Education should operate as far as possible outwith the scope of this Bill. Many Schools and Educational Institutes work to a particular ethos, and they should continue to have this freedom. Schools run along the lines of a particular religion or denomination should not be constrained by equality legislation either in terms of staff recruitment and retention, student intake, or adherence to particular aspects of the curriculum (*see the case of O'Neill versus the Governors of St Thomas More Roman Catholic School in Bedfordshire as documented in the answer to 4.8*). To apply the terms of your proposals to schools and education providers would undermine parental choice and religious liberty.

DISPOSAL & MANAGEMENT OF SMALL PREMISES

4.19 – Do we:

Retain the exception for all grounds except race?

Yes

Remove the exception for all existing grounds except race?

No

Remove the exception for all grounds but include a defence where there is an objective justification for discrimination in relation to small premises?

No

4.20 – Please explain the reasons for your answer. We would also welcome your view on any other way of dealing with this issue.

In property owned and / or rented out by churches, religious organisations, charities, loyal orders etc the owner should have a veto over who may rent / buy the premises. Organisations must not be forced to lease their property to those who will use the facilities to carry out activities that contradict the organisation's ethos.

For example the Orange Order should be allowed discretion in the disposal of its halls. Similarly the Ancient Order of Hibernians should be given a veto in the disposal of premises that it owns. Likewise churches and religious organisations should be granted the same freedom. Private Landlords must also have a veto over whom they lease their premises to. Religious-based housing associations should have discretion over the tenants they admit.

COVERAGE OF PUBLIC FUNCTIONS

4.21 – Should the coverage of public functions be extended to a similar extent as in the GB Race Relations (Amendment) Act 2000?

No

Should the extension of coverage of public functions be limited to that already in place for Race, this would include procurement?

Yes

4.22 – Please explain the reasons for your answer. We would also welcome your views on any other way of dealing with this issue.

Existing legislation goes far enough where public functions are concerned! By adding specific categories of person the principle of equality before the law is diluted, not reinforced. This creates a hierarchy of people to be considered when carrying out public functions, and those who are defined by other classifications are not entitled to equal consideration because of this. Emphasis should be placed on equal treatment of all citizens when carrying out public functions, not tailoring functions to meet the perceived aspirations of a specific population groups.

PRIVATE CLUBS / VOLUNTARY ASSOCIATIONS

4.23 – should the Bill continue to restrict coverage to the race ground only?

Yes

4.24 – should the Bill include provisions similar to those of the race and disability grounds to cover some or all of the other grounds?

No

4.25 – If so, which grounds and what exceptions do you consider would be needed?

Private clubs and voluntary associations should be allowed to continue to operate autonomously and admit or bar whomever the membership (or its legitimate representatives) wish. If the grounds are extended (I believe they must not be), then it must not include religion, political affiliations, sexual orientation, gender, or acquired gender.

4.26 – please explain the reasons for your answer. We would also welcome your views on any other way of dealing with this issue.

Private clubs and voluntary associations are often membership based and operate according to a particular ethos. They must have the liberty to function according to their ethos and / or the wishes of their membership and must not be constrained to admit people who do not share the ethos or with whom the existing membership (or governing committee) is unwilling to admit. Private clubs and voluntary associations are not public bodies and should not be subject to the same constraints in relation to equality legislation as public sector organisations.

5. DEFINITIONS OF DISCRIMINATION

5.1 – which of the following options should be used in defining direct discrimination?

Maintain the existing definition as contained in the EU directives and contained in NI legislation. In the disability legislation the "reasonable adjustment" duty would remain.

5.2 – please give your reasons for choosing one of the above definitions.

Current definitions go far enough where discrimination legislation is concerned. Providing an employer / organisation makes its ethos clear from the outset, then the employee must accept that anything done by the employer within that ethos does not constitute discrimination.

5.4 – do you consider that the "reasonable adjustment" duty should be extended to other grounds?

No

5.6 – For disability only, do you think that the current definition in the Disability legislation in relation to discrimination on the provision of GFS should remain?

No View

5.8 – Do you have any other comments on the definition of direct discrimination?

There has to be clear evidence of discrimination and not simply trivial reasons based purely on a personal perception. The ethos of the employer / organisation must be taken into account, and factors relating to this should not be counted as discrimination.

5.9 – do you think that a standardised definition of indirect discrimination should relate to all the grounds to be included in the Bill?

No

5.11 – Should the current disability approach to indirect discrimination be maintained?

No View

5.12 – Do you have any other comments on the definition of indirect discrimination?

Indirect discrimination must not simply be perceived from the personal perspective of one individual – there has to be evidence. The employee has to be pressurised or forced to do something in conflict with his / her religious / political beliefs. However the employee in accepting employment must recognise the ethos of the employer (if one exists).

5.13 – should the existing definition of harassment be used in all grounds?

No

5.14 – Do you think a comparator is required?

No View

5.16 – Should "sexual harassment" be defined separately?

Yes

5.17 – If you answer "Yes" or "No" please explain the reasons for your choice.

No employer / manager / service provider has the right to ask or pressurise staff to engage in sexual activities. This is beyond the remit of any reasonable job requirements and must be treated in the same manner as if someone was sexually harassed in any other context. It must have a definition of its own. Sex is designed for marriage and no employer should be pressurising staff in regard to this area. It is different to most other forms of harassment.

5.18 – Do you have any other comments on the definition of harassment?

Harassment must not simply be based on the perception of one individual. Some individuals are naturally more sensitive than others, some are hyper-sensitive, therefore legal protection must be in place to ensure that clear evidence exists before an allegation of harassment can be acted upon. What is meant by creating a "hostile environment"? This concept would need to be developed and consulted on to ensure it is adequately defined before being enshrined in legislation. The ethos of the work organisation must also be taken into account, so that employees cannot cite any application of the organisation's ethos as creating a "hostile environment".

VICTIMISATION

5.19 – Do you think the common definition of victimisation in current legislation and applicable to all the grounds of discrimination should be retained?

Yes

5.20 – Do you think that the definition of victimisation should be amended so that, for example, a comparator is not required?

No

5.22 – Do you have any other comments on the definition of victimisation?

Any legal measures introduced to tackle victimisation must take into account the employer's liberty to operate his / her business in accordance with an agreed ethos. It must also be recognised that some individuals are naturally more sensitive than others and therefore measures must be set in place to ensure that the personal perceptions of a hypersensitive employee are not treated as victimisation.

6. EXCEPTIONS

COMPULSORY GROUNDS

6.1 – Which of the following options should be adopted in dealing with exceptions?

Retain some or all of the exceptions with the option of an additional GSR exception – Option (B)

6.2 – Please explain the reasons for your choice. If you chose Option (b) please list the exceptions that should be retained and explain why?

Many organisations and service providers operate according to a particular ethos. This freedom must be protected in law and such bodies should not be bound to recruit / retain staff or accept service users whose conduct or beliefs contradict the ethos. The exception for "Organised Religion" must be carefully preserved. All other current exceptions must also be maintained.

POSSIBLE NEW GROUNDS

6.3 – Which of the following options should be adopted in dealing with exceptions?

List all the exceptions to be covered – Option (E)

6.4 – If you chose Option (e) please give examples of the exceptions that should be covered?

The exception for "Organised Religion" should be retained and extended to "Organisations with a religious ethos". Examples include charities, schools, housing associations, nursing homes with a religious ethos, services provided by churches to the public and the loyal orders. It must also include firms and businesses with a religious ethos, that provide services to the public – for example an accountancy firm with a Christian ethos that promotes high standards of accountancy as well as ethical investment policies, and offers clients in serious financial difficulties Christian counselling as well as practical advice, should be allowed to recruit only staff whose beliefs, conduct and practices are consistent with Biblical Christianity. Such firms should be granted exception from current equality proposals.

Exceptions must also be made for "Independent and / or parent-controlled schools" and "Membership based organisations". Members (or their legitimate representatives) should be allowed influence over the recruitment of staff and admission of new users.

6.6 – If you consider that some or all of the exceptions should be listed, how should these be dealt with – i.e. through inclusion in primary legislation, subordinate legislation or codes of practice? Please explain your preference, highlighting any advantages and disadvantages?

The exceptions should be included in primary legislation in order to ensure more comprehensive legal protection for organisations that fall within the categories outlined in answer to question 6.5. Legal recognition must be given to the rights of organisations to operate according to a particular ethos and this will be most effectively legitimised by including in primary legislation.

6.7 – Do you have any other comments on exceptions

Protection must be afforded to those employers, staff, and service-providers who adhere to evangelical Christianity. Their duty to that ethos must over-ride any requirement to recruit / retain staff, or provide services for those groups who would undermine that ethos. For example Christian social workers dealing with adoption and fostering services should not be forced to give children for adoption or fostering to same-sex couples.

Employers, staff and service-providers with an evangelical ethos must not be forced to comply with legislation or perform work practices that undermine their religious principles. For instance Christian staff in a manufacturing firm should not be forced to work on a Sunday, but should rather be given the option to work on the other six days.

Where the teachings of one religion conflict with those of another religion, or disagree with particular conduct (sexual or otherwise), that religion must be allowed the freedom of expression. By way of example, those who adhere to evangelical teaching that Christ is the unique Son of God should be allowed to express that view publicly without accusations of harassment or incitement to religious hatred.

7. GOODS, FACILITIES & SERVICES

DEFINITION

7.1 – In considering the need for a definition for GFS, which option should be used?

Option (B)

7.2 – Please explain the reasons for your choice. If you chose Option (b) can you suggest a definition?

GFS should refer only to those goods, facilities, and services provided by the public sector, funded by the taxpayer, and designed for use by all sections of the public. It should not refer to goods, facilities or services delivered by private, voluntary, charitable, or non-public sector organisations, regardless of how widely these services are used. In Northern Ireland many services are run by those with a particular political or religious ethos (e.g. some boarding houses, hotels, B&Bs, schools, nurseries, recreational facilities etc) and it is justifiable, in a free society, that the service provider has the ultimate right to refuse someone access to their services.

7.3 – In considering option (b), do you feel that this could represent a reduction in the level of protection already afforded under the Race Relations Order?

Possibly, but it is important that the freedom of service-providers to operate their services according to an ethos is protected. This means that the service-provider should have the liberty to refuse an individual or group access to those services if the conduct of that individual or group undermines the ethos.

PUBLIC FUNCTIONS

7.4 – Do you think that the Bill should continue to specify that it is only unlawful to discriminate in the provision of GFS if the provision is to the public or a section of the public?

Yes – with the proviso that the GFS is also funded with public money and / or provided by the public sector also

7.5 – Should discrimination over the provision of GFS be unlawful even when the transaction is between two private persons?

No

7.6 – If you answered "yes" or "no" please explain why and in the case of the former outline what difficulties you foresee and how these might be overcome?

Individuals providing and using GFS privately must come to their own arrangements and the provider should have the freedom to run the GFS according to an ethos. Where granting goods, facilities or services to a particular user would threaten, undermine, or contradict the provider's ethos, the provider should have the right to refuse the goods, facilities or services to such an individual (on condition that the provider does not accept payment for GFS undelivered).

BALANCING OBLIGATIONS

7.7 – Which approach should the Bill take to possible exceptions?

Option (b)

Specific exemptions

If these should be listed what sort of exceptions would be appropriate?

Should there be different exceptions for different strands, such as age, disability, gender and sexual orientation?

Option (b)

Please explain why you have chosen this option

There must be exemptions to allow the suppliers of goods, facilities and services to operate according to an ethos (if they so wish) and to ensure that the ethos is not compromised in terms of who uses these goods, facilities and services, and for what purpose. There would need to be exemptions for GFS provided by Organised Religion and organisations with a religious ethos. For example a Christian-based Outdoor Activity Centre which seeks to provide recreational facilities for young people in a Christian environment should have the right to refuse, for example, an Islamic organisation from booking the Centre's facilities for a weekend. There should also be exemptions for organisations with a political ethos. For instance a community hall owned by the Labour Party should have the right to refuse a booking for a Conservative Party function.

It is not only on the basis of ethos that exemptions should be made. Where sports, recreational and leisure facilities are concerned, the service providers (public or private) must be granted exemption from equality measures, especially where sexual orientation and gender reassignment are concerned. The consultation document argues for the protection (from discrimination) of a person who "*intends to undergo, is undergoing or has undergone*" gender reassignment¹⁴. It also proposes protections on the basis of gender identity whereby individuals may adopt an acquired gender without undergoing gender reassignment or a medical process to change their physical birth gender¹⁵. In such cases it is right and proper that the providers of sports, recreational and leisure facilities discriminate against these individuals for the benefit of other service users. For example, suppose someone born as a man is currently undergoing gender reassignment processes and decides to use a Council run swimming pool. Does this person use the male or female changing rooms? If there are other users in the changing rooms then it is surely justifiable that the Council staff refuse the said individual access to the changing rooms on grounds of his / her gender identity. Similar situations could arise in clothes shops where there are male and female changing rooms for

customers. The shop owners have a duty to ensure that only those with a male body use the male changing rooms and only those with a female body use the female changing rooms. Discrimination in these cases is desirable – and exemptions must be granted.

In granting exemptions, consideration must also be given to the identity and ethos of other typical users of a public good, facility or service. For example, a Community Centre may on a weekday evening be used by clubs for children. If a group offering sexual health advice applied to use rooms within the Centre at the same time as these clubs, then it would be justifiable for the Centre Manager to refuse the sexual health group facilities at that time of day because of the clientele already using the Centre then. This is wise and informed discrimination. Exemptions must be made for this and similar scenarios whereby other service users would be adversely affected. Discrimination should be allowed (and encouraged) in these cases.

7.8 – Are you aware of any possible implications with your chosen option?

Yes, this option may be resisted, but it is right that exceptions are made for the scenarios described in my previous answer.

PROTECTION PROVIDED BY GFS POLICY

7.9 – Are there any determining factors that need to be considered in clarifying who should be protected? (paragraphs 35-38)

Yes. The ethos of the provider of the goods, services or facilities must be considered, and so should the rights, liberties and protection of other typical service users (see my answer to question 7.7). People should expect to be discriminated against on grounds of gender reassignment or identity where sports and recreational facilities are concerned.

CONFIDENTIALITY CONSIDERATIONS

7.10 – Are there any considerations around confidentiality and sensitivities in relation to GFS complaints?

This depends on the ethos of the service provider. For instance, those providing religious-based services should have the right to be informed if the conduct of one of their clients (in relation to sexual orientation, religious beliefs, past convictions, or gender reassignment and identity) contradicts and undermines the organisation's ethos.

In the case of sports facilities (and other facilities with public changing rooms), the service providers should be informed if someone using their services is undergoing gender reassignment. This is necessary to protect other service users.

IMPLEMENTATION

7.11 – Considerations and options include:

- In the event that GFS protection is introduced for existing grounds where this is currently not covered (married persons, gender re-assignments and sexual orientation), such protection is introduced on the enactment of the Bill
- In the event that GFS protection for sexual orientation is to be introduced in the Bill, such provisions should be introduced on enactment of the Bill
- In the event that GFS protection for age is to be introduced in the Bill, such provisions should be introduced on enactment of the Bill
- In the event that GFS protection for age is to be introduced in the Bill confirm plans to introduce this protection but defer implementation to reflect the necessity to adjust service policy and procedures

Have you any views on these options?

GFS protection should not be introduced for sexual orientation or gender reassignment. This would greatly increase the potential for litigation and affect other service users (and providers). As already stated, some service providers should discriminate against those who have undergone gender reassignment (e.g. sports / recreational facilities, clothes shops with changing rooms). As many goods, facilities and services are provided by organisations with a particular ethos (often religious) the freedom of the service provider to prevent someone who would undermine the ethos from using their services must be protected in law.

8. ADDRESSING UNDER-REPRESENTATION IN EMPLOYMENT

GROUNDS

8.1 – Do you consider that the Bill should address under-representation in employment with regards to other grounds?

No

8.6 – If "Yes", to which grounds and to what extent in relation to each ground should the approach be extended?

The Bill should not address under-representation in employment with regards to any other ground than those covered in existing legislation. No other grounds must be added. But if other grounds are going to be added, the Bill should only cover characteristics such as age, gender, race and disability. It must not include sexual orientation or gender reassignment. Sexual orientation and gender reassignment must not be added to the grounds on which this Bill addresses under-representation in employment.

8.7 – Please explain the reasons for your answers

To address under-representation in employment with regards to particular grounds will create a hierarchy of groups within the labour market. The merit principle only should be applied with respect to all classifications of people.

THE APPROACH TO BE TAKEN

This paragraph raises a number of issues around the balance between the legislative and non-legislative approaches.

8.8 – Do you have any views on these issues?

Monitoring under FETO must not be extended beyond current provisions (i.e. employers with less than ten employees must continue to be exempt). Employers in small firms cannot reasonably be expected to recruit a representative cross-section of staff. The imposition of monitoring duties on all employers would be impractical and ineffective. There should be no affirmative action in favour of specific under-represented groups, because this in itself constitutes discrimination.

8.9 – Can you suggest ways to overcome any perceived difficulties?

No specific groups of employees should be singled out in legislation – this creates a hierarchy and causes employers to look on potential staff in terms of characteristics that encourage discrimination. Any measures introduced should emphasise appointment on merit only. Measures must also recognise the rights of employers to run their organisations on the basis of a particular ethos and recruit only staff whose beliefs and conduct are in harmony with that ethos.

8.10 – Do you consider that the existing voluntary approaches in place to tackling under representation in employment should remain unchanged?

Yes

EXTENSION OF AFFIRMATIVE / POSITIVE ACTION EXCEPTIONS

8.11 – Should the affirmative / positive action exceptions applicable to the different grounds be harmonised?

No

8.12 – If you answer "Yes" or "No" please explain the reasons for your answer

Affirmative action should not be encouraged because it is a form of discrimination and creates a hierarchy of opportunity among sections of the labour force.

8.13 – Should the affirmative / positive action exceptions be expanded to permit a wider range of

voluntary affirmative action measures?

No

8.14 – If you answer "Yes" or "No" please explain the reasons for your answer?

Affirmative action must not be encouraged, employers should emphasise the merit principle only.

FAIR EMPLOYMENT APPROACH

8.15 – If under-representation in the context of other grounds should be addressed in the Bill, should some or all of the existing FETO approach be applied to other potentially under-represented grounds?

No

ALTERNATIVE REGULATORY APPROACHES

8.17 – If the existing FETO approach should not be adopted in whole or in part for other grounds, should a different approach be adopted to addressing under-representation in employment?

No

SECTION 75 APPROACH

8.19 – Is a model, which places a duty on private sector employers to promote equality of opportunity, a desirable model from which to devise an appropriate regulatory approach to addressing under-representation in employment?

No

GOVERNMENT CONTRACTS & GRANTS

8.21 – To what extent should government contracts and grants be linked to the carrying out of policies by the contractor that address under-representation in employment.

Government contracts and grants should be linked to the cost-effectiveness and quality of services provided to the general public. They should not be concerned with internal measures to address under-representation of groups within particular companies.

8.22 – Have you any other comments on the issues raised in this chapter?

Any regulations or measures resulting from this consultation re under-representation in employment must not single-out specific population group. This merely politicises the particular population group concerned and creates a hierarchy of under-represented groups. For instance, a group under-represented on the basis of sexual orientation will find itself with greater legal powers to address under-representation in the workplace than a group who is under-represented on grounds of physical appearance. This fosters inequality, since all groups must be equal before the law and none singled out for special protection.

- 1 O'Neill v St Thomas More RCVA Upper School and Bedfordshire County Council (1996), IRLR 372,
http://www.eoc-law.org.uk/cseng/case_summaries/oneill_v_1_governors_of_st_thomas_more_rcva_upper_school_2_bedfordshire_county_council_1996_irlr_372_eat.asp
- 2 Weight Standards May Constitute Sex Discrimination, Laura S Scott,
http://library.lp.findlaw.com/articles/file/00305/008990/title/Subject/topic/Constitutional%20Law_Equal%20Protection/filename/constitutionallaw_2_1875, see also
www.careerjournal.com/myc/survive/20000906-voros.html
- 3 <http://in.jobstreet.com/career/writing/resume5.htm>
- 4 If Looks Could Kill: Looks Discrimination in Employment by Don D Sessions, Employee Rights
<http://www.job-law.com/articles/7304.cfm?vPage=7304>
- 5 If Looks Could Kill: Looks Discrimination in Employment by Don D Sessions, Employee Rights Attorney, Mission Viejo, California, <http://www.job-law.com/articles/7304.cfm?vPage=7304>
- 6 If Looks Could Kill: Looks Discrimination in Employment by Don D Sessions, Employee Rights Attorney, Mission Viejo, California, <http://www.job-law.com/articles/7304.cfm?vPage=7304>
- 7 BBC News, 23rd April 2003, <http://news.bbc.co.uk/1/hi/health/2970461.stm>
- 8 Barriers to Employment: Why jobs are hard to get if you live on the High Rise Estates in the City of Yarra, by David Holdcroft (January 2003), Ignatius Centre for Social Policy & Research, <http://www.jss.org.au/research/documents/BarrierstoEmploymentJan03.pdf>
- 9 O'Neill v St Thomas More RCVA Upper School and Bedfordshire County Council (1996), IRLR 372,
http://www.eoc-law.org.uk/cseng/case_summaries/oneill_v_1_governors_of_st_thomas_more_rcva_upper_school_2_bedfordshire_county_council_1996_irlr_372_eat.asp
- 10 Dr Gavin Petrie, *Smoking – Health Risks*,
http://www.tiscali.co.uk/lifestyle/healthfitness/health_advice/netdoctor/archive/000417.html,
©1998-2004, NetDoctor.co.uk
- 11 Dr Gavin Petrie, *Smoking – Health Risks*,
http://www.tiscali.co.uk/lifestyle/healthfitness/health_advice/netdoctor/archive/000417.html,
©1998-2004, NetDoctor.co.uk
- 12 Do not give blood without reading this leaflet, The UK Blood Transfusion Services, Department of Health, December 1995
- 13 Public Health Laboratories, *Communicable Diseases Report*, 25th July 1997 Volume 7, no 30, page 272, table 2
- 14 *A Single Equality Bill for Northern Ireland*, A Discussion Paper on options for a Bill to harmonise, update and extend, where appropriate, anti-discrimination and equality legislation in Northern Ireland, June 2004, page 25
- 15 *A Single Equality Bill for Northern Ireland*, A Discussion Paper on options for a Bill to harmonise, update and extend, where appropriate, anti-discrimination and equality legislation in Northern Ireland, June 2004, page 32