



Falls Community Council (FCC) is a community development umbrella organisation working in West Belfast. Our organisation is committed to achieving human rights, social justice and economic equality.

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Resume of Considerations

The following are the key concerns for this paper:

- (1) there is harmonizing upwards of existing anti-discrimination and equality coverage;
- (2) the mandates set out in the Good Friday Agreement are fulfilled;
- (3) the Single Equality Bill conforms with EU law and international best practices;
- (4) the provisions of the Single Equality Bill are in line with the government's existing equality duties under Section 75 of the NI Act;
- (5) procedures are simplified and streamlined;
- (6) the Bill fosters a positive model for achieving an equality whose success is measured using the principle of equality of outcomes;

Considerations

The establishment of a Single Equality Bill for NI is in many respects a natural development of both the Good Friday Agreement and the Amsterdam Treaty. The Good Friday Agreement sets out firm commitments to the protection of rights and freedom from discrimination, founding NI governance on "principles of full respect for, and equality of, civil, political, social and cultural rights, [and] of freedom from discrimination for all citizens..."¹.

Section 75 of the NI Act (1998) ("Section 75") provides additional impetus for expanding and refining NI's equality framework. Section 75 mainstreams equality issues by requiring public bodies to carry out their functions relating to NI with due regard to the need to promote equality of opportunity for nine covered categories. The Single Equality Bill is an essential continuation of this mainstreaming process, further facilitating equality measures in the public and private sector.

It should also be remembered that as both directives point out, the right of all persons to equality before the law and protection against discrimination constitutes a universal right recognized by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.

FCC is of the view that the particular circumstances of the North of Ireland will benefit greatly from a more unified approach to equality. This is a society marked by great inequality and division, and the conflict has often eclipsed other equally harmful forms of discrimination and disadvantage. As a result, many groups, such as children, older people, and members of the minority ethnic communities have suffered even greater marginalisation than would have been

¹ Agreement Reached by Multi-Party Negotiation, Apr. 10, 1998, p. 2.

the case, had NI been a “normal” society. In this light, the strength of a Single Equality Bill becomes its ability to address the concerns of all constituencies and remedy any inadvertent hierarchy of discrimination.

Centralising Equality

The Single Equality Bill should centralise a positive, proactive conception of equality. In drafting this Bill, there may be a temptation to simply combine the existing legislation using the anti-discrimination template that has been in use for the past three decades. Many current anti-discrimination models, with their focus on equality of opportunity, have failed to result in measurable gains for marginalised groups. Further, their provisions often leave the institutional structures supporting inequality unaffected.

A practical framework for achieving lasting equality must focus on more than equality of opportunity. Equality demands addressing disadvantage and focusing on achieving equal access, fair participation, and equality of outcome. Equality measures are only as real as the tangible, lasting change they produce. This new legislation should establish mechanisms centred on a diagnostic approach to achieving the goal of fair participation – where remedies, time tables, and positive action can be tailored to specific contexts, while providing sufficient latitude for addressing the unique positioning of different groups in NI. The Single Equality Bill should include the following equality principles:

- Equality as recognizing difference
- A commitment to a diagnostic approach in achieving equality
- Equality as fair and representative participation
- Equality as equality of outcome

A Single Equality Bill integrating these equality commitments will benefit not only those who have experienced disadvantage, but also employers, government, and society as a whole by facilitating productivity, good relations, stability, and full participation.

Effective Implementation

Effective implementation of the equality provisions set out by the Single Equality Bill will hinge on the careful formulation of clear targets and timetables in relation to each of the protected constituencies. OFMDFM should also ensure the SEB is drafted so that it includes adequate funding and effective mechanisms for reaching these targets; a lack of resources or inappropriate implementation mechanisms would pose a risk of undermining the effectiveness of the entire Bill. In regards to timetables, Instead of viewing the timetables set out in the EU Directives as schedules dictating the outer limit for extension of coverage, these dates be interpreted as review schedules for revisiting and evaluating the effectiveness of the SEB's provisions.

In addition to clearly articulated targets and timetables, independent, external review mechanisms must be built into the legislation. This will allow for full exploration of whether the legislation's objectives are being met and, if not, what additional or alternative strategies are required. Under the Framework Directive (Art. 19) and the Race Directive (Art. 17), NI is already required to report on the application of the Directives in 2005, and every five years thereafter. This reporting requirement should be treated as an opportunity to conduct an independent review of the effectiveness of the legislation as a whole.

Drafting Principles

At present system there is too much statutory law. Moreover, most of the legislation is written using inaccessible language, and the complexity across different equality regimes is very confusing. This clearly serves to reduce the potential impact of the legislation for those seeking protection, the commissions and employers trying to implement the laws, and the courts seeking to enforce them. The Single Equality Bill should use clear and simple language, and supplementing it with detailed, accessible Codes of Practice. The degree to which the Bill is accessible and understandable will determine whether it is able to remedy the current defects in the existing legislative framework, and succeed in providing inexpensive and fair redress of grievances, workable procedures and assistance for the private sector and government.

There is a need to harmonise current anti-discrimination and equality legislation in force in NI. Fair employment measures and protective provisions are as necessary as ever in addressing the systematic disadvantage, which has remained largely untouched by current discrimination-model legislation. The published examinations of anti-discrimination and equality legislation in NI and the UK, conducted by scholars, policy makers, and the relevant Commissions, have come to the same conclusion. That is, this is not the time to roll back measures focused on disadvantage and inequality. Instead, these analyses focus on the dire need to strengthen, harmonize, reframe and simplify the current frameworks. In drafting this consultation response, FCC highlights the work carried out by the Committee for Administration for Justice who have surveyed literature for examples of best practices. Sources include, among others, the Hepple Report², an independent review of UK anti-discrimination legislation; SACHR's review of employment equality legislation in NI³; the Equal Opportunity Commission for NI's (EOC(NI)) recommendations for changes to sex discrimination legislation⁴; the Disability Rights Task Force's Report on civil rights for disabled people;⁵ the Starting Line Group's analysis of the Race Directive's incorporation into national law⁶, and the NI Affairs Committee Report on the Operation of the Fair Employment Act (1989).⁷

II. Scope

Much of the scope of the Single Equality Bill has already been mandated by the EU Framework Directive (2000) and the EU Race Directive (2000). The provisions required by these directives should be extended across the categories covered under Section 75 of the NI Act and harmonized in terms of areas of application. This will avoid generating a hierarchy of coverage among different types of disadvantage, while allowing for the drafting of simple, clear legislation.

² Hepple, B., Coussey, M., & Choudhury, T. (2000). *Equality: A New Framework, Report of the Independent Review of the Enforcement of UK Anti-discrimination Legislation*. Oxford: Hart Publishing.

³ Standing Advisory Commission on Human Rights. (1997). *Employment Equality: Building for the Future*.

⁴ Equal Opportunity Commission for NI. (1996). *The Sex Discrimination Legislation: Recommendations for Change*.

⁵ Disability Rights Task Force (1999). *From Exclusion to Inclusion: A Report of the Disability Rights Task Force on Rights for Disabled People*.

⁶ Chopin, I. & Niessen, J (Eds.). (2001). *The Starting Line and the Incorporation of the Racial Equality Directive into the National Laws of the EU Member States and Accession States*. Brussels/London: Belmont Press, hereafter referred to as 'Starting Line'.

⁷ NI Affairs Committee, Fourth Report, 'The Operation of the Fair Employment (NI) Act 1989: Ten Years On', Vol. 1, Report and Proceedings of the Committee, HC, Session 1998-99, London HMSO.

Application

Both of the EU Directives adopted in 2000 set out *minimum* levels of application for which NI must extend current anti-discrimination coverage. The Framework Directive (Art. 3), which applies to employment, including access, training and membership in workers/employer organizations, requires the extension of anti-discrimination provisions on the grounds of sexual orientation and religion or belief by 2003, and age and disability by 2006 at the latest. FCC expects to see this coverage brought into effect well advance of these time limits as part of the Single Equality Bill. The Race Directive (Art. 3) mandates a broader extension of coverage than the Framework Directive. Under the Race Directive, NI must extend protection on the grounds of race or ethnic origin to the areas of employment covered in the Framework Directive, as well as to social protection, including social security and health coverage, social advantages, education, and access to and supply of goods and services which are available to the public.

A practical approach would be to extend discrimination and equality coverage using a non-exhaustive list of examples of the fields covered. This flexible approach would permit overt reference to the coverage mandated by the EU Directives, while allowing future extension of protection to areas where discrimination is thus far unseen and to discrimination that does not fit into existing categories.

Goods, Facilities and Services

The extension of coverage to the provision of goods, facilities and services for all covered groups, including age and sexual orientation, is essential to furthering the goal of creating an ethos of equality in NI. In its review of employment equality legislation, SACHR stressed the importance of correcting the anomaly at the time that discrimination in the provision of goods, facilities, and services was not covered by existing legislation. Further, the Equal Opportunity Commission of NI (EOC(NI)), in its review of sex discrimination legislation, recommended that protection from discrimination should not just be prohibited in terms of employment, but also in respect to education and goods, facilities and services.

The definition of Goods, Facilities and Services must be as broad as possible taking in at the very least those normally provided for direct remuneration and those falling within the scope of public services, unless covered specifically in other provisions of the SEB.

II. C. Coverage

1. Categories

In the furtherance of equality and harmonization, FCC urges extension of the coverage set out in the Race Directive to the nine Section 75 categories. Although extension of equality provisions on the grounds of marital and dependant status is not explicitly called for by either EU directives, the inclusion of all Section 75 grounds in the Single Equality Bill is necessary if NI is to put forward coherent and consistent equality legislation.

It is also important to remember that the EU Directives set *minimum* standards which do not prevent Member States from setting a **higher standard** for discrimination protection. Therefore, the coverage required by the Framework and Race Directive should in no way be seen as limiting harmonization and coverage across NI's identifiable, marginalised categories. It should also be pointed out that the Good Friday Agreement itself expresses the commitment to providing rights not covered by the European Convention to the people of NI, reflecting an

approach of updating and supplementing existing rights. Given the commitment to implementing best practices and surpassing coverage provided by European law, the extension of equality protection across the Section 75 and other categories will move towards incorporating the commitments of the Good Friday Agreement into the Single Equality Bill.

2. Multiple-discrimination

One important reason for this extension of coverage can be seen in the covert and multiple ways inequality operates. That is, discrimination on one ground often provides a backdoor for discrimination on another ground. For example, 'Starting Line' points out how religious discrimination often constitutes indirect racial discrimination, and recommends that national legislation implementing the Race Directive extend at least the same level of protection on the grounds of religion or belief. Similarly, some sectors within NI have alluded to the possibility of discriminating on the grounds of sexual orientation by utilizing the narrowly-worded religion or belief exemption in the Framework Directive. Although this is clearly not allowed under the Framework Directive, such examples demonstrate how different forms of discrimination are often linked and function together to exclude sectors of our society from full participation.

The only way to ensure equality for everyone in NI is to take an integrated, harmonized approach to discrimination by offering an equivalent level of protection on all grounds. An important part of this harmonized approach will be the inclusion of legal provisions specifically aimed at multiple-discrimination and multiple disadvantage. For example, the Race Directive (Para. 14) and Framework Directive (Para. 3) make clear that when implementing equal treatment principles in terms of racial or ethnic origin, attention must also be given to the promotion of equality between men and women, "especially since women are often the victims of multiple discrimination."

3. "Other Status"

The phrase "and other status" should be included in the list of covered categories to allow expansion and adaptation of the legislation. This would bring the SEB in line with Protocol 12 of Article 14 of the European Convention on Human Rights and the Human Rights Act of 1998. An "other status" provision permits individuals from groups not listed to make their case to appropriate authorities in the future.

An 'other' status provision is particularly important because of its ability to extend provisions to other identifiable, marginalised groups who are not specifically mentioned in the coverage provisions. The inclusion of this clause is also justified within the terms of the Good Friday Agreement which refers to a "...commitment to the mutual respect, human rights and the religious liberty of everyone in the community."

The Hepple Report endorses this suggestion, explaining how "other status" allows the courts to develop discrimination law in response to social mores. What is meant by "other status" should be enumerated further in the Codes of Practice of the SEB, allowing more time to consider the intricacies of the extension of coverage to other areas of particular concern to NI, including nomadism, ex-prisoners, and socio-economic status.

4. Coverage of Public Sector Functions

As with the Race Relations (Amendment) Act (2000), which outlawed race discrimination in all public sector functions not already covered, the Single Equality Bill should apply to all public authority functions and operations in NI. This should include, as Starting Line recommended, extending anti-discrimination provisions to the activities of immigration authorities.

Certain exemptions may be necessary, but these should be narrowly tailored in accordance with the basic principle that exemptions for public sector functions should be necessary, legitimate, and proportionate. This extension of coverage to public sector functions should apply to all covered categories, and not be limited to racial grounds.

Exemptions

It is imperative that all current exemptions be re-examined for the purpose of a Single Equality Bill. A clear distinction should be made between the exemptions allowing discrimination and measures fostering positive actions. Actions aimed at remedying disadvantage should be framed as equality measures rather than permitted forms of discrimination or positive discrimination. It does not advance the aim of equality to refer to positive measures in the negative language of exemptions. The inclusion of provisions specifically legalizing measures designed to remedy disadvantage and promote equality of outcome is recommended. This set of provisions should be expanded on in the Codes of Practice accompanying the Single Equality Bill.

Employment Exemptions

Many of the current discrimination exemptions maintain stereotypical assumptions that are no longer relevant in our current cultural landscape, and now contrary to European equality law. These should not be carried forward into the new equality legislation. This conclusion was echoed in the analysis of anti-discrimination legislation by the EOC(NI), the Hepple Report, and Starting Line. Neither the Framework Directive, nor the Race Directive provided many opportunities for exemptions.

Genuine Occupational Qualifications

In the area of employment, exemptions are usually classified as "Genuine Occupational Qualifications" (GOQ). The EOC(NI) illustrated how for many exemptions in relation to gender, such as where a job involves living on an employer's premise, employers have had sufficient time to adapt since the passage of such legislation two decades ago. In relation to other areas of gender discrimination, such as personal services, the EOC(NI) recommended that the exemptions should be greatly narrowed, so the gender of the employee must be directly relevant to the service provided.

In light of the litany of exemptions requiring reassessment, an alternative approach to the outdated and cumbersome lists of exemptions is required. This could take the form of a general defence for discrimination, clarified in the Codes of Practice in order to provide guidance in determining where a difference in treatment is justifiable. For these purposes, the EU Framework Directive's general employment exemption (Act. 4(1)) should be looked to as a model and extended to all sectors covered by the SEB. FCC suggests the exemption clause read as follows:

Occupational Exemption clause: a given characteristic constitutes a genuine and determining occupational requirement, provided that the objective is necessary and legitimate, and the requirement is proportionate.

This definition ensures each particular instance of discrimination must be justified.

Framework Directive's Provisions on NI

The Framework Directive (Art. 15) exempts the recruitment of teachers from the Directive's provisions on religion or belief. Education exemptions should be subject to the same justification as set out above for occupational exemptions in general - the exemptions should be necessary, legitimate and proportionate. For example, under this standard, discrimination on the grounds of religion or belief may meet these criteria for the hiring of religious education teachers and teachers for other ethos-driven subjects, but broad religious discrimination for all educational hiring would fall short of meeting these requirements.

Goods, Facilities and Services Exemptions

Express provisions should be made elsewhere in the Bill allowing for positive action to remedy disadvantage in relation to the provision of goods, facilities and services. Exemptions in the provision of goods, facilities and services are vulnerable to encouraging the same kind of stereotyping as the outdated lists of employment exemptions.

Exemptions allowing discrimination in this area should be very narrowly tailored. Any exemption should provide for the same burden of proving a genuine and legitimate objective, and that the characteristic in question is a relevant consideration. Along these lines, for example, we would question the continuation, seen most recently in the Race Relation (Amendment) Act (2000), of a small premises exemption allowing for discrimination on the grounds of race. It is questionable whether this exemption is even compatible with the Race Directive. A general provision, accompanied by examples in the SEB's Codes of Practice, could facilitate addressing the complicated issue of exemptions for discrimination in private clubs, associations, and voluntary bodies. Under the general provision, exemptions would only survive where the grounds of discrimination are relevant to the organization or body's purpose.

IV. Definitions

For much of the Single Equality Bill's terminology, EU law has set out workable and practical definitions which should be incorporated into the new legislation. Since, in many cases, the EU definitions represent the minimum standard that must be implemented in NI, our response focuses on important modifications aimed at making sure the Single Equality Bill sets out practical mechanisms for ensuring protection and equality. Several important modifications include:

- **Eliminating the need for a comparator** - There should be no requirement of a comparator or reference to comparable situations for most of the terminology defined in this section. The requirement of a comparator often makes discrimination much harder to prove, works at cross-purposes with principles of equality by setting up the currently privileged group as the norm. For example, the European Court of Justice found that discrimination on the grounds of pregnancy, in and of itself, constituted sex discrimination without the need for comparison with a man. Making discrimination on the grounds of pregnancy a substantive form of discrimination sets a workable standard of protection for

those who are pregnant, whereas a comparator requirement only acts as a barrier to addressing this form of discrimination.

- **Prevention of leveling downward** – In line with long-established principles of human rights, equally poor treatment should not be considered as fulfilling equity principles. The provisions of the SEB should also include specific measures preventing a diminution in protection or a “leveling down”.

Direct Discrimination

The formula used for direct discrimination by current legislation in NI should not be incorporated into the Single Equality Bill because it retains the need for a comparator. Similarly, the EU Directives’ definition of direct discrimination is workable if, as mentioned above, the need for a comparator is removed.

The most practicable method of defining direct discrimination is introducing the notion of disadvantage in the definition of discrimination, as was recommended by the Human Rights Commission’s Bill of Rights Equality Working Group. Disadvantage as a gauge for determining direct discrimination is also used in the Equal Treatment Directive and supported by the European Court of Justice.

Direct Discrimination: direct discrimination shall be taken to occur when a person has suffered, will or would suffer disadvantage on the basis of their membership of a designated group.

Indirect Discrimination

The definition of indirect discrimination set out in the Race Directive (Art 2(2)(b)) serves as a useful model. This clause clarifies when indirect discrimination is permitted. We would urge the removal of any requirement of a comparator for the reasons mentioned above. This definition would then closely resemble the recommendation of the Human Rights Commission’s Bill of Rights Equality Working Group in regards to indirect discrimination. The definition would read:

Indirect discrimination: indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a [covered characteristic] at a particular disadvantage unless that provision, criterion or practice is justified by a necessary aim and the means of achieving that aim are appropriate.

Defining indirect discrimination in this way has several strengths. First, it does not contain a statistical requirement as an element of proving indirect discrimination, which is a weakness in the definition as set out in the Burden of Proof Directive. The requirement of statistical proof has the effect of neutralizing an indirect discrimination claim, as statistics are rarely available and/or costly to gather. This is especially relevant in the NI context, where there is little statistical evidence yet available on many forms of discrimination. Second, the definition does not require the discrimination be overt, intentional or conscious. It sends a clear message that discrimination does not have to be direct or intentional to be highly damaging to society. Moreover, the provisions on indirect discrimination should make clear that the term “practice” refers to inaction as well as action. Thirdly, the definition, as adopted by the Equality Working Group, provides a strong definition of ‘objective justification’. There are some areas of EU gender equality law in which the ECJ has accepted a ‘legitimate aim’ test, particularly in relation to welfare cases and some statutory employment schemes. However the pre-eminent test for

'objective justification' is still the test from *Bilka-Kaufhaus*⁸, that is a necessary aim. In these circumstances, the Framework Directive involves a watering down of pre-existing ECJ case law. The FCC believes that a strong indirect discrimination test is a vital component of the SEB. While other aspects of the SEB should facilitate those organizations which wish to pursue proactive equality policies, the threat of indirect discrimination actions provides strong encouragement to all organizations governed by the Act to conduct equality audits of their policies and practices.

How the SEB sets out its measures for indirect discrimination is of the utmost importance as this provision will function as a primary means of confronting NI's institutional discrimination. There is no justification for excluding disability from full protection from indirect discrimination, and for the sake of harmonization, does not recommend a completely separate approach to disability. There will be a clear need to articulate fully and ensure within the Codes of Practice the duty to make reasonable adjustments in regards to disability, but this should not work to exclude disabled people from indirect discrimination protection.

That is, although indirect discrimination provisions provide indispensable protection from institutional discrimination, indirect discrimination and reasonable accommodation should not be framed as either/or options. Rather than doing away with reasonable accommodation, FCC recommends exploring its potential as a positive action measure, which should be harmonized across the covered categories. Looking to Canadian equality legislation as a model, reasonable accommodation, when applied as a more general concept, offers a way of addressing equality concerns which is more reflective of a diagnostic approach. Reasonable accommodation and adjustments draw attention to the practicalities of working towards sustained equality and representative participation.

IV. C. Burden of Proof

Both the Framework Directive and the Race Directive require a shifting of the burden of proof onto the respondent in discrimination cases. This alteration will have to be incorporated into national law, and should be harmonized for cases on all grounds covered by the SEB in terms of direct discrimination, indirect discrimination, victimization, and harassment.

IV. D. Victimization

The definitions of victimization currently in force in anti-discrimination legislation, such as in the Race Relations (Amendment) Act (2000), are inadequate because they limit victimization to those who have brought forward discrimination cases. They are also flawed in using the comparative approach. The EOC (NI) revealed how the number of allegations relating to victimization had increased in recent years, and thus recommended that proper protection against victimization was crucial.

Victimization should be recognized as a widely reaching form of discrimination. Victimization protections should be extended far beyond their current limited scope and should receive as thorough treatment as other forms of discrimination. The Race Directive's definition of victimization is far preferable to the definitions offered by the Framework Directive, Race Relations Order, or other current NI legislation. Under its victimization section, the Race Directive calls for Member States to "introduce measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment." The SEB's

⁸ Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607.

Codes of Practice should ensure those brought within the ambit of victimization protection include

- former employees;
- third parties adversely affected, including those giving evidence; and
- current employees, including post-complaint/post-proceeding protection.

Harassment

Harassment is not defined within current NI anti-discrimination law, and it will therefore be necessary for the Single Equality Bill to carefully articulate a definition of harassment. The SEB's harassment provisions should spell out prohibited behaviour, while allowing for positive measures and prevention. The provisions must make clear that both public bodies and employers have a positive duty to be proactive in taking all reasonable and relevant steps to prevent harassment. This is particularly important within the context of an Equality Bill, because of the severe exclusion, loss of dignity and intimidation experienced by the subjects of harassment.

FCC recommends a definition of harassment based on the Framework Directive's definition:

Harassment: harassment shall be deemed a form of discrimination when unwanted conduct related to [any ground covered by the SEB] takes place with the purpose or effect of violating the physical integrity or dignity of a person, or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

This definition clearly frames harassment as a form of direct discrimination. The Single Equality Bill must, again, ensure there is no requirement of a comparator in proving harassment. As the Hepple review of current UK anti-discrimination legislation points out, requiring a comparator ignores that harassment is really about creating an environment which undermines dignity. Physical integrity should be further elaborated in the Codes of Practice as including sexual and emotional abuse and neglect, as well as physical forms of abuse.

Advertising

The Single Equality Bill should have clearly articulated standards pertaining to advertisements. These provisions should make it unlawful to publish an advertisement indicating an intention to discriminate, or which could reasonably be taken to indicate an intention to discriminate. The coverage of advertisements is particularly relevant to the new categories, such as age, given the tendency of employment advertisements to use age discriminatory and age exclusionary language. .

Incitement of Discrimination

Both EU Directives (Art. 2(4)) require that an instruction to discriminate be considered discrimination; this is entirely logical and emphasizes the importance of NI introducing legislation which would include an express ban on incitement or pressure to discriminate in relation to all covered groups. Provision should then also be made for the application of sanctions to those who promote or incite discrimination.

Addressing Under-representation

Although OFMDFM refers to this section of the consultation as "Addressing Under-representation", FCC would caution re-enshrining language used in discrimination-focused legislation in a Bill whose focal point is equality. More appropriate terminology should be drawn from the equality discourse, where terms such as positive action, fair participation and equal

access reframe affirmative measures in terms of creating lasting structural and institutional transformation. The EU Directives are committed to this equality model. Their positive action clauses (Art. 5 and 7) give NI broad latitude to seek permanent institutional change throughout society by “adopting specific measures to prevent or compensate for disadvantage linked to any of the grounds.” In effect, European law now offers a vast range of positive action options for national legislation, and even where there are limitations, Member States can provide more protection than set out in EU provisions.

The EU Directives, the Good Friday Agreement, and international human rights instruments and best practices all recognize the importance of positive action. Both EU Directives encourage Member States to engage in positive action measures.

To reiterate, positive action must be at the centre of any equality framework. Positive action affords a means of understanding our institutional structures, examining existing practices, and addressing the power structures that perpetuate disadvantage within our society. Positive action, framed as a means of achieving parity for everyone in NI, must go beyond head-counting and the status quo language of under-representation to emphasise mechanisms for attaining and ensuring fair participation and equality of outcome.

Principles of Equality

The Single Equality Bill must overtly express a commitment to equality. Equality should be articulated as a positive, proactive concept, moving beyond the negative, remedial focus of discrimination language. It should embody a commitment to the prevention of discrimination and the promotion of those who have suffered disadvantage as a result of the existing institutional structures in our society. For purposes of the Single Equality Bill, the definition of equality would best be set out as a series of principles indicative of the meaning of inclusive equality. Among these principles are:

- **Equality as recognizing difference** – Sectors to which the SEB applies should be given license to explore the most appropriate positive actions for addressing the particular disadvantage they are seeking to remedy. Positive action should not be constrained by a list of finite options, but given as wide a scope as possible. For example, the needs of ethnic minorities are very different to those of persons with a disability, so flexibility must be a guiding principle. Equality measures should carve out a space for the innovation necessary in effectively meeting the distinct needs and unique positioning of the different groups within NI. The Canadian Employment Equality Act (1995) expresses this principle as a commitment to, “... the principle that...equity means more than treating persons in the same way, but requires special measures and the accommodation of difference.”
- **A commitment to a diagnostic approach** – There is no one-size-fits-all solution to social disadvantage and exclusion. Layers of discrimination combine to position groups differently in relation to systems of privilege – inequality can be exacted and sustained via social invisibility, over-visibility, or selective exclusion. Formulating practical, tangible strategies for achieving equality will require a close assessment of particularities affecting each of the covered groups. This diagnostic approach would include a combination of monitoring, assessment and consultation with all relevant parties, and should be accompanied by statutory duty provisions. A diagnostic approach is the most effective means of revealing where fair participation is an issue and where positive action is appropriate.
- **Equality as fair and representative participation** – Equality as “fair participation” must accompany a commitment to equality of outcome. The SEB’s framework should focus on achieving fair and representative participation at all levels within societal institutions. For example, in terms of employment, this translates into representation at all levels

approximately in proportion with the numbers of a given constituency in the overall population. Representative participation will provide a useful yardstick by which to judge the successes and shortcomings of Single Equality Bill's equality framework.

- **Equality of outcome** - The past three decades of anti-discrimination law have focused on equality as equality of opportunity. This focus has not resulted in substantial or lasting change for those targeted by this legislation, because it fails to recognize the underlying structures which maintain inequality and prevent people from reaching the starting point from which accessing opportunity becomes possible. In contrast, an understanding of equality as equality of outcome recognizes that equality measures are only as real as the substantial, tangible change they produce and support. Equality of outcome has the potential for affecting real change as it pays attention to the wider processes of social exclusion and legacies of discrimination.

Monitoring

Scope and coverage

For many groups within NI, equality concerns go far beyond equal access to employment. Often even more important than access to work is access to public services and/or addressing pre-employment issues. In this light, FCC finds no reason to limit monitoring to employers and employment or to certain readily "countable" categories. Employers have been monitoring their workforces for several decades, and their best practices can be surveyed for the purpose of developing monitoring instruments for use in the monitoring of other sectors, like the provision of goods, facilities and services.

The OFMDFM has expressed some doubt about the value of requiring monitoring for categories where there is not likely to be statistically significant participation. FCC disagrees with the consultation document's suggestion that the lack of economically active populations in a sector may make assessment difficult for employers or that the relatively small overall population of some groups makes monitoring data statistically irrelevant. These assumptions overlook the power such monitoring data may have when aggregated by an equality body. For example, such aggregated data from employers has the potential to reveal patterns of participation across a sector; there is also diagnostic value in revealing patterns of participation by members of those categories about which statistical information has proved elusive.

Fair Employment legislation has been successful in implementing monitoring for religious belief or political opinion. This monitoring was initially responded to with reservations quite similar to the doubt currently being expressed towards the expansion of monitoring for other categories. We as a society, though, now have much more experience with monitoring. Employers in particular are accustomed to monitoring their workforce in terms of workforce composition, training, recruitment, promotion, etc. Monitoring across the full spectrum of stages of employment and training facilitates a diagnostic approach to equality. It allows for the focusing of attention on the different experiences of each constituency, and their specific needs in achieving representative participation.

While particular attention must be paid to concerns about confidentiality and sensitivity in monitoring procedures as they are extended to other categories, FCC believes full harmonization of monitoring across the Section 75 categories is essential to implementing a comprehensive, diagnostic approach towards equality. The SEB should commit to providing resources for training in relation to effective monitoring. Monitoring procedures should also be provided for through strong, specific Codes of Practice on monitoring for each of the covered

constituencies. Finally, FCC feels it is important that monitoring entities be given the room to explore alternative methods to the traditional monitoring procedures, as long as those monitoring are held accountable for accurately and sensitively accessing the information required by a diagnostic approach to equality.

2. A statutory duty to monitor

If NI is to develop an equality framework committed to achieving lasting equality of outcome, then the Single Equality Bill must include a statutory requirement to register and monitor. When monitoring is voluntary or seen as supplemental to an organization's processes, only a limited number of organizations may choose to make use of it. A statutory requirement to monitor facilitates the mainstreaming of equality commitments into organizational and institutional culture. Given the benefits organizations often experience as a result of the monitoring process, a statutory duty to monitor would only strengthen NI's progress toward equality.

As mentioned above, because of the potential for aggregating data across a sector and the efficiency gains experienced, there should be few exemptions from the duty to monitor. The statutory duty to monitor, at a minimum, should apply to the public sector, private bodies performing a public function, and large and intermediate size private sector organizations, including employers and goods, facilities and service providers. There may be need for an exemption from monitoring for small, private sector employees and small, private sector goods, facilities and service providers.

3. Fully utilizing the potential of monitoring

In their review of fair employment legislation, SACHR sets out a detailed set of recommendations in relation to monitoring. An insightful section relates to making monitoring more useful to employers and the monitoring entities themselves. Incorporation of these suggestions into NI's monitoring procedures is long over-due, and should be incorporated into the Single Equality Bill.

The SEB should use the annual monitoring and triennial reviews under FETO as a model. Other provisions for monitoring for purposes of the Single Equality Bill, many modified from SACHR's recommendations,

Effect on Employers

The burden created by monitoring is often alluded to in arguments against advancing positive action measures. Monitoring is an important method for the equality body's gathering of information and for facilitating employers' focus on the progress being made towards securing equality. SACHR illustrated how, for both sides, monitoring is a helpful and informative process. Too often, the debate around positive measures emphasises the supposed burden on employers, rather than highlighting the gains experienced as a result of monitoring in terms of efficiency, work force diversity, and increased employee retention.

Positive Action

1. Protection for positive action measures

Under present anti-discrimination law, direct discrimination is unlawful unless it falls within a specific legislative exemption. As we pointed out earlier, most evaluations of the significant pieces of anti-discrimination legislation call for more aggressive positive action measures. Clearly this is an opportunity to integrate these recommendations across the various

categories. The Single Equality Bill should contain express provisions carving out a general exemption for positive action measures..

Scope and coverage of positive action measures

As mentioned above, most of NI's current anti-discrimination legislation makes limited reference to positive measures. In setting up this new equality framework, the Single Equality Bill should provide for an express extension of positive action for all of the covered categories. In the consultation document, OFMDFM raises some concern over how to define a disadvantaged group for positive action purposes. Disadvantage is best seen as a relative position, which can be clearly identified and remedied with positive measures. It may not, however, fit into the prescriptive, fixed definitions usually set out in anti-discrimination legislation. That is, indicators of disadvantage can be clearly discerned using a diagnostic approach – this combines monitoring and evaluation in assessing whether a designated groups enjoys fair participation or fair access to a sector in question, be it employment in a sector, participation in training, access to housing, etc.

FCC would particularly wish to see promoted positive inclusionary measures to be undertaken by equality-conscious organisations. Such measures, while not involving direct reliance upon an otherwise prohibited category to achieve equality of outcome, nevertheless are based upon a diagnosis of obstacles to representative participation and seek actively to reverse the effect of previous discriminatory regimes. An example from the existing fair employment regime is the protection for recruitment of the long-term unemployed, a measure justifiable in terms of employment policy but also having the effect of being more likely to bring about the recruitment of Catholics than Protestants. SACHR (and the Patten Report) approved of protection of recruitment policies based upon geographical criteria. Clearly under-representation, in a deeply segregated society, can be counteracted by 'post code' recruitment. Indeed, such a measure can be much more targeted than an arguably cruder direct reliance on religion, such as the quota on police recruitment which has been accepted as a permissible element of NI equality policy. In both cases, such strategies require protection from indirect and possibly direct discrimination actions. In another context, employers and other organisations should be free to promote the inclusion of those who have had actively to reconcile working life and family or private life. Inevitably, a wider range of women with a greater spectrum of life skills would be included. Organisations, possibly in consultation with the Equality Commission, should be free to undertake such affirmative action programmes on the basis of a rigorous equality diagnosis.

Statutory Duty to Promote Equality

The Single Equality Bill should include a statutory duty to promote equality. Such a duty would work in conjunction with the duty to register and monitor. Where under-representation is proven, this statutory mechanism could be triggered by monitoring reports and reviews submitted to the equality body. Positive actions plans would be drawn up, with the option of support from the equality body and in consultation with the targeted constituencies. For other sectors, such as the provision of GFS, housing, etc., the Codes of Practice accompanying the SEB will need to detail the specifications of registering, monitoring, and statutory duty to promote equality. The equality body should then be empowered to review and revise the monitoring and statutory duty guidelines periodically as more experience is gained in these areas.