

## **EQUALITY COMMISSION FOR NORTHERN IRELAND**

### **Response to OFMDFM's consultation on proposals to outlaw sexual orientation discrimination in the provision of goods & services in Northern Ireland**

**September 2006**

#### **Introduction**

1. The Equality Commission for Northern Ireland ("the Commission") is an independent public body established under the Northern Ireland Act 1998. The Commission is responsible for implementing the legislation on fair employment, sex discrimination and equal pay, race relations, sexual orientation and disability. The Commission's remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998.
2. The Commission's general duties include:-
  - working towards the elimination of discrimination;
  - promoting equality of opportunity and encouraging good practice;
  - promoting positive/affirmative action;
  - promoting good relations between people of different racial groups;
  - overseeing the implementation and effectiveness of the statutory duty on relevant public authorities; and
  - keeping the legislation under review.
3. The Commission welcomes the opportunity to respond to the Office of the First Minister and Deputy First Minister's (OFMDFM) consultation paper 'Getting Equal: Proposals to outlaw sexual orientation discrimination in the provision of

goods and services in Northern Ireland'. The Commission when responding to this consultation, draws on the unique experience it has gained from its role in enforcing in Northern Ireland the Employment Equality (Sexual Orientation) Regulations (NI) 2003 and in implementing the statutory duties under Section 75 of the Northern Ireland Act 1998 across nine equality grounds including sexual orientation.

The Commission responded in detail in June 2006 to a consultation exercise carried out by the Department for Trade and Industry (DTI) in relation to the proposed introduction of similar legislation in Great Britain. A copy of the Commission's response is available on the Commission's website ([www.equalityni.org](http://www.equalityni.org)).

It will be noted from the Commission's response that it seeks clarification in relation to a number of the proposals contained within the consultation paper. The Commission would welcome the opportunity to meet with OFMDFM in order to discuss these points of clarification, as well as any draft Regulations which may be produced as a result of this consultation exercise.

4. As regards the structuring of this response, this paper deals in turn with the specific questions raised in the consultation paper. At the end of this paper, the Commission makes a recommendation for change specifically in the area of sexual orientation, which, although outside the scope of the consultation paper, outlines a proposal for further reform of sexual orientation equality law and other related legislation.

For ease of reference, the proposed new sexual orientation discrimination Regulations in Northern Ireland are referred to as the 'new Regulations', the Employment Equality (Sexual Orientation) Regulations (NI) 2003 are referred to as the '2003 Regulations' and the proposed new sexual orientation discrimination Regulations in Great Britain (GB) are referred to as the 'new GB Regulations' .

This response also refers to the Commission's response to OFMDFM's consultation paper 'A Single Equality Bill for Northern Ireland' dated November 2004 (referred to as 'the

response to the SEB') which is attached hereto and is also available on the Commission's website.

## **Question 1**

### **Do you agree that the new sexual orientation Regulations should apply to goods, facilities and services?**

The Commission welcomes the proposed extension of the sexual orientation legislation to include prohibition on discrimination on the grounds of goods, facilities and services and in the exercise of public functions. It also welcomes the proposal that the prohibition will apply to housing, education in schools, advertising and clubs, where those activities are not otherwise caught by the general goods, facilities and services provisions.

## **Question 2**

### **Should the concept of goods, facilities and services have the same scope as in other equality enactments, in particular Part 3 and Part 4 of the Race Relations (Northern Ireland) Order 1997?**

On a broad basis, the Commission recommends that the new Regulations should reflect the 'best standards' within the existing regimes. In addition, subject to the need for justifiable exceptions and variations in certain equality areas, the new Regulations should offer the same level of protection to those who have rights under this legislation as that enjoyed by members of other groups protected under other equality legislation.

The Commission promotes a 'common template' across the equality legislation setting out common principles, exceptions and means of redress. The Commission is committed to 'equality of the inequalities' though it recognises that the differing nature of equality law grounds justifies variations of the 'common template'

In relation to the various proposals contained in the consultation paper, the Commission has commented in detail on the extent to which provisions contained in other equality legislation should be reflected in the new Regulations.

The Commission agrees that the scope of the goods, facilities and services provisions in the new Regulations should reflect that of Part 3 of the Race Relations (Northern Ireland) Order 1997 ('the RRO 1997'). Article 21 of the RRO 1997, unlike Part 2 of the Equality Act 2006 ('the Equality Act'), makes it clear that 'facilities for education' and 'the services of any local or other public authority' are included within the term 'goods, facilities and services.' The Commission strongly recommends, in the interests of clarity and consistency with other equality legislation, that the new Regulations should make it clear that these two areas are included within the scope of the goods, facilities and services provisions.

Part 4 of the RRO 1997 does not specifically deal with the provisions relating to goods, facilities and services, but covers other areas such as discriminatory advertisements and instructions to discriminate. The Commission's views on the degree to which these should be included in the new Regulations is outlined later in response to specific questions relating to these provisions.

### **Question 3**

**Do you agree that we should provide an exemption from the prohibition on sexual orientation discrimination so that services to meet a specific and justified need can be provided separately to different groups on the basis of their sexual orientation? What specific activities would such an exception need to apply to?**

In line with other equality legislation, the Commission agrees with the proposed exception to the legislation to allow individuals and organisations to limit access to their goods, facilities or services to persons of a particular sexual orientation in order to meet a specific and justifiable need.

As regards the specific activities the exemption should apply to, it is proposed that the specific activities should mirror those contained in the RRO 1997; namely education, training or welfare and the provision of ancillary benefits.

However the Commission is mindful of the fact that the main (or sole) activities of some LGB groups may be considered 'social activities' and may not fall within the terms 'education, training or welfare or the provision of ancillary benefits'.

As with Part 2 of the Equality Act, it is vital that this exemption is framed in such a way that it takes the form of a general exemption to the new Regulations (ie that the exemption is not limited to the goods, facilities and services provisions.) This would, for example, enable a public authority to commission a LGB organisation (as oppose to a non-LGB organisation), to carry out public functions for the benefit of LGB individuals, in order to meet a specific and justifiable need.

#### **Question 4**

**Do you agree that premises should be covered by the sexual orientation regulations?**

In line with other equality legislation, the Commission welcomes the fact that discrimination in the disposal and/or management of premises will be covered by the new Regulations. Although not specifically referred to in the consultation paper, it is assumed that this prohibition on discrimination will also apply to circumstances where a person's permission is required for the disposal of another person's interest in a property.

#### **Question 5**

**Do you agree that an exemption should be provided for selling or letting of private dwellings as described in this consultation paper?**

The Commission accepts, in line with a similar exception in other equality legislation, that there should be a qualified exception in the new Regulations to allow people to choose whom they live with in their own homes. The consultation paper sets out the circumstances in which this exemption can be relied upon. The paper has also made it clear that this exception will not apply to the letting of rooms in a private home that is being used on a commercial basis, such as a bed and breakfast or guesthouse. The Commission welcomes this clarification.

#### **Question 6**

**Do you agree that private members clubs should be included in the sexual orientation regulations?**

In line with the protection afforded in other equality legislation, the Commission welcomes the proposal to prohibit discrimination by private members clubs in the new Regulations.

### **Question 7**

**What is your view on our proposal that both private members clubs and associations should be permitted to include having a particular sexual orientation as a membership criterion, but only where this criterion is explicitly connected to the purpose for which the club has been established?**

The Commission agrees that the new Regulations should contain an exception allowing private members clubs that exist primarily for the benefit of persons of a particular sexual orientation, to restrict membership to persons of that particular sexual orientation.

The Commission recognises that such an exemption for informal associations, will allow LGB groups which are not either charities or private clubs to restrict their membership to LGB members. In the interests of clarity, the Commission believes that there should be a clear definition of what constitutes an 'informal association'.

The Regulations should also make in clear in what limited circumstances an informal association or private club can restrict membership to persons of a particular sexual orientation. The Commission seeks clarification from OFMDFM on how narrowly it proposes to define those circumstances.

The Commission notes that it is already proposed, as outlined in question 3 above, that the new Regulations will contain an exemption from the prohibition on sexual orientation discrimination so that certain services to meet a specific and justified need can be provided separately to different groups on the basis of their sexual orientation.

### **Question 8**

**Do you agree that the new sexual orientation regulations should apply to public functions as well as to goods, facilities and services? Do you think that any specific additional**

## **exceptions might be needed from a prohibition on sexual orientation discrimination in the exercise of public functions?**

The Commission welcomes the proposal to make it unlawful for a public authority to discriminate on the grounds of sexual orientation in carrying out its functions. The consultation paper makes it clear that these provisions will apply to activities carried out by public authorities that are not otherwise caught by the general goods, facilities and service provisions. The paper also clarifies that this prohibition on discrimination will apply to anyone exercising a public function, including where the function is being undertaken by a private or voluntary body on a public authority's behalf.

### **Question 9**

#### **Do you agree that schools should be covered by the sexual orientation regulations?**

The Commission welcomes the proposal to extend the protection against unlawful discrimination on the grounds of sexual orientation to include access to, and provision of, education in all schools (both grant-aided and independent).

It notes that it is proposed that the new Regulations will prohibit schools from discriminating in relation to their admission policies, access to privileges or opportunities, disciplinary policies etc.

The Commission is disappointed to note, as indicated in paragraph 3.30, that 'the behaviour of pupils towards each other will not be caught directly by this legislation'. Instead it is proposed that if a school fails to deal with homophobic bullying as firmly as any other kind of bullying, e.g. racist bullying, they may be vulnerable to a claim of discrimination under the new Regulations.

By way of illustration, take for example a situation where a Lesbian, Gay or Bisexual ('LGB') pupil is subjected to homophobic harassment by other pupils and the school fails to take any action. The LGB pupil will not be able to take a complaint under the new Regulations against the school, if the school treats homophobic harassment in the same way as other types of discriminatory harassment; i.e had the complaint been a complaint of racist harassment, the school would also have taken no action. The LGB

pupil can only take a complaint if the school treats homophobic harassment differently to the way it treats other types of discriminatory harassment; for example if the school investigates complaints by pupils of racist or sexual harassment but takes no action if the complaint relates to harassment on the grounds of sexual orientation.

Due to the problems of harassment faced by many LGB pupils (or pupils perceived to be LGB) and the impact that this harassment can have on educational achievement (see response to question 10), the Commission calls for stronger provisions in the new Regulations, conferring greater protection against harassment to LGB pupils than those proposed. In particular, the Commission recommends that the new Regulations adopt a similar approach to that taken in the Equal Status Acts in the Republic of Ireland. They provide that a person who is responsible for the operation of an educational institution must ensure that any person who has a right to be there is not harassed. 'The responsible person' is liable for the harassment unless he or she took reasonably practicable steps to prevent it. This would make an educational institution liable for the harassment of pupils by other pupils on the ground of sexual orientation, unless it took reasonably practicable steps to prevent the harassment occurring.

## **Question 10**

**Are there any circumstances in which you consider that schools, or a part of the schools sector, should be exempted from the regulations?**

The consultation paper has sought views on whether teaching in schools should be covered by the new Regulations.

The Commission is of the view that all exceptions to the equality legislation should be narrowly construed and justified.

The Commission notes that the Department for Education, in its circular "Relationships and Sexuality Education"<sup>1</sup> (RSE) issued in 2001, indicates that RSE 'should be taught in a sensitive manner which is in harmony with the ethos of the school and in conformity

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<sup>1</sup> Relationships and Sexuality Education, Department of Education, Circular Number 2001/15 (August 2001) available at <http://www.deni.gov.uk/2001-15.pdf>

with the moral and religious principles held by parents and school management.’ It also notes that the Department in this circular ‘encourages schools to develop a policy, in keeping with the ethos and moral framework of the school, that sets out how RSE will be delivered in the curriculum’.

The Commission further notes that Guidance issued by the Council for the Curriculum Examinations and Assessment (CCEA)<sup>2</sup> advises that teachers should deliver education about these issues in a sensitive, reassuring and non-confrontational way, remind pupils of the legal position regarding consent and counteract prejudice and support self-esteem and responsibility in every pupil.

The consultation paper indicates that in the revised curriculum, which will be introduced on a phased basis from September 2007, RSE will be provided through the new strand of personal development. The Commission welcomes the fact that the topic of ‘Relationships and Sexuality’, which will be covered at post-primary level, will cover different types of relationship and family structure, sexual identity and sexual orientation, including respect for differing views on homosexuality.

It is not clear from the consultation paper whether or not it is proposed to include an exception as regards the curriculum which will apply to all schools (both grant-aided and independent). The Commission seeks clarification on whether it is proposed that such an exception will apply to both faith and non-faith schools or solely to faith schools.

The Commission recommends strongly that the new Regulations should not contain an exception as regards the curriculum either in relation to faith or non-faith schools.

As regards an exception in relation to the curriculum for faith schools, the Commission recognises that the purpose of such an exception is to allow faith schools to teach subjects that deal with sexuality in a way that is relevant and appropriate to their ethos. However, the Commission believes that there is a tension between the inclusion of such an exception and the need for that teaching to meet the requirements of all young people whatever their developing sexuality. For example, can a school or teacher that teaches that

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<sup>2</sup> Council for the Curriculum Examinations and Assessment (<http://www.ccea.org.uk/>)

homosexuality is deviant or sinful behaviour be deemed to be meeting the needs of a gay or lesbian pupil?

In addition, the Commission asks OFMDFM to clarify whether such teaching could be deemed to amount to harassment of a LGB pupil or create an environment in the class/school which makes a LGB pupil more susceptible to homophobic bullying by other pupils (either on the grounds of his/her actual or perceived sexual orientation or on the grounds of the actual or perceived sexual orientation of the pupil's parents/associates).

In the Commission's opinion, the main difficulties faced by LGB pupils at schools do not relate, for example, to the application of a school's admission policies or disciplinary policies, but arise out of isolation, loneliness, fear of rejection, harassment and the problems associated with being 'invisible'.

Research undertaken in Northern Ireland has confirmed this. For example, in 2003, research commissioned by the Department of Education and carried out by Youthnet focused on the experiences of young people in the youth and education sectors, including those at school and in further and higher education. The findings of this research were startling; 35% of LGB young people surveyed stated that they had been subjected to physical abuse; 65% had experienced verbal abuse; 29% had attempted suicide; 44% of respondents said they had been bullied at school because of their sexual orientation; 33% of students and pupils believed they had achieved lower results because of their sexual orientation.

The problems faced by LGB individuals at school have also been recently highlighted by the Equalities Review<sup>3</sup> in its interim report. It has identified the educational attainment of LGB teenagers who have suffered homophobic bullying as one of the 'persistent and disturbing challenges for the task of reducing inequality and increasing fairness'. It should also be noted that in its summary report on 'The call for evidence', the Equalities Review states that one of the top priorities for the Review suggested by respondents, was 'action in schools both to educate pupils about discrimination and to combat the impact of policies and practices within schools that are seen as having a harmful effect on minority groups'. In the

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<sup>3</sup> The Equalities Review: Interim Report for Consultation, March 2006 (available at [www.theequalitiesreview.org.uk](http://www.theequalitiesreview.org.uk))

Commission's view, schools have the potential to play a pivotal role in promoting equality and challenging prejudice and discrimination in the wider society.

The Commission also believes that schools, both at the primary and secondary level, should be proactively addressing homophobic harassment both of pupils and staff.

In addition, as part of this consultation exercise, the Commission assumes that OFMDFM will take into account views on the extent to which such an exception if applied to non-faith and faith schools, is considered compatible with the human rights legislation; for example, the degree to which it is consistent with the Article 2 Protocol 1 (the right to an effective education) and Article 14 (the right to enjoy the rights and freedoms set out in the Convention without discrimination) of the European Convention on Human Rights as enshrined in the Human Rights Act 1998.

The Commission also assumes that it will take into account views on the extent to which such an exception is deemed consistent with the United Nations Convention on the Rights of the Child (UNCRC); for example, the degree to which it is deemed compatible with the following principles enshrined in the UNCRC; Article 2 (right to enjoy rights in the UNCRC without discrimination); Article 3 (that the best interests of the child must be a primary consideration); Article 6 (need to ensure to the maximum extent possible the survival and development of the child); Article 12 (the right of a child to express views and those views to be given due weight); Article 17 (access to information and material, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health); and particularly Article 28 (the right to education) and Article 29 (the aims of education).

The Commission notes that in the Republic of Ireland, the Equal Status Acts prohibit unlawful discrimination by educational establishments, including schools. No specific exemption was deemed necessary as regards the curriculum either for faith or non faith schools. The Commission recommends that the same approach to that taken in the Equal Status Acts, is taken in the new Regulations.

## **Question 11**

### **Are there any areas of activity for schools for which you consider special provision needs to be made?**

As indicated above, the Commission recommends that there should be no exception as regards the curriculum for faith or non-faith schools. It is also of the view that there is no justification for excluding any other areas of activities or services performed by faith or non-faith schools, either in the grant-aided or independent sectors.

The Commission is currently considering options as regards the most workable and realisable way of mainstreaming equality objectives in schools. One option the Commission is considering is whether schools should be designated for the purposes of Section 75 of the NI Act 1998. If schools are designated, then they will be required when carrying out their functions to have due regard to the need to promote equality of opportunity across nine grounds, including sexual orientation.

## **Question 12**

### **Do you consider that an exemption should be provided from the regulations for some of the activities of religious organisations?**

The Commission notes that it is proposed to have an exception for religious organisations in relation to 'activities closely linked to religious observance or practices that arise from the basic doctrines of a faith'. The paper mentions in particular activities such as 'worship, teaching and preaching, officiating in marriage, conducting baptisms and giving sacraments to members of their religious community.' The Commission assumes that such an exception will cover the content of and access to those activities. If such an exception exists, it will therefore not permit a religious organisation to refuse membership to a LGB individual, but it will allow the organisation to restrict that individual from attending or participating in certain activities.

If such an exception is included in the new Regulations, the Commission argues that it should not permit religious organisations

to discriminate against a person because of the actual or perceived sexual orientation of that person's parents, friends or other associates.

As stated earlier in this response, the Commission believes that all exceptions should be both narrowly construed and justifiable. The Commission is concerned that the wording 'activities closely linked to religious observance or practices that arise from the basic doctrines of a faith' is not sufficiently precise and will lead to uncertainty and confusion about which activities are lawfully covered by this proposed exception. Could, for example, a religious organisation claim that its charitable work was a practice that arises from the basic doctrines of its faith? If such terminology is used, is it intended to give an illustrative list of the type of activities which this exception will apply to?

The Commission also seeks clarification, if this exception is to be included in the new Regulations, as to whether the wide definition of 'religious organisations' as outlined in Part 2 of the Equality Act, will be adopted in the new Regulations. The Commission is concerned that such a broad definition, coupled with a lack of clarity about the scope of the activities covered by the exception, will lead to unjustifiable discrimination.

The Commission also notes that there is no indication that a religious organisation, in order to rely on the proposed exception, must show the following: that the restriction on accessing certain activities is required in order to comply with the doctrines of the religion or so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers. The Commission seeks clarification as to whether such a caveat to the operation of the exception is proposed.

The Commission welcomes the fact that it is not proposed to exempt activities that are provided by an organisation related to religion or belief, or by a private individual who has strongly held religious beliefs, where the sole or main purpose of the organisation offering the service is commercial.

The Commission also welcomes the proposal that churches, charities or other similar groups with a religious ethos, that are contracted by a public authority to deliver a service on its behalf will not be allowed to discriminate.

The Commission notes that in the Republic of Ireland there is no specific exemption on the ground of sexual orientation under the Equal Status Acts as regards religious organisations.

### **Question 13**

**Do you agree that these exemptions should be restricted to activities that are primarily doctrinal? If there are any other activities that you consider should be covered by an exemption, what are these and why do you consider that the need to be exempted?**

The Commission has outlined above its concerns about the proposed exception relating to activities closely linked to religious observances or practices that arise out of the basic doctrines of a faith. The Commission believes that there is no justification for any other activities carried out by religious organisations to be excluded from the new Regulations.

### **Question 14**

**Do you agree that an exception should be provided for charities that provide services specifically to people because of/according to their sexual orientation?**

In line with other equality legislation, the Commission agrees that the new Regulations should contain an exception allowing charities, in pursuance of the provisions of a charitable instrument, to restrict benefits to persons of a particular sexual orientation.

As stated in its reply to question 12, the Commission welcomes the proposal that charities with a religious ethos, that are contracted by a public authority to deliver a service on its behalf, will not be allowed to discriminate.

### **Question 15**

**Do you agree that the sexual orientation regulations should include direct and indirect discrimination as well as victimisation? Are there any particular considerations or**

## **situations that should be taken into account in how such provisions are drafted?**

Subject to the points raised below, the Commission broadly welcomes the proposal to include direct and indirect discrimination and victimisation within the scope of the new Regulations. It notes that discrimination 'on grounds of sexual orientation' will, in line with the 2003 Regulations, cover discrimination because of a person's actual or perceived sexual orientation as well as discrimination against a person by reason of the sexual orientation or perceived sexual orientation of a person with whom s/he associates. The Commission agrees, in line with the amended 2003 Regulations, that the new Regulations should provide that a civil partner can bring a direct discrimination claim against providers of goods, facilities and services where they are treated less favourably than a married person in similar circumstances.

### **Indirect Discrimination**

The Commission notes that it is proposed to include indirect discrimination in the new Regulations. The consultation paper indicates that discrimination will occur if a 'particular disadvantage' is suffered or there is a 'disproportionate adverse effect' on persons of a particular sexual orientation as compared to persons who are not of that orientation. On the basis that the words 'particular disadvantage' as oppose to 'disadvantage' are used, the Commission assumes, as regards the definition of indirect discrimination, that the new Regulations will adopt a similiar approach to that taken in the 2003 Regulations (which refers to 'particular disadvantage') rather than in Part 2 of the Equality Act (which refers simply to 'disadvantage').

The Commission also assumes, as regards the justification test, that the new Regulations, in line with the 2003 Regulations, will refer to a 'proportionate means of achieving a legitimate aim' rather than the approach taken in Part 2 of the Equality Act which refers to a reasonably justifiable test. The Commission is of the view, in the interests of consistency, that the definition of indirect discrimination in the new Regulations, should reflect that in the 2003 Regulations.

## **Victimisation**

Subject to the points raised below, the Commission welcomes the proposal to include protection against victimisation in the new Regulations. Although not specifically referred to in the consultation paper, the Commission assumes that the protection against victimisation will also apply where 'A' suspects that 'B' has done or intends to do any of the actions listed and will therefore mirror the protection against victimisation as outlined in the 2003 Regulations and in other equality legislation.

## **Harassment**

The Commission notes that OFMDFM is 'minded to accept that it is not appropriate to legislate for harassment within the new Regulations' and it believes that 'the future Single Equality Bill will provide a more appropriate vehicle to consider harassment in terms of goods, facilities and services and allow more time to deal with the complex arguments put forward'. The paper refers to the fact that there was concern during the passage of the Equality Act about the difficulty in establishing the threshold for what would constitute harassment by a goods or service provider.

The Commission is aware of the difficulties surrounding the definition of harassment which arose during Parliamentary discussions on Part 2 of the Equality Act. The Commission seeks further clarification as to why it is considered that the difficulties faced in this area on the ground of religion and belief also apply to the same extent to the ground of sexual orientation.

In addition, a failure to include a specific definition of harassment in the new Regulations will lead to the anomalous situation whereby such a definition will exist in the 2003 Regulations but not in the new Regulations. It also leads to further inconsistencies between the equality legislation in that harassment is specifically defined in the area of goods, facilities, services, education etc. under the RRO 1997, but will not be defined in those areas as regards sexual orientation.

Harassment on the grounds of sexual orientation in the area of goods, facilities, services, the exercise of public functions, housing, education in schools and other areas, is a major issue for members of the LGB community. The Commission is of the view that effective

and clear legislative provisions are required in order to ensure maximum protection against such discriminatory conduct.

The Commission recognises that a failure to include a definition of harassment in the new Regulations does not mean that a complaint of harassment cannot be taken. A case can still be brought if a service provider treats a person less favourably on the grounds of sexual orientation by refusing to provide that person with goods, facilities or services in a manner which is the same as or similar to that normally provided to the public. However, in the absence of a definition of harassment, persons alleging harassment under the new Regulations, will have to satisfy the comparator test.

In addition, if a definition of harassment was to be included, it would have to be open to the legislature (should the new Regulations allow for an exception as regards the teaching in schools) , to permit an exception as regards the curriculum, but make it clear that harassment on the grounds of sexual orientation was unlawful.

The Commission regrets that it is not proposed to include a definition of harassment in the new Regulations. It believes there is an urgent need for an agreed definition in order to ensure a degree of clarity about the standards and tests to be applied in harassment cases. There is also an urgent need to address, should a definition not be included, the unsatisfactory situation that there will be a lack of consistency, as regards the test of harassment, between the 2003 Regulations and the new Regulations, as well as tests adopted in other equality legislation.

In the Commission's view, rather than await the outcome of the debates surrounding harassment, a similar definition to that contained in the 2003 Regulations should be incorporated into the new Regulations, in order to ensure firstly consistency between the two Regulations and to ensure some clarity about the standards and tests to be applied in harassment cases.

## **Question 16**

**Do you agree that discriminatory practice should be included in the scope of the sexual orientation regulations?**

The Commission welcomes the proposal to make it unlawful under the new Regulations to operate a practice which results in unlawful

discrimination or which is likely to result in unlawful discrimination if applied to persons of a particular sexual orientation. It also welcomes the proposal to grant the Commission enforcement powers in relation to such discriminatory practices.

## **Question 17**

### **Do you agree that discriminatory advertising should be included in the scope of the sexual orientation regulations?**

The Commission welcomes the proposal to include in the new Regulations provisions which will make it unlawful to publish an advertisement, or to cause an advertisement to be published, which indicates (expressly or by implication), an intention by any person to discriminate.

The Commission notes however, that there is no similar provision in the 2003 Regulations that makes it unlawful to publish an advertisement or to cause an advertisement to be published. It is accepted that employers who publish discriminatory advertisements for recruitment purposes may be held to discriminate as regards the 'arrangements' made for the purposes of determining who should be offered that employment. In addition a publisher of an unlawful advertisement may be held to have 'unlawfully aided' an act provided s/he had 'knowingly' done so.

Although the Commission welcomes the proposal to include the publishing of discriminatory advertisements in the new Regulations, the fact that the publishing of a discriminatory advertisement is not specifically prohibited under the 2003 Regulations should be urgently addressed.

The Commission also notes that in line with other equality legislation, it is proposed that enforcement action in relation to discriminatory advertisements is to be pursued by the Commission exclusively, rather than by an individual through the court. The Commission welcomes the extension of this power to the Commission and seeks a similar enforcement power as regards the publishing of discriminatory advertisements under the 2003 Regulations.

## **Question 18**

**Do you agree that instructions to discriminate should be covered by the sexual orientation regulations?**

The Commission welcomes the proposal to make unlawful the act of instructing another to discriminate or causing another to discriminate under the new Regulations. The Commission notes however, that similar to publishing unlawful advertisements, the 2003 Regulations do not specifically prohibit instructing or pressurising a person to discriminate. In order to ensure consistency with other equality legislation and with the new Regulations, the Commission urges OFMDFM to urgently amend the 2003 Regulations to address this anomaly.

The Commission welcomes the proposal as indicated in paragraph 5.13, that the Commission solely will be granted the power to take enforcement action in relation to persons who give instructions or pressurise others to unlawfully discriminate under the new Regulations. The Commission seeks a similar power under the 2003 Regulations.

## **Question 19**

**Do you agree that validity of contracts should be covered by the sexual orientation regulations?**

In line with the protection afforded in other equality enactments, the Commission welcomes the proposal to include a provision that will ensure that a term of a contract is void in the following circumstances; where it provides for an act which is made unlawful by the new Regulations, where it is included to further an unlawful act or where its inclusion renders the making of the contract unlawful.

## **Question 20**

**Do you agree that the enforcement provisions for the sexual orientation regulations should match those for the other Northern Ireland anti-discrimination legislation?**

The Commission notes that it is proposed, in line with the time limits set out in the disability, sex equality and fair employment legislation, that complaints brought under the new Regulations must be lodged within six months of the alleged unlawful act, or if later, with the permission of the court. The Commission notes that it not proposed that the new Regulations will reflect the time limits in relation to certain discrimination complaints made under the RRO 1997; which permit complainants a further two months to lodge a complaint with the County Court where they have made an application for assistance to the Commission within that six month period. In line with its response to the SEB, the Commission calls for the harmonisation to the 'best standard' of legislative provisions in this area.

The Commission welcomes the proposal to make the questionnaire procedure available to complainants alleging discrimination under the new Regulations.

## **Question 21**

### **Do you have any comments on the proposals for how the sexual orientation regulations will be enforced and supported by the ECNI?**

The Commission welcomes the proposal to grant it powers to provide legal advice and assistance to actual or prospective complainants under the new Regulations, as well as powers to provide advice and guidance and to issue a Code of Practice in relation to the new Regulations.

The consultation paper also indicates that the Commission will be given powers to 'make recommendations for changes in policies or procedures following formal investigations or to advise the Department on changes necessary to the law in relation to the anti-discrimination legislation Northern Ireland'.

The Commission seeks confirmation from OFMDFM that it will be granted the power to conduct formal investigations under the new Regulations. It also seeks a similar power under the 2003 Regulations in the areas of employment and vocational training.

In the interests of consistency and parity with other equality legislation in Northern Ireland, the Commission, in addition to the power to conduct an investigation, seeks the following powers under the new Regulations; -

- to seek undertakings;
- to apply for an injunction to the County Court;
- to make arrangements for the provision of conciliation services for disputes;
- to undertake research and educational activities;
- to give financial or other assistance to organisations concerned with the promotion of equality of opportunity on the ground of sexual orientation.

As set out in its response to questions 17 and 18, the Commission also seeks amendments to the 2003 Regulations granting the Commission enforcement powers as regards discriminatory advertisements and persons who give instructions or pressurize others to unlawfully discriminate under the 2003 Regulations.

### **Powers of CEHR**

The Commission notes that the Commission for Equality and Human Rights (CEHR), as regards **both** the Employment Equality (Sexual Orientation) Regulations 2003 and the new GB Regulations, will have the following power to:-

- apply for injunctions (England and Wales) or interdicts (Scotland);
- publish/disseminate ideas or information;
- undertake research;
- provide education or training;
- provide advice and guidance;
- issue Codes of Practice;
- conduct inquiries;
- make grants;
- seek undertakings;
- carry out investigations;

The Commission seeks similar powers to those listed above in relation to both the 2003 Regulations and the new Regulations.

## **Conciliation powers**

Under the Equality Act, the CEHR will also have the power to make arrangements for conciliation services as regards disputes arising under the Employment Equality (Sexual Orientation) Regulations 2003, relating to further and higher education and to relationships which have come to an end. It is clear from the DTI consultation paper on the new GB Regulations, that it is also proposed that the CEHR will have the power to arrange conciliation services as regards disputes relating to the new GB Regulations.

The Commission seeks similar conciliation powers to those granted to the CEHR in relation to both the 2003 Regulations and the new Regulations.

## **Power to give assistance to ancillary proceedings**

The Commission notes that under the Equality Act, the CEHR will have the power to grant legal assistance to individuals who have or may become party to legal proceedings relating, wholly or partly to the equality legislation. Where proceedings relate partly to a provision of the equality legislation and partly to other matters, assistance may be given in respect of any aspect of the proceedings provided the issue relating to discrimination persists. The Commission seeks similar powers of assistance, both in relation to the new Regulations and under the 2003 Regulations, as regards proceedings which are ancillary to the sexual orientation discrimination issue.

In addition, in line with its recommendations contained in its response to the SEB, the Commission recommends that it has an explicit power to assist cases which are significant to its pursuit of its general duties but outside the scope of the Single Equality Act.

## **Capacity to institute/intervene in proceedings**

The Equality Act grants the CEHR an express capacity to institute or intervene in legal proceedings where the proceedings are relevant to any of the CEHR's functions (subject to certain limitations). As set out in its response to the SEB, the Commission proposes that it should have the standing to bring cases on behalf of named individuals and in the case of systemic discrimination, and that this standing should also be granted to trade unions and other suitably

qualified organisations. The Commission seeks an express capacity to institute or intervene in legal proceedings brought under either the new Regulations or the 2003 Regulations.

## **Powers of Investigation**

As regards investigative powers, the Commission has consistently recommended that the approach adopted in the fair employment and treatment legislation (FETO) towards investigations should be applied across all equality grounds both in relation to employment, vocational training, goods, facilities and services and related matters. The Commission notes that the Equality Act as regards the investigative powers of the CEHR in this and other equality areas, adopts the approach of the 'named person' formal investigation model, including the provision of action plans in response to an 'unlawful act notice'. This investigative power exists across a wide range of areas including employment, goods, facilities and services etc.

The Commission has, in its response to the SEB, raised the difficulties in carrying out 'named person investigations' and meeting the requirement that a formal investigation into a particular employer or service provider must be based upon a 'belief' that an act of discrimination has been committed.

If the Commission is to be granted investigative powers under the new Regulations, the Commission seeks clarification from OFMDFM as to the form of the investigative model proposed.

## **Commission duties**

In line with its recommendation in the SEB for a harmonisation of its general duties, the Commission wishes to see its good relations duty which it has as regards race, apply to all equality grounds, including sexual orientation. The Commission notes that under the Equality Act, the CEHR has a duty to promote understanding of the importance of good relations and encourage good practice in relation to relations, across a range of equality grounds including sexual orientation.

## **Recommendation for change**

Although not part of this consultation exercise, the Commission wishes to raise the following recommendation for change in the area of sexual orientation equality legislation.

### **Tribunal rules of Procedure**

In relation to sexual orientation discrimination cases brought under the 2003 Regulations and the Employment Equality (Sexual Orientation) Regulations 2003 in GB, the Commission believes that the Rules of Procedure for tribunals should be amended to allow tribunals to issue restricted reporting orders, a register deletion order and/or a restricted attendance order in relation to complaints brought under those Regulations, in circumstances where the applicant would otherwise be deterred from proceeding with his or her case. For example, Industrial Tribunals currently can only provide for restricted reporting orders in relation to cases involving national security (Article 12 of the Industrial Tribunals (NI) Order 1996), sexual misconduct (Article 13), and disability (Article 14).

In the Commission's view the inability of a tribunal to issue restricted reporting orders and the other orders referred to above, and therefore ensure anonymity for the person bringing a sexual orientation discrimination complaint in the area of employment and vocational training, can act as a major deterrent to potential LGB complainants who do not want their sexual orientation disclosed to the wider public.