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Single Equality Bill Team  
OFMDFM

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Dear colleagues

I have pleasure in enclosing the Northern Ireland Human Rights Commission's response to the Discussion Paper. Although this is stated in the text, I would also like to take this opportunity to say that we at the Commission very much appreciated the intense effort that has gone into the consultation. There remains much to do and we look forward to further co-operation with you.

Best wishes

Ciarán Ó Maoláin  
Head of Legal Services, Policy and Research



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

**A Single Equality Bill for Northern Ireland**  
Response of the Northern Ireland Human Rights Commission  
to the OFMDFM Discussion Paper

**Introduction**

1. The Northern Ireland Human Rights Commission (NIHRC) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights,<sup>1</sup> advising on legislative and other measures which ought to be taken to protect human rights,<sup>2</sup> advising on whether a Bill is compatible with human rights<sup>3</sup> and promoting understanding and awareness of the importance of human rights in Northern Ireland.<sup>4</sup> In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding or “soft law” standards developed by the human rights bodies.
2. The Commission wishes to contribute its views to the Office of the First Minister and Deputy First Minister (OFMDFM) in what is undoubtedly one of the most important consultation exercises of recent years, not least in terms of its potential human rights impact. The Commission commends the Bill team and the panel of experts on the detailed work carried out to date.

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<sup>1</sup> Northern Ireland Act 1998, s.69 (1).

<sup>2</sup> *Ibid*, s.69(3).

<sup>3</sup> *Ibid*, s.69(4).

<sup>4</sup> *Ibid*, s.69(6).

## **The Commission's general position**

3. Equality has always been a central concept in human rights law, and one that is of particular sensitivity and importance in the context of any society characterised by social, political and religious differences, and many areas of persistent inequality. Perhaps the greatest achievement of this Commission's predecessor body, the Standing Advisory Commission on Human Rights (SACHR), was its work on strengthening legal protections and remedies in relation to discrimination in employment. The Northern Ireland Human Rights Commission, in presenting its views in the current consultation, is conscious of the need not only to build on the work of SACHR, but to take account of the changing landscape of equality law and practice, particularly in terms of European Union developments and the increasing recognition of the unacceptability of manifestations of discrimination and inequality on grounds other than those covered by previous legislation.
4. The Commission broadly welcomes the far-reaching proposals contained in the Discussion Paper which provide an opportunity for serious debate and discussion regarding the future of equality and anti-discrimination law in Northern Ireland. The comments below are arranged in sequence with the format of the OFMDFM Discussion Paper.

### **Chapter 1: Introduction**

5. The Commission would like the process of preparing the Single Equality Bill (SEB) to provide a genuine opportunity to consider anew the fundamental components of equality provision in Northern Ireland. In light of this, the Commission considers that the OFMDFM is interpreting in an unduly restrictive way the overall aim of the Bill as expressed in paragraph 1, namely "to harmonise anti-discrimination law as far as practicable and extend it into new categories".
6. The NIHRC considers that the Bill should not be confined solely to harmonising existing anti-discrimination statutes, such as those relating to sex, religion, political opinion and disability, and extending into new categories. Harmonisation should be about *all* existing equality and non-discrimination provisions, specifically including sections 75 and 76 of the Northern Ireland Act 1998. Without an attempt to integrate these important provisions, which impact on areas not covered by the other statutes, the Bill might more accurately be described as the Single Non-Discrimination Bill rather than the Single Equality Bill. Such harmonisation must provide the opportunity to consider the potential to adopt fresh approaches where required. The Commission wants the SEB to be as strong and ambitious as possible.
7. It is for this reason that the Commission stresses its interest in the SEB process encompassing all equality provisions in Northern Ireland and not just those devolved matters currently covered by anti-discrimination legislation.

Consequently, the Commission is disappointed at the failure to provide a fuller context for the Discussion Paper, notably in the following areas:

- there is no substantive reference to the equality provisions of the proposed Bill of Rights for Northern Ireland nor to the potential inter-relationship between the two pieces of legislation;<sup>5</sup>
- consequently, there is no discussion of the potential for general equality and non-discrimination provisions<sup>6</sup> and whether these would be better placed in the SEB or in the proposed Bill of Rights;
- there is no proper consideration of sections 75 and 76 of the Northern Ireland Act 1998; and
- no information is provided as to the potential opportunities and constraints associated with amending certain types of equality legislation.<sup>7</sup>

8. The first paragraph of the Discussion Paper refers to section 75 being part of the distinctive character of Northern Ireland equality and anti-discrimination law, but it does not then explain where s.75 sits within the SEB process. In the very first sentence of the Paper reference is made to the grounds of age and sexual orientation. Thus the Discussion Paper is already trespassing on the area of section 75, these being s.75 categories, and yet the SEB is apparently not to be the vehicle for any change to s.75. Some of the issues the Commission would like to see explored in relation to sections 75 and 76 are:

- the potential for enforcement of section 75 in a manner akin to section 76(2);<sup>8</sup>
- the need for clarity as to whether or not section 76 covers indirect as well as direct discrimination; and
- consideration of a power for the Equality Commission to order an impact assessment when presented with evidence of non-compliance with an equality scheme, rather than having to await voluntary production of such an impact assessment.

9. The Commission considered these issues carefully and prepared a discussion paper on the potential for amending various types of equality provisions through

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<sup>5</sup> A missed opportunity to discuss the possible impact of a Bill of Rights for Northern Ireland arose in paragraph 23 of the Discussion Paper (p15) where it is stated:

“...there are some general issues to be considered such as how detailed the legislation should be or whether it should provide a general framework with the detail contained in subordinate legislation.”

<sup>6</sup> Such as that proposed by the NIHRC in its April 2004 publication, *Progressing a Bill of Rights for Northern Ireland: An Update*.

<sup>7</sup> See *Constraints and Possibilities for the Single Equality Bill*, a discussion paper issued by the NIHRC, September 2004, appended to this response as Annex 1.

<sup>8</sup> Section 76(2) of the Northern Ireland Act provides as follows:

“An act which contravenes this section is actionable in Northern Ireland at the instance of any person adversely affected by it and the court may -

- (a) grant damages;
- (b) subject to subsection (3), grant an injunction restraining the defendant from committing, causing or permitting further contraventions of this section.”

the vehicle of the SEB.<sup>9</sup> The Commission came to the view that the interconnectedness of the various existing equality and non-discrimination provisions provided an imperative to consider them all together in the SEB. The Commission has been encouraged by the positive response it has received from both governmental and non-governmental actors to the content of the Commission's discussion paper and, in particular, the apparent agreement with the paper's interpretation of the lack of legal constraints to such an integrated approach. The Commission would welcome an approach which allowed for the outcome of what are currently parallel consultation processes in the field of equality, such as the Shared Future consultation<sup>10</sup> and the current Review of section 75,<sup>11</sup> to be considered alongside the responses to the present consultation, which focuses on non-discrimination.

10. As regards harmonisation, the NIHRC considers that a balance must be struck between the attractiveness of a "one size fits all" approach versus a variable approach tailored to the specific needs of each ground. The NIHRC has itself had to grapple with this dilemma in developing its thinking in respect of the proposed Bill of Rights for Northern Ireland.

#### ***The need for general principles to aid interpretation***

11. The Commission considers that the addition of a "Part One" to the Bill, setting out general principles to guide interpretation of the legislation, may well provide the answer in respect of striking this balance. Such an approach would also go some way towards addressing the need for a harmonious approach to equality provision as between the SEB and the Bill of Rights for Northern Ireland. The Commission has considered various means by which such harmony could be achieved given the likelihood that the SEB, which will contain the detailed provisions, will predate the enactment of the more general framework provisions of the Bill of Rights. The Commission's conclusion is that the principles enunciated in any such "Part One" to the Bill ought to reflect both section 4(1) of the Commission's proposals for a Bill of Rights for Northern Ireland,<sup>12</sup> and the second of the principles enunciated in Chapter 2 of the Discussion Paper regarding the need to ensure compliance of the Bill with international human rights law.<sup>13</sup>

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<sup>9</sup> *Constraints and Possibilities* paper, Annex 1.

<sup>10</sup> *Consultation on Improving Community Relations: A Shared Future*. The response of the NIHRC to the consultation of December 2003 can be found on the Commission website at [www.nihrc.org](http://www.nihrc.org) by following the link to "submissions."

<sup>11</sup> *Review of section 75 of the Northern Ireland Act 1998*, announced 15/4/04 pursuant to the commitment in the Joint Declaration of the British and Irish Governments of April 2003.

<sup>12</sup> Section 4(1) is set out in the Commission's April 2004 Progress Report as follows:

*"Everyone is equal before and under the law and has the right to equal protection and equal benefit of the law. Equality includes full and equal access to and enjoyment of all rights and freedoms set forth by law."*

<sup>13</sup> Principle 2, p.17 of the Discussion Paper states:

*"To ensure compliance with international human rights treaties which promote equality and prohibit unfair discrimination, as well as compliance with European law."*

12. Part One of the Bill could then read as follows:

*Section 1(1)*

*In interpreting this Act the aim shall be to ensure that everyone is equal before and under the law and has the right to equal protection and equal benefit of the law. Equality includes full and equal access to and enjoyment of all rights and freedoms set forth by law.*

*Section 1(2)*

*This Act must be read and given effect in a way which is compatible with the United Kingdom's obligations under international law.*

***Rationale for section 1(1)***

13. The Single Equality Bill will inevitably be a very complex piece of legislation. The Commission considers that there would therefore be great benefit in the inclusion of a clear statement in section 1 with the purpose of clarifying the aim of the legislation. Such a section would also provide an opportunity for a harmonious approach between this and a future Bill of Rights for Northern Ireland. It would provide an important tool to guide judicial interpretation of the remainder of the Act.

***Rationale for section 1(2)***

14. The United Kingdom has accepted a wide range of obligations under international human rights law in the fields of equality and non-discrimination. These are set out in Annex 2 appended to this response. Given the dualist nature of the UK's approach to its international law commitments, with the exception of those ECHR rights enshrined in the Human Rights Act 1998, the rights in, for example, the United Nations Convention on the Rights of the Child or the Council of Europe's European Social Charter are not directly enforceable before domestic courts. The Commission's aim is to ensure that due regard is had to the UK's obligations under international human rights law not only in the development of legislation, policy and practice but also in judicial decision-making. The United Kingdom is subject to periodic examination by international human rights bodies in respect of many of these obligations. It makes sense, therefore, to ensure that these obligations are placed at the core of new legislation providing a constant benchmark against which to test ongoing developments.

15. The need to have due regard to the UK's international law commitments has been reflected in different ways in a number of key pieces of legislation in recent years. The **Human Rights Act 1998** requires legislation to be interpreted in a way that is compatible with the European Convention on Human Rights, so far as it is possible to do so.<sup>14</sup> In addition, it requires courts and tribunals determining a

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<sup>14</sup> See section 3 of the Human Rights Act 1998 which states:

3. - (1) *So far as it is possible to do so, primary legislation and subordinate legislation must*

question which has arisen in connection with a Convention right to take into account, among other things, any judgment of the European Court of Human Rights.<sup>15</sup>

16. The **Northern Ireland Act 1998** provides that the Secretary of State for Northern Ireland can direct that an action not be taken by a minister or by a government department where he considers that action would be incompatible with, among other things, “international obligations”.<sup>16</sup> He may also direct that certain action be taken where he considers it is necessary in order to comply with such obligations.<sup>17</sup>

17. The **Justice (Northern Ireland) Act 2004** places a duty on the Attorney General for Northern Ireland to issue to organisations within the criminal justice system guidance on the exercise of their functions in a manner consistent with relevant international human rights standards.<sup>18</sup>

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*be read and given effect in a way which is compatible with the Convention rights.*

*(2) This section -*

*(a) applies to primary legislation and subordinate legislation whenever enacted;*

*(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and*

*(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.*

<sup>15</sup> See section 2 of the Human Rights Act 1998 which states:

*2. - (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any -*

*(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,*

*(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,*

*(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or*

*(d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given,*

*so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.*

<sup>16</sup> See section 26(1) of the Northern Ireland Act 1998 which states:

*26. - (1) If the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations, with the interests of defence or national security or with the protection of public safety or public order, he may by order direct that the proposed action shall not be taken.*

<sup>17</sup> *Ibid.*, s.26(2):

*26. - (2) If the Secretary of State considers that any action capable of being taken by a Minister or Northern Ireland department is required for the purpose of giving effect to any international obligations, of safeguarding the interests of defence or national security or of protecting public safety or public order, he may by order direct that the action shall be taken.*

<sup>18</sup> See section 8 of the Justice (Northern Ireland) Act 2004 which states:

*8. - (1) The Attorney General for Northern Ireland shall issue, and as he thinks appropriate from time to time revise, guidance to organisations to which this section applies on the exercise of their functions in a manner consistent with international human rights standards relevant to the criminal justice system.*

*(2) In the exercise of its functions, such an organisation shall have regard to any guidance for the time being in operation under this section; but this does not affect the operation, in relation to any such organisation, of section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act in*

18. The **Commissioner for Children and Young People (Northern Ireland) Order 2003** requires the Commissioner, in determining whether and how to exercise his functions, to have regard to, among other things, any relevant provisions of the United Nations Convention on the Rights of the Child.<sup>19</sup>
19. The Commission considers that the wording of its proposed section 1(2) best reflects the overall purpose of the SEB while mirroring the wording of the legislative models outlined above.

### ***Human rights impact assessment***

20. The NIHRC is pleased to note that the proposals are to be subject to, among other things, a human rights impact assessment.<sup>20</sup> We understand the attraction of deferring such an assessment until the final policy decisions have been taken. The Commission considers, however, that there is merit in subjecting developing policy proposals to regular, informal human rights impact assessments throughout the policy making process in order to avoid the situation whereby final proposals are found to be incompatible with human rights requirements.

### ***Sexual Orientation Regulations***

21. Paragraph 11 of the Discussion Paper refers to the Regulations of December 2003 designed to implement in Northern Ireland the sexual orientation provisions of the EU Employment Framework Directive. The NIHRC is of the view that the new exception for organised religion in the Sexual Orientation Regulations is a breach of the principle of non-regression in the context of implementing EU Directives. The Commission has obtained Senior Counsel's opinion in this regard which has endorsed the Commission's view. The Commission is now considering taking a case in its own name<sup>21</sup> in order to challenge the legality of the Regulations.

## **Chapter 2: Purpose and Principles**

22. The NIHRC is attracted by the idea of having principles upon which the SEB is founded and, as stated in our remarks in respect of Chapter 1, we consider that a number of these principles ought to be interpretative tools included in Part One of the Bill. The Commission has, however, concerns in two respects. First, while the language of a number of the principles promises much, the Discussion Paper as a whole makes little if any reference to certain of these founding principles. Second, there are significant omissions from the founding principles, such as a

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*a way incompatible with a Convention right).*

<sup>19</sup> Article 6(3) of the Order.

<sup>20</sup> See para 2, p.9 of the Discussion Paper.

<sup>21</sup> See section 69(5)(b) of the Northern Ireland Act 1998.

permission to carry out positive action. The Commission wishes to comment on three of the principles as follows.

### ***Principle 2***

*“To ensure compliance with international human rights treaties, which promote equality and prohibit unfair discrimination as well as compliance with European law”*

23. This principle is one that the NIHRC pressed the Government to include in the Discussion Paper. It is a matter of key importance. Regrettably, the imperatives of this principle appear to have had little or no impact on the proposals in the Discussion Paper. At no point in the Discussion Paper is consideration given to the range of relevant international human rights standards by which the UK is bound. It is difficult to see how this principle can be observed without an assessment of these obligations. Throughout the paper there is only one reference to international human rights standards beyond the ECHR, and no substantive discussion of the obligations they place on the UK in respect of equality.
24. The paper has no discussion of Protocol 12 to the ECHR (general prohibition of discrimination: the free-standing right to equality under the ECHR). There appears to be no prospect of UK ratification of this Protocol in the near future but, should that change, there would clearly be implications for Northern Ireland equality law, not least in terms of Human Rights Act remedies.<sup>22</sup> The Commission takes this opportunity to repeat its call for ratification of Protocol 12. Irrespective, however, of such ratification, the Commission is clear that the SEB ought to equate to the standards laid down in Protocol 12 and, at the very least, must not constitute an impediment to the ratification of that Protocol.<sup>23</sup>
25. The Commission is disappointed that, in spite of its earlier representations to OFMDFM in this regard, the Discussion Paper contains no substantive discussion of the UK’s obligations under relevant international treaties. For this reason the Commission draws attention to the equality obligations for the United Kingdom arising from the main UN and Council of Europe instruments.<sup>24</sup> As set out above in our comments in respect of Chapter 1, the Commission considers this principle to be of such core importance that it ought to be included in a new Part One designed to guide the interpretation of the Act.

### ***Principle 3***

*“To promote respect for the equal dignity and worth of all and to facilitate full participation and good relations in society”*

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<sup>22</sup> Section 1(4) HRA empowers the Secretary of State to extend the scope of the Act to new Protocols.

<sup>23</sup> Of the 46 member states of the Council of Europe, 34 states have signed Protocol 12 with 8 of these having further ratified it. The Protocol will enter into force with the tenth ratification.

<sup>24</sup> See Annex 2 to this document.

26. The notion of good relations is not developed in the explanatory paragraph which follows this principle, nor anywhere else in the Discussion Paper. It is therefore difficult to understand what possible impact it will have on the development of these proposals. Not only is there no substantive discussion of the good relations duty in the Discussion Paper, but the Review of section 75 which is running alongside the SEB consultation also fails to consider this aspect of the s.75 duty.
27. The Commission welcomed the recent acknowledgement by the Director of the Equality Directorate in the OFMDFM, that further work was required in order to develop the good relations duty in conjunction with the SEB proposals.<sup>25</sup> The Commission considers that there is a need for a radical reconsideration of the enforcement and impact assessment aspects of the good relations duty as currently provided for in Schedule 9 to the Northern Ireland Act. Designated public bodies are obliged to report on the steps they have taken in order to comply with the good relations duty as part of their duties under section 75. It is the Commission's understanding, however, that the enforcement and impact assessment in respect of this part of the equality duties have not been sufficiently rigorous.
28. Rigorous compliance with the good relations duty could have a far-reaching impact and address issues of inequality and discrimination that a purely "equality" approach could not, e.g. a duty on the police to promote good relations between different ethnic groups would require something much more proactive than merely treating all of the groups equally.
29. With this in mind, the NIHRC has been impressed by the arguments put forward by the Equality Commission for Northern Ireland (ECNI) regarding the possible extension of the good relations duty, which is currently confined to religious belief, political opinion and racial groups,<sup>26</sup> to the other grounds for which it has responsibility.<sup>27</sup> The NIHRC considers that the duty ought to be extended to the remainder of the section 75(1) grounds, namely: age, marital status, sexual orientation, gender, disability and dependants. The Commission is conscious, however, of the difficulties arising in respect of good relations between the various grounds, hence the actions that might be required vis-à-vis each ground are of a different nature and may change over time. The ECNI ought therefore to be required to produce and update guidance in respect of appropriate measures to comply with the duty, as extended.
30. The Human Rights Commission's aim is to harmonise all protections to the greatest degree possible. For this reason we find attractive the idea of extending

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<sup>25</sup> Comments made during the feedback session of the OFMDFM Consultative Seminar, Belfast, 21 September 2004.

<sup>26</sup> See section 75(2) of the Northern Ireland Act 1998.

<sup>27</sup> This was raised at p23 of the Working Draft of the Response of the ECNI to the Discussion Paper which calls for an extension of the good relations duty to all the new categories and for consideration to be given to the role of the ECNI and to the question of enforcement generally.

the duty to all of the remaining section 75 grounds. Of course, in practice the implementation of the duty will be demand-led, and provision should be made for possible future extension of the duty by ministerial order.

31. What has been missing to date is any coherent government strategy for compliance with and enforcement of the good relations duty. The NIHRC considers that the appropriate location for such a discussion would have been in Chapter 4 of the Discussion Paper, dealing with the scope of the legislation. The Commission is clear that significant improvements are required in terms of the strategy for compliance with, and enforcement of, the good relations duty and the institutional mechanisms charged with delivery of that strategy. The Commission does not take a position as to the shape of such institutional arrangements, be it an enhanced role for the ECNI or for the Community Relations Council or an appropriate division of labour between the two.<sup>28</sup> The Commission is clear that whatever body is to be charged with responsibility for good relations ought to have a clear statutory mandate, which will require appropriate funding. Amendment to Schedule 9 to the Northern Ireland Act 1998 will be required to ensure that impact assessments deal comprehensively with the good relations duty.

#### ***Principle 8***

*“To minimise the tendency for hierarchies of inequalities to develop and to address the multiple identities held by all, which should ease the legal complexities or multiple discrimination cases before tribunals or courts”*

32. Again the Human Rights Commission considers that the components of this principle are inadequately developed in the remainder of the paper. There is an absence of a detailed discussion of the possible benefits of a general equality clause which, as already indicated, we propose should be included in a new Part One to the Bill.

### **Chapter 3: Grounds**

33. The Discussion Paper is clear that the SEB will, as a minimum, cover those grounds of discrimination that are already specified in law. These “compulsory grounds” are as follows:
- Race, including national or ethnic origin
  - Disability
  - Religious belief
  - Political opinion
  - Gender

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<sup>28</sup> For example, in Britain the Commission for Racial Equality oversees the good relations duty while the locally based Racial Equality Councils deliver the good relations duty on behalf of the CRE.

and the following four grounds where at present the law does not extend to goods, facilities and services (GFS):

- Gender reassignment
- Married persons
- Sexual orientation
- Age.

34. The Paper discusses some options for extending protection against discrimination to various categories or groups not currently covered by the law. Consideration of the difficult issues posed by the question of grounds in the SEB is reminiscent of the similar difficulties the Commission has experienced in respect of grounds that should be included in any non-discrimination clause in the Bill of Rights. The Commission's recommendation in respect of grounds in the SEB has therefore been informed by our ongoing work in respect of the Bill of Rights. The Commission has, however, decided to recommend that fewer new grounds be included in the SEB than the 25 grounds it has suggested for inclusion in the Bill of Rights. This is not only because the Bill of Rights provides an over-arching framework, but also because subject-specific legislation or other measures would better secure the rights in respect of certain grounds.<sup>29</sup> Of the "optional grounds" set out in the Discussion Paper the Commission supports and opposes their inclusion as follows:

***Support:***

- ***Marital or family status/dependants***  
This is a more satisfactory formulation than the present protection for "married persons" and reflects the more inclusive language of s.75, covering, e.g., carers and cohabiting and divorced people.
- ***Pregnancy/maternity***  
It is well established by case law that this ground is already covered within discrimination on the ground of sex but, in line with the Equality Commission's position, the NIHRC recommends that it be specifically included for the avoidance of doubt and for the purpose of visibility.
- ***Gender identity***  
The Commission supports the extension of the coverage already afforded to post-operative trans people to prohibit discrimination against people living in an acquired gender, without a need for medical reassignment.
- ***Other status***  
As the Discussion Paper states, this is an unusually ambiguous formula for inclusion in a statute, but "or other status" follows the wording adopted in

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<sup>29</sup> It should also be noted that, given the Commission's legislative mandate (section 69(7) Northern Ireland Act 1998 to be read with para. 4, Human Rights Section of the Belfast Agreement) the Commission's starting point in considering grounds for the Bill of Rights equality provisions was Article 14 of the ECHR, which already has the following grounds: sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

major international treaties such as the ECHR,<sup>30</sup> and allows sensible development of the statute by case law. The Commission wishes to stress that it would not be opposed to the future inclusion, via the “other status” category, of those grounds listed below which it currently considers should not be included in the Bill.

***Genetic predisposition***

The Commission is aware of concerns regarding the use of genetic information relating to insurance and employment.<sup>31</sup> On balance the Commission would support the inclusion of this ground, not least given its inclusion in the recent EU Charter of Fundamental Rights.<sup>32</sup>

***Oppose:***

- ***Past convictions***

While the Commission is strongly of the opinion that the Government needs to radically re-think its approach to discrimination against those with past convictions, we remain unconvinced that the SEB is the correct vehicle for introducing those changes. The right to freedom from discrimination on the grounds of past conviction by necessity must be subject to a number of important exceptions (e.g. a record of violence must be considered in judging suitability to work with children). It cannot therefore be treated in the context of the uniformity that is sought in respect of other areas of discrimination and does not fit easily within the framework of the SEB. The Commission considered the possibility of including past convictions in the SEB for the purposes of clarity and visibility with a reference to the specific statute aimed at regulation of the ground in question. In the end we considered that such an approach might confuse rather than simplify matters and so it has been abandoned in favour of including in the SEB list only those grounds for which the detailed provisions are contained in the Bill itself.

- ***Language***

In its Bill of Rights proposals the Commission has included options for legislation setting out official languages and defining language rights. No such legislation currently exists. As argued above in relation to the potential new ground of past convictions, the ground of language does not fit the uniform approach which is sought in respect of other areas of discrimination and does not fit easily within the SEB framework. This is another area where government action is required. It is the Commission’s

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<sup>30</sup> See Annex 2, which refers to, for example: Article 26, International Covenant on Civil and Political Rights; Article 2 of the International Covenant on Economic, Social and Cultural Rights; Article 1, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; Article 2(1) of the United Nations Convention on the Rights of the Child; Article 14 of the ECHR and Article 1(1) of Protocol 12 of the ECHR.

<sup>31</sup> See, for example, the report of the Human Genetics Advisory Council on Employment and Genetic Testing of 1999 and the ongoing work of that body’s successor, the Human Genetics Commission, in particular the work of its Genetic Discrimination Monitoring Group.

<sup>32</sup> See Article 21 of the Charter dealing with non-discrimination which includes genetic features as one of the prohibited grounds.

view that the Government ought to begin work on a comprehensive Languages Act for Northern Ireland, which should include appropriate anti-discrimination provisions.

- ***Victims***

The Commission considers that there is insufficient evidence that victims *as a class* experience discrimination or disadvantage (i.e. on the specific ground of their status as victim) comparable with that experienced by other groups to be protected by the SEB. The many, and very real, difficulties experienced by members of this group should in our view be dealt with via a range of appropriate initiatives rather than by way of equality legislation. Moreover, where individual victims are disadvantaged they may be covered by one or more of the other categories. There is a further difficulty in defining victimhood (e.g. as to whether it should be in relation to “past” victims of the Northern Ireland conflict only, perhaps taking the 1998 Agreement or some other significant date as a cut-off point, which would potentially create discrimination against “new” victims of politically motivated violence or of “ordinary” crime). As with past convictions and language, this is an area where the Commission considers that government action is required outwith the SEB process.

- ***Socio-economic status***

The Commission considers this concept as relating to poverty and social exclusion at group or societal level, as distinct from discrimination against individuals. Consequently it is inappropriate for the SEB and would be better addressed through the new TSN/anti-poverty strategy. In our proposals for a Bill of Rights we have referred to it in our draft sub-section on positive action (section 4(5)).

### ***Definition of disability***

35. The Discussion Paper refers to the many concerns which exist regarding the definition of disability. These concerns are widespread and are shared by the NIHRC. The Commission considers that the definition of disability must be reconsidered in advance of the enactment of the SEB in order to address these concerns.

### ***Political opinion***

36. Paragraph 10 of Chapter 3 discusses the existing exception in the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO) regarding opinions supportive of the use of violence for political ends in relation to Northern Ireland. The options include retention of that exception or its extension to advocacy of political violence anywhere. The Commission favours the current approach, i.e. retention of the Northern Ireland exception, but is not in favour of any further extension. The Commission considers the Northern Ireland exception to be clearly in line with the rejection of violence for political ends in the Belfast

(Good Friday) Agreement and in the Northern Ireland Ministerial Code of Conduct.

### ***Relevant proposed legislation***

37. Paragraph 30 of Chapter 3 refers to the Gender Recognition Act which has recently completed its passage through Parliament, but makes no reference to how the relevant provisions of such an Act could eventually be consolidated into the SEB, should the gender identity ground be deemed appropriate for inclusion.
38. The Commission is continuing to provide advice to the Government with a view to strengthening the proposed Special Educational Needs and Disability (NI) Order, which is shortly to be introduced by way of Order in Council. No reference is made in the Discussion Paper to the need for consolidation of the disability provisions of that measure which extend the Disability Discrimination Act (DDA) to the education sector in Northern Ireland.

### ***Equal pay***

39. The consultation seeks views on whether the SEB should incorporate and extend the equal pay for work of equal value legislation, which currently applies only as between men and women. The Commission supports the extension of this principle across *all* SEB categories, i.e. a prohibition on paying anyone less on grounds of their ethnicity, political opinion, transgendered status and so on. An exception or clarification clause might be required to ensure that annual increments or other experience-based or seniority-based pay criteria do not constitute age discrimination.

### **Chapter 4: Scope**

40. The consultation document points out the absence of uniformity in the scope of non-discrimination and equal treatment law in the various domestic and international laws covering those matters. They variously cover:
  - employment;
  - education;
  - goods, facilities and services;
  - sale and management of premises;
  - self-employment;
  - occupation;
  - membership/involvement in organisations of employers and workers;
  - vocational guidance/training/work experience;
  - social protection, including social security and healthcare;
  - social advantages; and
  - access to and supply of housing.

41. Generally, the Commission approach is in favour of significant harmonisation upwards, e.g that goods, facilities and services and education be covered within all the grounds. The Commission believes there is a need for a consolidation and simplification of the current approaches, reducing exceptions to the minimum.

### ***Education***

42. As stated in our comments regarding proposed legislation in Chapter 3 above, the Commission regrets that a separate disability discrimination regime is envisaged under the proposed Special Educational Needs and Disability (NI) Order.

### ***Public appointments***

43. The Commission regrets that this chapter makes no reference to the SEB covering public appointments. We believe that this should be stated for the avoidance of doubt.

### ***Volunteering***

44. The Commission is aware that there are differences of opinion as to the best way in which to ensure that volunteers are protected from unlawful discrimination. The ECNI is keen to ensure that the scope of the SEB should extend to volunteers in anything but a very short-term volunteering relationship. The Volunteer Development Agency is in favour of a form of regulation which stops short of equating the volunteer relationship with the employment relationship.<sup>33</sup> Recent case law from Britain has not clarified the issue.<sup>34</sup>
45. On balance the Human Rights Commission considers that the concerns behind both approaches might be met by the inclusion of volunteering within the Bill as a service rather than as employment. In this way the fears of voluntary bodies regarding added bureaucracy and costs could be met whilst still ensuring protection from unlawful discrimination for those who have been unfairly denied the right to volunteer.
46. In reaching this position, the Commission has sought to avoid an approach which would act as a deterrent to those who might consider volunteering or which would impose financial burdens on voluntary bodies. There should be provision for a review, in due course, of the impact of any provisions bringing volunteering within the scope of the legislation, to ensure that it did not have a seriously negative impact on participation in volunteering, which has brought enormous social and economic benefits to Northern Ireland.

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<sup>33</sup> See briefing paper of August 2004 of the Volunteer Development Agency at [www.volunteering-ni.org](http://www.volunteering-ni.org)

<sup>34</sup> See cases cited in the Working Draft ECNI response to the SEB para 4.6.1, p21.

## **Chapter 5: Definitions of Discrimination**

### ***Direct discrimination***

47. Paragraph 12 presents various options for a definition of direct discrimination.

The Commission endorses option (b) because:

- it goes beyond the existing definition in the EU Directives, in that it outlaws less favourable treatment “*for a reason which relates to his or her age, disability etc.*” rather than just “*on the ground of his or her age, disability etc.*”;
- it treats disability in the same way as other grounds, unlike at present;
- it does not require “disadvantage” to have been caused (the concept of “less favourable treatment” appears to presuppose that some “detriment” has been suffered).

48. The definition should be worded so as to ensure that it covers less favourable treatment for a reason which relates to “perceived as well as actual” age, disability etc. While paragraph 7 states that this is already the way that Northern Ireland law has developed, the Commission considers that there would be merit in making it explicit across all the prohibited grounds, including gender identity (which would have the effect of protecting transvestites to some extent).

### ***Indirect discrimination***

49. Paragraph 19 presents various options for a definition of indirect discrimination.

The Commission endorses the definition in the EU Framework / Race / Equal Treatment Directives together with the retention of the “reasonable adjustment” duty in disability cases – this would ensure that people with disabilities are as well protected as possible.

### ***Reasonable adjustment duty***

50. The Commission recommends that the current wording of the “reasonable adjustment” duty (para. 10 on page 56 of the consultation paper) should be amended so that it not be premised on demonstrating “a substantial disadvantage”. The Commission considers that the reasonableness requirement is sufficient, and that requiring also the demonstration of a substantial disadvantage places a disproportionate burden on the individual seeking the adjustment. The Human Rights Commission also agrees with the Equality Commission’s suggestion that the reasonable adjustment concept could usefully be extended to other grounds, such as age (see page 58, third bullet point).

### ***Harassment***

51. As regards the options for defining harassment, discussed on page 63, the Commission considers that the existing definition should be used for all grounds,

that a comparator should *not* be required and that sexual harassment should *not* be separately defined. In response to the suggestion in paragraph 25 that harassment should be required to be “on the grounds of” [e.g.] age, the Commission considers that the existing requirement (“related to any of the grounds of”) is preferable, because it is wider. Bullying (i.e. bad treatment not based on an unlawful ground of discrimination) should also be outlawed, but not necessarily through a Single Equality Act. The Human Rights Commission’s Progress Report on the Bill of Rights, for example, proposed in section 6(2) a right to protection against physical violence and bullying.

### ***Victimisation***

52. As regards the options for defining victimisation (page 65), the Commission considers that the common definition already applying ought to be retained (para. 28). If victimisation is to be included in an Act on equality then it would be necessary to retain the need for a comparator (point (b) on page 65), provided that somewhere else (as in our proposed Bill of Rights) bullying is also outlawed. As regards the period during which former employees should be protected (para. 30), the Commission favours a one year limit (certainly not three months); this would make it the same as the time limit for claims under the Human Rights Act.

### **Chapter 6: Exceptions**

53. Paragraph 22 presents various options for dealing with exceptions. The Commission favours the third option, i.e. limiting exceptions to those specifically referred to in the EU Framework Directive. The Commission also considers that there is a need for a “general service requirement” exception for goods, facilities and services (subject to what is proposed by us in respect of Chapter 7 of the consultation paper).

### ***Teachers’ exemption***

54. The Commission wishes to see the removal of the present exception for the recruitment of teachers (in line with our proposals for a Bill of Rights). The Equality Commission recently published recommendations arising from its review of the exemption. The Commission’s conclusion was that the exemption was not sustainable in relation to secondary schools and that if it was to be retained in primary schools it should only be as a staging post towards its removal.<sup>35</sup>

### ***PSNI recruitment***

55. The Commission supports the exception, at least for the time being, relating to PSNI recruitment (mentioned in para. 7). The compelling reasons for securing a

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<sup>35</sup> See Working Draft of the response of the ECNI to the SEB Discussion Paper, at p34.

police force that is more reflective of the composition of the community justify this temporary special measure.

### ***Organised religion***

56. The Commission reiterates its view that the new exception for organised religion in the Sexual Orientation Regulations (see para. 10 on page 69) is a breach of the principle of non-regression. The Commission has obtained Senior Counsel's opinion in this regard, which has endorsed its view. The Commission is now considering taking a case in its own name<sup>36</sup> in order to challenge the legality of the Regulations.

### ***Scope for legislative amendment***

57. The Human Rights Commission strongly believes, as demonstrated in our recent discussion paper,<sup>37</sup> that there is virtually nothing touching on the SEB which cannot be dealt with by an Assembly Bill – even in respect of reserved matters. The consultation paper seems to deny this (see paras. 9 and 22(a)), thereby indicating that the OFMDFM has unnecessarily limited ambitions in this context.

## **Chapter 7: Goods Facilities and Services**

### ***Definition of goods, facilities and services***

58. The Commission endorses the third option given (on page 83 of the paper), namely, that the SEB should leave the terms without express definition, but give guidance on the need to take a broad approach.

### ***Discrimination in the provision of GFS as between private persons***

59. The Commission favours retaining the existing position, namely that such discrimination is unlawful only if the provision of GFS is to the public or to a section of the public. There are certain purely private activities which should not be regulated by anti-discrimination law.

### ***General/specific exceptions***

60. The Commission favours specific exceptions, as in the existing legislation. General exceptions are not sufficiently clear and can result in outcomes with the potential to undermine the aims of the legislation.

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<sup>36</sup> Under section 69(5)(b) of the Northern Ireland Act 1998.

<sup>37</sup> *Constraints and Possibilities* paper, Annex 1.

***Timing of the introduction of GFS protection for new grounds (married persons, gender re-assignment, sexual orientation, age)***

61. The Commission considers that such protection should be introduced when the SEB is enacted. The Commission notes that the European Framework Directive<sup>38</sup> is confined to employment. It is the Commission's view that the effect of the Directive ought to be extended to include goods, facilities and services.

**Chapter 8: Addressing under-representation in the workplace**

62. The Fair Employment and Treatment (NI) Order 1998 (FETO) contains provisions carefully designed to tackle under-representation. It places obligations on employers, such as monitoring, periodic review and affirmative action. Monitoring is not to be carried out for its own sake but with the clear purpose that where under-representation is established, affirmative action is required. Under other existing law, employers are encouraged to take action to address under-representation in the work place in the categories of race, gender, disability and sexual orientation. However action is largely voluntary, and limited to targeted advertising and training, with the exception of gender (where flexible working conditions are allowed), and disability (where the concept of reasonable adjustment exists).<sup>39</sup> Section 75 of the Northern Ireland Act 1988 requires that government bodies have regard to the need to promote equality of opportunity among the designated groups.
63. The Commission has considered to what extent the more limited law governing groups, other than those covered by FETO, ought to be reviewed, amended and harmonised to reflect some or all of the approach used in FETO. The Commission's starting point is the need to build upon the work to date in employment monitoring in Northern Ireland and to ensure that there is no regression from existing requirements.
64. The Commission favours improvements to the current monitoring system under FETO in order to fine-tune the system. The Fair Employment (Monitoring) Regulations 1999 allow (indeed, in some instances require) employers to treat an employee or applicant as having a "community background" as a Protestant or a Roman Catholic even though the person in question, at the time the monitoring occurs, may for many years no longer have been a Protestant or a Roman Catholic. One possible change would be an amendment to the Monitoring Regulations so as to give employees and applicants the right to have it recorded

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<sup>38</sup> Council Directive 2000/78/EC of 27 November 2000, establishing a General Framework for Equal Treatment in Employment and Occupation.

<sup>39</sup> It will be recalled that disability was the first of the grounds under discussion for SEB purposes to benefit, at least in terms of the letter of the law if not in its enforcement, from statutory provision for affirmative action: the Disabled Persons (Employment) Act (Northern Ireland) 1945 formerly required employers with 20 or more employees to employ a 3 per cent. quota of registered disabled people.

that, even though for monitoring purposes they may be perceived to have a community background as Protestants or Roman Catholics, they do not wish to be regarded as belonging to that particular community. A more accurate system needs to be devised to reflect the reality as well as the perception of people's background. In order to achieve this there is also a need for an expansion of the categories within which individuals can identify themselves in order to achieve greater accuracy, for example, the inclusion of a specific category for race or ethnicity.

65. As well as these improvements to the system, the Commission makes the following recommendations.

### ***Level of protection***

66. As with other aspects of the SEB the Commission's general approach is towards harmonisation upwards, so that the FETO model be extended to other grounds. The Commission advocates extension of the FETO approach as a well-developed model which has widespread compliance and support among employers in Northern Ireland.

### ***Grounds***

67. The Equality Commission's Guidance to Employers on monitoring advises monitoring on all compulsory grounds.<sup>40</sup> Compliance with the section 75 equality duty requires a degree of monitoring for designated public bodies across all of the section 75 grounds. For practical purposes, employers at present correlate monitoring on grounds of sex alongside the FETO monitoring. This adds value in that it has the potential to identify disadvantaged subsets, for example where Catholic men may be under-represented in a given context while men in general, or Catholics in general, may be equitably represented.
68. The Human Rights Commission's starting point is that *a number* of additional grounds should be monitored to the FETO standard. We consider that there would be considerable benefits for employers were *all* these grounds to be approached in the same way and that, as the FETO monitoring system is already in place, such an extension ought not to impose an unduly harsh burden on employers. However the Commission recognises that there may need to be a phased implementation of the new monitoring requirements, and that some are easier to implement than others. Such a phased implementation could be effected by an enabling power perhaps initially confining monitoring for a "new" ground to the public sector alone. Such a phased implementation would need to consider the different benchmarks for affirmative action appropriate to each ground.

69. After consideration the Commission recommends as follows:

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<sup>40</sup> ECNI *Step by Step Guide to Monitoring*.

- gender, disability and race should all be monitored to the FETO standard with immediate effect;
- protection of the right to privacy should be an integral part of monitoring on grounds of disability; no description should be ascribed by an employer to a person on grounds of disability other than that which he or she chooses, and there should be no obligation to disclose the existence of a disability;
- voluntary monitoring on the ground of sexual orientation may in the future, subject to advice from the sector, be desirable; and
- political opinion is not a suitable ground for employment monitoring.

### **Chapter 9: The Equality Commission**

70. The Human Rights Commission is very supportive of the functions and powers of the Equality Commission being enhanced. This may of course mean that additional resources will be required if the Commission is to be able to exercise its functions and powers effectively. There is little point in conferring extensive functions and powers if at the end of the day the Commission is unable to bring about change and enforce the laws through a lack of finance.
71. Generally speaking the Human Rights Commission is in favour of harmonising the general duties of the Equality Commission in a way that makes them very similar, if not identical, across all the grounds of discrimination. We would prefer these functions to be conferred in terms of duties rather than powers because this will provide an incentive to the Commission to focus on achieving real change.
72. We do not see any fundamental objection to conferring a duty to promote affirmative action across all the grounds of discrimination. If such action is needed in any particular sector there should be an organisation able to bring it about. If such action is not required then any failure on the part of the Equality Commission to promote it will not leave the Commission vulnerable to criticism. The Human Rights Commission is also in favour of duties being imposed to promote the equalisation of opportunities and good relations, regardless of the sectors in question. Obviously the steps that will be required to be taken will differ significantly depending on the sector in question, but what is appropriate should be left in the first instance to the discretion of the Equality Commission.
73. As regards the Equality Commission's power to draft codes of practice, the Human Rights Commission proposes that there should be as much harmonisation across the grounds of discrimination as is possible. We therefore agree with option (a) on page 127 of the discussion paper.
74. For the avoidance of doubt we are in favour of retaining the "admissible in evidence" provisions in the Single Equality Bill and of extending them to all the grounds of unlawful discrimination.

75. As regards the Equality Commission's power to support complainants, we are in favour of the provisions being the same across all sectors. But we would prefer the grounds for assisting applicants to be somewhat more particularly worded. The provisions which currently apply, with which we are familiar because they also govern the work of the Human Rights Commission are too vague and indefinite.
76. We are not in favour of the time limits which currently exist in the Race Relations Order being extended to other grounds, but we are supportive, for the avoidance of doubt, of the Equality Commission's power to provide advice on prospective proceedings being extended to all grounds.
77. On balance we think it is wiser if the power to exercise its functions in relation to providing assistance is limited to the Commission, or to a Committee of the Commission, rather than being extended to employees. The power to provide assistance to complainants is one of the most important in the Equality Commission's armoury and we therefore believe that it ought to be exercised by Commissioners rather than by staff. In the Human Rights Commission all such decisions are taken by Commissioners.
78. We are in favour of the "recovery of expense" provisions being extended to all grounds of discrimination.
79. As regards its powers of investigation, the Equality Commission should, we believe, be given wide and general powers to conduct such investigations as are necessary for the performance of its other functions. This is the way in which investigative power is conferred on the Human Rights Commission by section 69 of the Northern Ireland Act 1998 and it appears to work satisfactorily. Of course the power to investigate should be accompanied by the power to compel the production of information and we are therefore supportive of the more general approach to this issue suggested by option (a) on page 134 of the discussion paper. We are also in favour of extending the "no fault" concept to all grounds of discrimination and to removing the limitations which confined FETO investigations to employment or training. We are against the Equality Commission being legally required to conduct an investigation when instructed to do so by the Department: it is important that the Equality Commission remain completely independent of government departments when considering whether or how to perform its functions.
80. We do not see the need for detailed provisions to be included in the legislation concerning the conduct of investigations and we are content to allow the Equality Commission to decide for itself whether investigations should be conducted in private or in public. The power to stop or suspend an investigation should in our view be extended to all the grounds of discrimination and the Equality Commission should have to give reasons in writing for refusing to receive oral representations.

81. The penalty for failure to comply with a request for information should be limited to a fine. We are not in favour of imprisoning people on account of their failure to supply information.
82. The Human Rights Commission is in favour of option (a) on page 155 of the discussion paper concerning the extension of provisions excluding “private affairs” from investigation reports. The provisions concerning non-discrimination notices, procedures for publication and inspection of reports should be harmonised across all the grounds. In our view it is unnecessary to allow for any differences in these areas.
83. We are in favour of option (c) on page 137, namely the requirement that written consent should be provided for across all the grounds. We are also in favour of uniform provisions across all the grounds dealing with matters such as summary statements, the “scope of restriction” provisions, exceptions for third parties, defences and information supplied to the Department.
84. The Commission is strongly in favour of the SEB making explicit provision for a right of intervention for the ECNI. In June 2002 the Commission successfully argued in the House of Lords that it had the power to apply to intervene in court proceedings as a third party. Their Lordships overturned (by four to one) a decision of the Northern Ireland Court of Appeal denying the Commission this power. For avoidance of doubt the Commission is strongly in favour of such a power being made explicit. The Commission has since exercised the power in a number of cases, including a further case in the House of Lords (the *Amin* case) where we successfully argued that all deaths in custody required a thorough investigation compatible with the requirements of Article 2 of the European Convention on Human Rights.
85. The Human Rights Commission is in favour of the more modern approach to non-discrimination notices and action plans etc contained in the EDO model and summarised in paragraph 39 on page 142 of the discussion paper. We are therefore supportive of option (a) on that page. Likewise we are in favour of harmonising the provisions on persistent discriminations (option (a) on page 143). We also favour the two options (a) on page 144 concerning discriminatory advertisements and pressure to discriminate. Likewise the special provisions in the RRO and SPO concerning preliminary action should be repealed (option (a) on page 145) and conciliation services for GFS complaints should be made available across all grounds.

## **Chapter 10: Courts and Tribunals**

86. Four options are canvassed in this chapter in relation to future tribunal and court structures. The Commission is strongly in favour of option (d), which proposes

the establishment of a new system of equality tribunals dealing with all discrimination matters relating to both employment and goods, facilities and services.

87. The Commission favours this option not just, as suggested in the Discussion Paper, in order to ensure equal treatment for different types of discrimination claim,<sup>41</sup> but to ensure the development of expertise in respect of the adjudication of such cases. We have doubts that county courts, which hear only a small number of goods, facilities and services cases each year, are best placed to deal with such claims. In addition, the Commission considers that much could be gained in terms of developing adjudication expertise were the discrimination focus of the Fair Employment Tribunal (FET) to be extended to encompass all other grounds. Employment discrimination claims on grounds other than religious belief and/or political opinion are currently dealt with within the normal employment tribunal system. The establishment of such a new system of equality tribunals would also resolve the current anomalous position in respect of hybrid cases or those which are taken on multiple grounds. At present such cases are heard separately by two different tribunals unless by direction of the President or Vice President the FET is deemed to have the powers of an Industrial Tribunal in respect of the particular complaint.
88. Given its support for this option, the Commission is disappointed that the Discussion Paper raises an apparent ground for rejection of this option without fully explaining it. Paragraph 33<sup>42</sup> states that “substantial change to the system in Northern Ireland would have significant implications for the tribunals themselves but also significantly for other areas of law.” The extent of these implications is not discussed, nor are the possible advantages and disadvantages associated with such a degree of change. The presumption in the Discussion Paper appears to be to avoid interference with the status quo irrespective of how desirable a change in the adjudication system might be.
89. It is quite clear from the commentary in the chapter that the Government favours option (b) – the establishment of a single employment tribunal which would hear both discrimination and non-discrimination employment matters. Goods, facilities and services (GFS) cases would continue to be dealt with in county courts. The Commission does not find the arguments put forward in favour of such a position to be persuasive. While it may sit well with the outcome of the Leggatt Review,<sup>43</sup> that exercise only considered those tribunals in Northern Ireland which operate under a UK-wide remit and not the “devolved” tribunals. It is therefore difficult to see how the recommendations of that review can carry much weight in respect of Northern Ireland.

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<sup>41</sup> See para. 13, p50.

<sup>42</sup> See p154.

<sup>43</sup> Independent Review of the Tribunals System commissioned in 2000 and led by Sir Andrew Leggatt, reporting in August 2001: *Tribunals for Users—One System, One Service*; see statement in para. 37, p155 of the Discussion Paper.

90. The Commission does not agree that moving GFS cases to a tribunal environment could pose problems in respect of “the appointment of lay people with the relevant experience”.<sup>44</sup> Surely groups such as federations of retailers, associations of licensed vintners and consumers’ organisations could nominate panel members in much the same way as trades unions and employers’ organisations currently do in respect of employment cases?
91. Finally, the Commission strongly rejects a further argument in favour of retaining GFS in the county courts proposed in the Discussion Paper, namely that the tribunals already have too many cases to hear without adding GFS. This argument is properly one about the allocation of appropriate resources to the tribunals. As the Commission stated in its opening remarks about the Discussion Paper, we should be looking afresh at every aspect of equality and anti-discrimination law. If the tribunal system is the best place for the adjudication of GFS then these cases should be adjudicated there irrespective of the relevant case loads of the respective fora.

### ***Rights of appeal***

92. As regards the right of appeal, the Commission is content that appeal remains on a point of law only. The Commission would welcome the establishment of an Employment and Equality Appeals Tribunal for Northern Ireland which would hear appeals from both the proposed Equality Tribunals and from the existing Industrial Tribunals. The creation of such an additional intermediary layer of appeals follows on from the Commission’s recommendations in relation to the development of appropriate adjudication expertise.

### ***Representative actions***

93. The Commission is in favour of the inclusion of representative actions in the SEB. The arguments in favour of representative actions have been well rehearsed and relate to the vulnerability of certain categories of applicants and to their unwillingness or lack of legal capacity to take cases in their own name.

### ***Legal aid***

94. The Discussion Paper refers to the fact that the absence of legal aid for tribunal cases was raised by some as a particular concern. The Commission is one of those who have long been advocating the extension of legal aid to tribunal cases in order to help meet the requirements of Article 6 of the ECHR. The most recent statement of the Commission’s position in this regard is set out in the NIHRC response to the draft Access to Justice (NI) Order of July 2002.<sup>45</sup>

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<sup>44</sup> See para. 41, p156.

<sup>45</sup> Available at [www.nihrc.org](http://www.nihrc.org) by following the link to submissions

95. The availability of legal aid ought not to be determined solely by the category of the proceedings but rather by the complexity of the proceedings and by the importance of the outcome for the individual(s) concerned. An approach which is dependent upon categorisation of proceedings runs the risk of contravening the right to fair trial guaranteed by Article 6 of the European Convention on Human Rights.<sup>46</sup> We consider that in order to comply fully with its human rights commitments the Government should establish a more flexible and qualitative approach.
96. Publicly-funded legal services *should* be available – provided certain conditions are met – at hearings before a range of tribunals. We approve of the recent reforms in Scotland whereby civil legal aid *can* be made available in some situations before industrial tribunals and are encouraged by the fact that this reform has occurred in a devolved setting. It is a matter of disappointment to the Commission that the Discussion Paper considers the matter of legal aid to be outside the scope of the SEB as it is a reserved matter. It is this kind of artificial separation of matters relevant to the SEB along transferred, reserved and excepted lines which prompted the preparation of the Commission’s discussion paper of September 2004.<sup>47</sup>

### ***Remedies***

97. Generally, the Commission favours an approach which gives the tribunal a broad discretion with regard to the award of remedies along the lines of the power for judges under the Human Rights Act 1998. Section 8(1) of the Human Rights Act 1998 states:

*“In relation to any act (or proposed act) of a public authority which the court finds is, or would be, unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.”*

98. The Commission would urge the extension of the availability of compensation for indirect discrimination, be it intentional or not, to all grounds (currently it is available in respect of fair employment and sex discrimination claims only).

### **Chapter 11: Alternative Dispute Resolution**

99. The Commission has not yet fully developed its position as regards alternative dispute resolution. In our supplementary report in respect of our own institution’s

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<sup>46</sup> The jurisprudence of the European Court on Human Rights was relied upon by Kerr J in *In the Matter of an Application by Jacqueline Lynch for Judicial Review*, which indicates that blanket exclusions of certain categories of case from legal aid should be examined very carefully to see whether they involve a denial of the applicant’s access to justice rights under the Human Rights Act 1998 and the European Convention on Human Rights. High Court judgment delivered on 18 June 2002.

<sup>47</sup> *Constraints and Possibilities* paper, Annex 1.

review of powers<sup>48</sup> we raised the possibility of the Commission itself being granted explicit powers in respect of ADR. The issue is whether the Commission can help the parties to a human rights dispute to settle their dispute without either or any of the parties commencing or wishing to commence court proceedings. On the one hand, this may lead to a speedier resolution of differences, but it may also be open to the danger of human rights being negotiated away. The Commission considers, however, that, at the very least, there needs to be developed a set of principles which would serve to guide any ADR in a rights-based field such as equality and anti-discrimination.

100. As minimum requirements for fairness in ADR processes, the Commission recommends:

- both parties should have the opportunity to receive independent expert legal advice in advance of agreeing to ADR;
- the applicant ought not to be prejudiced in respect of time limits for the issue of proceedings; where ADR is being pursued, time should not run in respect of such time limits until the ADR has concluded without success;
- the educative effect of developing jurisprudence in encouraging widespread compliance must not be lost nor must the opportunity to develop the meaning of the law through test cases and other litigation.

**November 2004**

**Northern Ireland Human Rights Commission**

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<sup>48</sup> NIHRC Supplementary Review of Powers, recommendation regarding an addition to section 69(5) of the Commission's powers as follows: a new paragraph (c) be added to section 69(5), with the word "and" deleted from the end of paragraph (a) and placed instead at the end of paragraph (b). The sub-section would then read as follows:

*(5) The Commission may –*

*(a) give assistance to individuals in accordance with section 70;*

*(b) bring proceedings involving law or practice relating to the protection of human rights;  
and*

*(c) resolve any dispute by mediation, conciliation or negotiation.*

## *Annex 1*

### ***Constraints and Possibilities for the Single Equality Bill***

#### ***A Discussion Paper issued by the Northern Ireland Human Rights Commission***

##### ***The purpose of the Single Equality Bill***

The proposed Single Equality Bill is designed to draw together in a coherent and more workable manner the law relating to equality and discrimination in Northern Ireland. The primary objective is to simplify and where possible eliminate any conflicts between the laws relating to equality and discrimination on the grounds of religion, gender, race and disability. These are currently provided for in the Fair Employment and Treatment (NI) Order 1998, the Sex Discrimination (NI) Order 1976, the Race Relations (NI) Order 1998 and the Equality (Disability etc) (NI) Order 2000 and associated Regulations. All of these are within the jurisdiction of the Northern Ireland Assembly and the Office of the First Minister and Deputy First Minister.

One of the difficulties which this poses is that there are other equally important provisions relating to discrimination and equality in other legislation, notably sections 75 and 76 of the Northern Ireland Act 1998, the Human Rights Act (incorporating article 14 of the European Convention on Human Rights) and a number of European Union Directives. There is also the possibility of the adoption of a Bill of Rights for Northern Ireland which may also include general provisions on equality and discrimination. The underlying issue is thus whether and if so to what extent the Single Equality Bill should seek to deal with the interrelationships of these various levels of legislation and to eliminate any inconsistencies or defects that have emerged.

There are a number of possible grounds on which it may be desirable for the Single Equality Bill to include or amend these provisions. If, as suggested in the Consultation Document, the Bill might include a general equality clause, it would have to take into account the existing provisions of sections 75 and 76. So too would any extension of the grounds for discrimination to cover other section 75 categories such as age or sexual orientation. In addition the concurrent consultation on the operation of section 75 has revealed a good deal of dissatisfaction with the provisions for its implementation under schedule 9. It is difficult to see how a fully comprehensive Single Equality Bill can be enacted without dealing in some way with these issues.

##### ***The issue of legislative competence***

This immediately raises a secondary issue of legislative competence. How far is it possible, if it is thought to be desirable, for the Single Equality Bill to deal with the full range of relevant legislation. This will involve a detailed consideration of the status of

each of the relevant legislative provisions and the resulting competence of the Northern Ireland Assembly and the Office of the First Minister and deputy First Minister to include or amend them in the Single Equality Bill.

There are four levels of legislation to be taken into account. The status of the relevant provisions on discrimination and equality can be summarised as follows:

Entrenched enactments: (Northern Ireland Act, s. 7)

Human Rights Act 1998 (article 14 on discrimination; potentially Protocol 12)  
European Communities Act 1972 (including a series of equality directives)

These cannot be altered, amended or affected in any way except by explicit Westminster Acts.

Excepted matters: (Northern Ireland Act, schedule 2)

International relations, national security, terrorism, etc. etc.  
Northern Ireland Act, ss. 68-72 & schedule 7 (NIHRC)  
Northern Ireland Act, s. 76 (discriminatory legislation or administration)  
Northern Ireland Act, s. 78 (Ombudsmen's powers)

These cannot be amended or repealed by the Assembly or an Order in Council, unless the changes are ancillary to reserved or transferred matters with the formal consent of the Secretary of State (Northern Ireland Act, s. 8(a)).

Reserved matters: (Northern Ireland Act, schedule 3)

Criminal law, etc. etc.  
Northern Ireland Act, s. 73 & schedule 8 (Equality Commission)  
Northern Ireland Act, s. 74(3)-(4) (functions of EC)  
Northern Ireland Act, s. 75 & schedule 9 (equality/good relations duties)  
Northern Ireland Act, s. 77 (oaths)

These can become transferred on the request of the Assembly by a cross-communal vote (Northern Ireland Act, s. 4(2)-(3)); they may also be covered by Assembly legislation or an Order in Council with the formal consent of the Secretary of State (Northern Ireland Act, s. 8(b)).

Transferred matters: (Northern Ireland Act, s. 4(1))

All other matters not listed above, including equality legislation  
Observing and implementing international obligations, the ECHR and EU law  
Reserved matters with the consent of the Secretary of State (Northern Ireland Act, s. 8(b))

Excepted matters ancillary to transferred or reserved matters with the consent of the Secretary of State (Northern Ireland Act, s.8(a))  
Northern Ireland Act s. 77(3) (declarations of eligibility for office)

These can be dealt with in Assembly Acts or in Orders in Council provided they do not infringe the ECHR or European legislation.

### ***Implications for the Single Equality Bill***

It is clear from the above that there are significant discrimination and equality provisions at every level, ranging from the entrenched provisions of the ECHR and EU Directives and the excepted provisions of section 76 of the Northern Ireland Act to the reserved provisions of section 75 and the transferred provisions in respect of legislation on fair employment, gender and disability. The underlying question is how much of this can or should be included in the Single Equality Bill.

The possibilities under this structure for the Single Equality Bill would appear to be as follows:

The inclusion of the phrase ‘observing and implementing international obligations’ as an effectively transferred matter (by way of an exception to the list of excepted matters in schedule 2) permits the adoption of Orders in Council or Regulations to implement the recent EU Directives and potentially their inclusion in the Single Equality Bill; it would also seem to open the door to the potential incorporation of other existing international obligations either in the Single Equality Bill or the Bill of Rights.

It would be formally, though perhaps not politically, possible for section 75 and schedule 9 of the Northern Ireland Act to be incorporated, with or without amendment, in the Single Equality Bill; alternatively some amendments to the detailed enforcement mechanisms in schedule 9 might be proposed; either of these would require either a cross communal vote in the Assembly or the formal consent of the Secretary of State.

It would be more difficult to make any substantial changes to section 76, though it might be possible to include a provision making it clear that the section is to extend to indirect discrimination; this would involve convincing the Secretary of State and the major political parties that the change was ancillary to the rest of the Single Equality Bill.

It would seem appropriate to argue that the best way of dealing with the proposed Bill of Rights and any general equality clause within this structure would be as entrenched legislation along with the Human Rights Act and European Community legislation.

23 August 2004

## *Annex 2*

### *Equality clauses from selected international human rights treaties*

#### **International Covenant on Civil and Political Rights**

*UN, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, in accordance with article 49.*

##### **Article 26**

All persons are equal before the law and are entitled without **any discrimination** to the equal protection of the law. In this respect, the law shall prohibit **any discrimination** and guarantee to all persons equal and effective protection against **discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.**

#### **International Covenant on Economic, Social and Cultural Rights**

*UN, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 3 January 1976, in accordance with article 27.*

##### **Article 2**

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without **discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.**

#### **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

*UN, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entered into force 26 June 1987, in accordance with article 27(1).*

##### **Article 1**

For the purposes of this Convention, the term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on **discrimination of any kind**, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

### **Convention on the Elimination of All Forms of Discrimination against Women**

*UN, adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entered into force 3 September 1981, in accordance with article 2(1).*

#### **Article 1**

For the purposes of the present Convention, the term discrimination against women shall mean **any distinction, exclusion or restriction made on the basis of sex** which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

### **International Convention on the Elimination of All Forms of Racial Discrimination**

*UN, adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entered into force 3 September 1981, in accordance with article 27(1).*

#### **Article 1**

In this Convention, the term racial discrimination shall mean **any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin** which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

### **Convention relating to the Status of Refugees**

*UN, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons Convened under General Assembly resolution 429 (V) of 14 December 1950, entered into force 22 April 1954, in accordance with article 43.*

#### **Article 3** Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without **discrimination as to race, religion or country of origin**.

### **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**

*UN, adopted by the General Assembly at its 45<sup>th</sup> session on 18 December 1990.*

#### **Article 1**

The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without **distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status**.

## **Convention on the Rights of the Child**

*UN, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entered into force 2 September 1990, in accordance with article 49.*

### **Article 2**

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without **discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.**

States Parties shall take all appropriate measures to ensure that the child is protected against **all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.**

## **Discrimination (Employment and Occupation) Convention, 1958**

*International Labour Organization, entered into force 15 June 1960*

### **Article 1**

For the purpose of this Convention the term discrimination includes--

**any distinction, exclusion or preference made on the basis of race, colour sex, religion, political opinion, national extraction or social origin,** which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

## **Indigenous and Tribal Peoples Convention, 1989**

*ILO, entered into force 5 September 1991*

### **Article 3**

**Indigenous and tribal peoples** shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to **male and female** members of these peoples.

## **Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)**

*Council of Europe, 4 November 1950, entered into force 3 September 1953*

### **Article 14**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without **discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.**

### **Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms**

*Council of Europe, Rome, 4 November 2000*

#### **Article 1 – General prohibition of discrimination**

1. The enjoyment of any right set forth by law shall be secured without **discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.**
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

### **European Social Charter**

*Council of Europe, Turin, 18 October.1961, entered into force 26 February 1965.*

#### **Preamble**

Considering that the enjoyment of social rights should be secured without **discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin...**

### **Framework Convention for the Protection of National Minorities**

*Council of Europe, entered into force 2 January 1998.*

#### **Article 4**

The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, **any discrimination based on belonging to a national minority** shall be prohibited.

#### **Article 6**

The Parties undertake to take appropriate measures to protect persons who may be subject to **threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.**

### **European Charter for Regional or Minority Languages**

*Council of Europe 5 November 1992, entered into force 1 March 1998.*

#### **Article 7 – Objectives and principles**

The Parties undertake to eliminate, if they have not yet done so, **any unjustified**

**distinction, exclusion, restriction or preference relating to the use of a regional or minority language** and intended to discourage or endanger the maintenance or development of it. The adoption of special measures in favour of regional or minority languages aimed at promoting equality between the users of these languages and the rest of the population or which take due account of their specific conditions is not considered to be an act of discrimination against the users of more widely-used languages.

## **Charter of Fundamental Rights of the European Union**

*European Union, entered into force 7 December 2000.*

### **Article 21 - Non-discrimination**

**Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation** shall be prohibited.

Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, **any discrimination on grounds of nationality** shall be prohibited.