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**NORTHERN IRELAND
COMMITTEE, I.C.T.U.**

3 CRESCENT GARDENS
BELFAST BT7 1NS
TEL: 028 9024 7940
FAX: 028 9024 6898
email: info@ictuni.org

10 November 2004

The Single Equality Bill Team
Office of the First and Deputy First Minister
Room E3.18
FREEPOST NAT 17679
Belfast
BT4 3BR

Dear Colleagues

Enclosed is the Irish Congress of Trade Unions response to OFM/DFM's consultation on A Single Equality Bill for Northern Ireland.

Congress is willing for its comments to be made public.

Please contact me at the above address if you wish to discuss any of the issues contained in the response.

Yours sincerely

Ann Hope
Advisory Services Officer

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**IRISH CONGRESS OF TRADE UNIONS
NORTHERN IRELAND COMMITTEE**

**SUBMISSION TO THE
OFFICE OF THE FIRST AND DEPUTY FIRST MINISTER
ON
*A SINGLE EQUALITY BILL FOR NORTHERN IRELAND***

**Northern Ireland Committee
ICTU
3 Crescent Gardens
Belfast
BT7 1NS**

Introduction

The Northern Ireland Committee of the Irish Congress of Trade Unions (Congress) welcomes this opportunity to respond to the OFMDFM Consultation Paper, *A Single Equality Bill for Northern Ireland*.

Congress is the lead trade union body in Northern Ireland representing 30 affiliates with a membership of approximately 220,000. In drafting its response Congress has consulted with its affiliates, its Equality and Human Rights Group, its Disability Committee and the Northern Ireland Committee.

This response should be read in conjunction with our earlier response to the initial consultation in August 2001. In formulating our response we have followed as closely as possible the Chapter structure of the consultation document. We have also included a Summary of our main points/recommendations at the end of the document.

Whilst recognising the importance of a full, wide ranging and inclusive debate on the hugely important issue of a SEA, Congress is concerned at the slippage in the timetable for its implementation. We are therefore anxious that at the close of this consultation Government should move quickly to publish a draft Bill as the need for a major overhaul of the fragmented equality law framework is long overdue. Pending the final enactment of a coherent SEA we continue to have piecemeal amendments to the separate equality statutes compounding confusion amongst individuals as to their legal rights and employers, service providers and others as to their legal obligations.

Chapter 1 – Introduction

Congress welcomes and supports Government's stated aim to harmonize anti-discrimination law as far as practicable. We believe, however, that any such harmonization should reflect the highest standards of protection against discrimination across all of the equality grounds and **must not** regress from existing standards. Any such regression will inevitably lead to an early challenge to any new legislation. The goal of achieving equality will not be well served if any new legislation is to become bogged down in early challenges to its scope and validity. Congress is therefore pleased to note that throughout the consultation document there is a repeated commitment to the principle of non-regression.

In relation to the question of the balance to be struck in the SEA between prohibiting discrimination and promoting equality of opportunity, we believe that the clear lesson that must be learnt after almost three decades of anti-discrimination legislation is that a mere prohibition against discrimination has not been, and will not in the future be, sufficient to combat inequalities.

Amongst the key limitations of the existing legal framework has been its excessive reliance on *individuals* to pursue complaints, and the complexity of proving discrimination. At present, even where discrimination is successfully challenged, remedies are designed to compensate for *individual* acts of

discrimination rather than eliminate structures and patterns of behaviour that perpetuate discriminatory practices. Any new legislation (in addition to providing collective remedies as referred to below in our comments on Chapter 10) must expand the permissions for engaging in positive/affirmative action thereby making it easier for those who proactively wish to pursue an equality goal to do so. In addition to broadening permissions any new legislation must also include provisions *imposing positive legal obligations* on employers, service providers and other relevant organisations/bodies to take a proactive approach to achieving equality. Such an approach is wholly consistent with the thrust of the statutory duty contained in Article 75 of the Northern Ireland Act 1998 and, we believe, will speed up the process of ensuring that employers and service providers rapidly reach the point where equality is integral to their policy development, practices and procedures thereby tackling the issue of structural discrimination.

Chapter 2 – Purposes and principles

In its response on a SEA in August 2001 Congress referred to a number of basic principles that it believes should underpin the legislation and those can be summarized as follows:

- the minimum goal of the legislation should be to eliminate unlawful discrimination *and* promote equality regardless of sex (including gender reassignment), race, colour, ethnic or national origin, religion, belief/political opinion, marital status, having or not having dependants, disability, age or sexual orientation;
- there must be clear, consistent and easily understood standards which reflect the highest standards of protection and meet the government's obligations under international human rights treaties and EU law in full;
- the new legislation must build upon and in no respect whatever regress from the existing level of protection;
- the new legislation should seek to draw on the best of the existing legislative models;
- the legislation must be effective, efficient, equitable and accessible, aimed at encouraging individual responsibility and at encouraging employers, service providers and others to take proactive measures to promote equality;
- individuals should be free to seek effective redress for any detriment they have experienced as a result of unlawful discrimination through effective procedures which are fair, expeditious and accessible.

Congress is pleased to note that many of those principles have been given prominence in Chapter 2 of the consultation document.

Congress is quite clear that the core of any new equality law whether it be definitions of discrimination, positive action measures, scope, remedies or means of enforcement, should be common across all the grounds. We therefore particularly welcome as a stated principle underpinning the Bill - *“to minimize the tendency for hierarchies of inequalities to develop”*.

Under the existing fragmented legal framework a hierarchy of inequalities has clearly developed as there are major discrepancies between the scope of legal protection and means of enforcement provided across each of the equality grounds. Whilst accepting that each of the grounds has its own unique characteristics which *may* require distinctions to be made in the legislative provisions, Congress does not accept that this should lead to a substantive disparity in the overall level of protection, the scope of that protection and access to redress provided. Not only is this unjustifiable but it has led to confusion, uncertainty, and protracted litigation with attendant high legal costs for those pursuing and defending cases (particularly in relation to multiple discrimination claims). This has placed complainants at a severe disadvantage under the current system where there is no Legal Aid for tribunals. That disadvantage has now been compounded by the changing costs environment in the industrial tribunal where the parties to the proceedings are to be placed in the position where costs can be awarded against them up to a maximum of £10,000.

Chapter 3 – Grounds

Racial grounds

Congress welcomes the proposed extension of the Race Relations (Northern Ireland) Order 1997(RRO) to cover “nationality” and “colour”. Following the implementation of the amending Regulations in July 2003 there are now two definitions of indirect discrimination which differ according to whether what is challenged relates to the effect of a practice on a person’s racial group as defined by their race or ethnic origin, on the one hand, or their colour or nationality on the other. The new definitions apply to cases of race, ethnic or national origin discrimination only. Where the issue is colour or nationality the old definitions apply. Although Congress would ideally like to have seen all substantive amendments occurring in the context of a SEA, we believe that the current anomalous situation is unworkable, should be amended immediately and should not await the outcome of this consultation exercise

Disability

Congress welcomes the recent proposals, as far as they go, to extend the definition of disability to cover people with cancer, multiple sclerosis or who are HIV positive from the point of diagnosis. We believe however that the changes do not go far enough and would support the Equality Commission’s call in its paper *Enabled for a ‘fundamental review of the definition of disability and of the “Guidance on matters to be taken into account in determining questions relating to the definition of disability” with a view to making them more broadly based, covering people who have/had (or perceived to*

have/had, or associated with a person who has/had) an impairment that limits their participation in society.' Any such review should take place without delay so that the outcome of that review will be taken into account in drafting the legislation

Political opinion

Congress has carefully considered the 3 options proposed with regard to dealing with what has been described as a potential loophole for those who might condone the use of violence generally to further political ends but not specifically in relation to Northern Ireland affairs. However, we have not yet come to a final decision on this issue but do believe the existing exclusion needs to be reviewed in light of the changed and changing political situation in Northern Ireland and also in light of our comments on Chapter 6: Exceptions below. Congress would welcome discussion with OFM/DFM on this issue.

Gender reassignment

Congress believes that protection against discrimination on grounds of gender re-assignment, which is currently limited to the areas of employment and training, should be extended to all areas covered by the legislation.

Gender identity

Congress believes that there should be protection against disadvantage on grounds of gender identity. Although gender identity raises different issues than those relating to gender reassignment we consider that it may be appropriate to bring it within the scope of an extended definition of gender as is currently the case with gender reassignment. If there is to be protection it should also extend to all areas covered by the legislation although the relationship between the SEA and the Gender Recognition Bill (should it become law) must be clear.

Possible extension to new grounds

In order to achieve a coherent equality law framework Congress believes that as a minimum all of the section 75 grounds should be covered in the SEA and that these should be extended to cover goods facilities services and premises (GFS). We believe that a common legislative model dealing with a prohibition on discrimination and positive /affirmative action can work across all of the section 75 equality grounds. We are not persuaded, however, that the most effective means of protection in respect of *all* of the additional grounds referred to in paragraphs 19-32 of the consultation document is within the context of a SEA and that all are appropriate to the common legislative model referred to above. Whilst supporting the principle of harmonization as far as practicable, we do not believe that this means a "one size to fit all" approach is the best way forward. We are concerned that the SEA, if cast too widely, will be too unwieldy and will be qualified by an ever increasing and unacceptable list of exceptions. The SEA must, in our view move away from excessive numbers of exceptions.

Government should be quite clear, however, that as a fundamental matter of principle we are committed to protection against discrimination for a wide range of vulnerable groups that goes beyond the groups referred to in section 75. Congress believes therefore that Government must actively consider the most appropriate and *most effective* model for providing real protection in particular situations for particular forms of disadvantage.

Marital or family status/dependants

Congress believes that this should be included within a SEA and that the protection should not be limited to the employment field but should also extend to GFS. The provisions should be widely defined to include same sex couples and should include married, single, cohabiting and those with or without dependants.

Pregnancy and maternity

Following a long line of decisions from the ECJ dating back to case of Dekker v VJV Centrum [199] IRLR 27 ECJ, it is well established that the existing legal framework provides protection against discrimination on grounds of pregnancy/maternity. It is therefore arguable that it is not necessary to articulate it as a separate protected ground. However, in the interests of clarity, Congress believes that pregnancy should be expressly stated as a protected ground in a manner that reflects the highest standards of protection articulated by the European Court of Justice in its case law.

Past convictions

Congress recognises that those with past convictions experience significant and widespread discrimination because of those convictions. We believe that such discrimination should be outlawed by legislation. We are not however persuaded that the SEA is the most appropriate place to legislate for that protection. One of the central benefits we believe of the SEA will be the adoption of common core concepts across each of the equality grounds. That approach in our view will not address the wide range of issues that are particular to those with past convictions.

Congress believes that the Rehabilitation of Offenders Order 1978 is much too narrow in its scope and in its present form wholly inadequate for addressing the disadvantage suffered by those with past convictions. We believe that the review of that Order should be about putting in place a specific legislative model to address in full the particular types of disadvantage suffered by those with convictions with proper safeguards in place through necessary exemptions.

Victims

Congress, again, whilst recognising the need to address in legislation the disadvantage suffered by victims, is concerned that this will not be most effectively done in the context of the SEA. The key concepts in the legislation

should be premised on protecting defined disadvantaged groups. *Victims* as a group are not easily susceptible of definition. Action must be taken to develop a legislative model that properly addresses the disadvantage experienced by this very disparate group.

Socio-economic grounds

The connection between high levels of poverty and inequality is well established. Whilst acknowledging that there have been Government initiatives to target social disadvantage, much more needs to be done. We see difficulty with trying to address the causes and effects of socio-economic disadvantage within the constraints of the SEA and believe that much more consideration needs to be given as to what is needed in this area.

Language

Congress believes that language barriers contribute to social exclusion and racism. Some discrimination issues associated with language may already be actionable under the RRO and/or FETO. We are undecided whether further protections need to be provided in the context of a SEA in respect of language or whether a separate piece of legislation dealing with this issue would be more appropriate.

Genetic predisposition

Congress believes that there should be legislation to deal with disadvantage on grounds of genetic predisposition. Given the close connection between it and disability, consideration must be given to its inclusion in the SEA through a broadened definition of disability. This is in accordance with the position adopted by the Disability Rights Commission.

Other status

Congress, whilst acknowledging the reference to protection against discrimination on grounds of *any other status* in a number of international treaties, has some reservation about the appropriateness of its inclusion in the SEA. We are concerned that this will amount to some form of "catch all" which may only serve to undermine the clarity that a SEA is seeking to achieve. It is difficult to advance the argument that as far as practicable common concepts in terms of legal prohibitions on discrimination and positive obligations must underpin the Act on the one hand whilst at the same time saying that it should be suitable to cover other status grounds that have not yet been identified. Without some idea of what other status disadvantage might involve it is difficult to say that the SEA will be the appropriate model for addressing the issue.

In any event we are not confident about leaving to the judiciary the final determination whether particular emerging groups should or should not be protected against discrimination. We believe that this is most appropriately a matter for the legislature. The SEA may prove a wholly inadequate model of

protection for some of these emerging groups given the nature of the disadvantage(s) that they face. Yet there is a risk that they will be forced within its ambit without any proper consideration merely because of the existence of this *other status* provision.

As against this it is arguable that the inclusion of an *other status provision* could be used as an efficient mechanism for enacting into our domestic legal system the provisions of any new European Equality Directives in the future.

Equal pay

Congress is somewhat confused by the comments in the second half of paragraph 36 which appear to suggest that pay discrimination is currently only outlawed in relation to gender. This in our view is not the case. Where an individual believes that s/he has been subjected to less favourable treatment in respect of remuneration for a reason related to their disability, on ground of race, political/religious belief or sexual orientation that individual is entitled to make a claim in the usual way under the relevant statute. However as there appears to be some uncertainty about this the SEA should explicitly state that discrimination in relation to any aspect of pay and remuneration is strictly prohibited across all of the equality grounds.

We do not believe that in relation to gender the position is satisfactory under the Equal Pay Act (Northern Ireland) 1970 as amended. Fourteen years ago the Equal Opportunities Commission for Northern Ireland issued comprehensive *Recommendations for Change to the Equal Pay Legislation*. Those recommendations were made following six years experience of the unsatisfactory operation of the Equal Value Amendment. There has been little improvement in the operation of the legislation since that date and more worryingly no significant reduction in the pay gap between average male and female earnings. The Equal Pay legislation has singularly failed. The artificial separation of contractual provisions concerning remuneration from all other aspects of equal treatment has been unhelpful, confusing and costly for the parties and those adjudicating on pay complaints alike. In 1990 the EOCNI recommended that the Sex Discrimination Order and the Equal Pay Act should be consolidated as one harmonious whole outlawing all forms of direct and indirect discrimination in both contractual and non-contractual aspects of employment. Congress believes that the shortcomings of the legislation identified in 1990 must now be comprehensively addressed in the context of the SEA.

Government's regrettable failure in 2001 to follow the recommendation of its own appointed Equal Pay Taskforce that pay audits should be put on a statutory footing must be addressed in the context of the SEA. In developing positive/affirmative action models across all of the equality grounds this glaring omission must be rectified.

Finally in relation to the issue of pay equity and age, we would urge Government to have regard to Congress's response to the consultation on

Promoting Equality of Opportunity: prohibiting Age Discrimination in Employment and Training (January 2004)

Chapter 4 – What do we mean by ‘Scope’

Extent of the scope

Congress has always been of the view that the scope of the SEA should be the same across all of the equality grounds and should be broadly defined. The interface between disadvantage suffered in employment, education and the provision of goods facilities and services is often blurred. If structural patterns of discrimination are to be effectively tackled in society all of those areas must be brought within the scope of a SEA. In any event any suggestion that the SEA should be limited to the scope of the EU Directives and existing Northern Ireland Legislation flies in the face of the most compelling arguments for the introduction of a SEA in the first instance—harmonization, removal of hierarchies and clarity.

To suggest that the extension of the scope would be an unreasonable additional burden or that it should be phased in gradually in order to prepare the community and business for the changes is in our view unacceptable. The community and business are not being asked to implement entirely new concepts. Many organisations, though not currently subject to equality law in all its aspects in respect of the provision of services, are familiar in their roles as employers and providers of vocational training. What is being required therefore is an extension of their thinking, procedures and policy development into other activities. Public functions are already subject to the statutory equality duty in section 75. The extension of the SEA into this area will complement the performance of that duty. Our reservation with a phasing-in period also flows from a concern about delay. More than three years have passed since the commencement of the consultation on the introduction of a SEA. Government has indicated that it may take up to a year for the publication of a draft Bill for further consultation following the close of this consultation exercise. To suggest that all of this should be followed by some period of phasing-in is quite simply unacceptable.

Congress acknowledges that within the equality grounds there are variations which may need to be addressed but it does not believe that these variations should lead to substantial differences in approach.

Employment, self-employment, occupation

The nature and range of employment relationships has changed and developed dramatically in the last twenty years. The SEA must be a relevant piece of legislation that reflects those changes and a responsive piece of legislation that will cover new types of employment relationship that may develop in the future. For that reason Congress believes that the definition of those covered must be capable of the broadest interpretation. We would therefore prefer the term ‘employment relationship’ as the basis of any new definition.

Volunteers

Congress recognises that volunteering is very often linked to employment and other opportunities. It believes that volunteers should be expressly brought within the scope of the SEA and that the group should be widely defined. To the extent that any volunteering may amount to a form of vocational training/work experience, it is our view that it *must* be brought within the scope of the legislation in order to give proper effect to the obligations imposed on the Member States by the EU Directives.

Congress does not accept that a distinction needs to be drawn between those who have entered into a volunteering agreement on the one hand and 'for example, the casual volunteer in the church or Women's Institute'. Many of the organisations that might be similar to the example of the Women's Institute cited in the document are also employers and service providers and will therefore be subject to equality obligations in respect of this. We do not believe that their obligations in respect of discrimination should be any less as regards volunteers. It is our view that discrimination wherever it occurs is unacceptable and should be outlawed (subject to very limited exceptions that are strictly justifiable). In any event many of these organisations are in receipt of some measure of government funding/grants and should be required to display good equality practice.

It has been said that there is little evidence to suggest that there is a need to protect volunteers on the basis that few complaints are made. We believe that the more likely explanation for the small numbers of complaints is the absence of legal protection which means that there is little point in making a complaint. Furthermore, even if the problem of discrimination against volunteers is a relatively small one, this can be no justification for not putting in place statutory protection.

Membership and involvement in organisations of workers or employers

These organisations have huge influence on the lives of those they represent. In addition to a prohibition on discrimination across all of the equality grounds, they should in our view be subject to positive obligations in respect of promoting equality of opportunity and addressing under-representation across all of the equality grounds.

Vocational guidance and vocational training, including practical work experience

Vocational training and work experience are inextricably linked with employment opportunities and outcomes. In our view they should not only be covered by the prohibition on discrimination across all of the equality grounds but should also be covered by positive obligations in respect of promoting equality of opportunity and addressing under-representation.

Social protection, including social security, healthcare and social advantages

Congress believes that the scope of the SEA should include these matters across all of the equality grounds but recognises that within some of the grounds careful consideration will have to be given to a limited number of exemptions.

Education

Congress agrees that it is often difficult to draw a distinction between vocational training and education in institutions of higher education. What is abundantly clear is that, as with vocational training, educational opportunities and the quality of educational provision are directly linked to employment opportunities and participation in society in general. Congress therefore believes that all sectors of education should be brought within the scope of the SEA.

Private clubs/voluntary associations

Congress believes that private clubs/associations should be brought within the scope of the SEA.

Chapter 5 – Definitions of discrimination

The SEA will only succeed as a tool for achieving equality if it is underpinned by clear broad and *workable* definitions of discrimination that are not dogged by evidential technicalities as is presently the case.

Direct discrimination

We believe that the SEA should include a definition of direct discrimination which will give maximum protection across all of the equality grounds. The purpose of any such definition should be to outlaw reliance on the prohibited factor and to focus on the *effects* of discrimination i.e. the *outcome* rather than the treatment itself.

The current definitions of direct discrimination contained in the RRO, FETO and the SDO have always been grounded in comparisons, as indeed are the definitions contained in the Race and Framework Directives. With effect from 1 October 2004 a definition of direct discrimination has been *added* to the DDA and is also grounded in comparison. This definition does not replace the definitions of discrimination contained in sections 5 and 6 of the 1995 Act but is *additional* to them. Our experience of pursuing cases shows that many legitimate complaints have floundered on an overly technical approach to proving the necessary comparison. Congress agrees with the view that has been previously expressed by the Equality Commission that comparison may be relevant as proof of discrimination but it should not be a necessary pre-requisite to establishing discrimination

Harassment

Congress is in favour of an express definition of harassment in the SEA and believes any common definition should also apply in relation to all areas covered by the SEA.

We welcome the broad approach adopted by Government to implementing the first part of the definition contained in the Directives by referring to *violating B's dignity or creating an intimidating, hostile, degrading or offensive environment*. We are, however, concerned that reservations which were raised when the amending Regulations were passed in relation to the second aspect of the definition have not even been referred to in the context of this consultation. Congress in common with many other organisations was concerned that the qualification contained in sub-paragraph (1)(b) as quoted on page 62 amounts to a regression from what had been the pre-existing position under domestic law. That sub-paragraph suggests that the test of whether an act amounts to harassment is an objective rather than subjective one and that, arguably, some element of intention is required on the part of the harasser. This is not correct and any new definition of harassment must address this. It has long been established that proof of intention is not necessary in cases of direct discrimination.

Consistently with our comments above in relation to direct discrimination we do not believe that comparisons should be necessary in relation to harassment. Indeed the Directives do not require comparisons. We do not accept that it is legitimate or practical to draw a distinction between blatant harassment and more subtle harassment for this purpose. Clearly however in some cases comparisons will be introduced by way of evidence to support a claim.

Victimisation

Strong protection against victimisation is a cornerstone of the SEA if it is to be an effective enforcement tool. Congress believes that there should be no need for a comparison and that the focus of any new definition, as with direct discrimination, should be on the ground for the treatment and the outcome rather than a comparative analysis of the treatment itself.

Congress would be strenuously opposed to the suggestion that victimisation claims by a former employee should be restricted to acts occurring within a specified time period after the end of employment. Any such restriction would undoubtedly contravene the Directives.

Chapter 6 – Exceptions

It has been well established in EU law since the landmark judgement of the ECJ in the case of Johnston-v-The Chief Constable of the RUC [1986] IRLR 263, that derogations from the principle of equal treatment must be narrowly construed. This principle was reinforced again very recently by Mr Justice

Richards in the judicial review brought by Amicus-MSF section challenging various exceptions in the Sexual Orientation Regulations where the court adopted a very restrictive approach to the interpretation of the exception in question. Government must therefore ensure that this guiding principle of restrictive interpretation underpins its approach to exceptions in the SEA.

Genuine occupational requirement (GOR)

Congress acknowledges that, in very limited circumstances, it may be necessary to provide that particular jobs are restricted to persons of a particular sex, religious background, racial group etc. We would wish to see, however, a move away from the long list of specific exceptions which appear in the Appendix to Chapter.8 (many of which are now outmoded) to a narrowly drafted GOR where reliance on the GOR must be strictly justified on a case by case basis.

The Race and Framework Directives in article 4 allow for exceptions in the form of '*a genuine and determining occupational requirement*' provided that '*the objective is legitimate and the requirement is proportionate*'. This contrasts with article 70(2) of FETO which provides for a GOR exception where the '*essential nature of the job*' requires it to be done by someone of a particular religious belief. When the Regulations to amend FETO in order to implement the Directive were made there was no change to article 70(2) on the basis that the standard it set was even more stringent than that contained in article 4 of the Framework Directive and to have adopted the wording of Article 4 in relation to FETO may have amounted to a regression. In view of this we believe that the more stringent *essential nature of the job* test should be incorporated into the SEA across all of the equality grounds.

Genuine service requirement (GSR)

Congress would wish to see a GSR comparable to the GOR enacted in relation to GFS placing the onus on the service provider to justify their actions should a claim be made by a consumer of those services.

Specific exceptions

If specific exceptions are to be retained on the basis that they are needed to accommodate the unique characteristics of the particular equality ground, these should be subject to strict scrutiny and must be strictly justifiable. The Equality Commission should be under an obligation to keep those exceptions under review and where appropriate make recommendations to Government for their removal.

Further Congress believes that such exceptions should not be listed in primary legislation but should be done through a combination of subordinate legislation and Codes of Practice.

School teachers' exemption

Congress is not in favour of retaining the blanket exemption under FETO relating to the recruitment of teachers. We accept that there may be circumstances, particularly in the primary sector, where it is necessary for the teaching of religious education. However, we believe that any exemption should be based solely on a new GOR definition and justified in the context of the particular post that is being recruited.

Chapter 7 – Goods, Facilities and Services

Definition

Congress is of the view that the provisions in the SEA relating to GFS should extend across all of the equality grounds. Age and sexual orientation which are currently unprotected are two of the areas (together with disability) where discrimination in relation to GFS is most blatant and widespread.

GFS is of necessity a fluid concept because of how we do things in society, and, in the world of business and commerce in particular, is all the time changing and evolving. In order to be relevant and responsive to those changes the definition of what constitute GFS must be susceptible to broad interpretation. Although we have no objection to the SEA containing a list, by way of example, of what constitutes GFS, it must explicitly state that the list is not exhaustive. It also seems to us that this would be an appropriate area in which to have a Code of Practice.

Given the tendency of some courts in the past to opt for a restrictive definition of GFS, we favour option (c) on page 83 i.e. there should be a statutory presumption that an activity constitutes provision of goods, facilities or services unless demonstrated otherwise.

Congress believes that were Government to adopt option (b) – a comprehensive, exhaustive list – this would represent not only a regression from the existing provision under the RRO but also from the position under the SDO (art.30), DDA(art.19) and FETO(art.28), all of which refer to '*examples*' rather than an exhaustive list.

Public functions

Congress believes that all public functions should come within the GFS provisions regardless of whether they are carried out by public or private bodies. This goes beyond the scope of the Race Relations (Amendment) Act 2000 which is directed at public bodies. A broad approach is particularly important given, as the consultation document points out, the extensive contracting out of public functions to private bodies.

Timing of introducing GFS protection

The consultation on a SEA is in its fourth year and it appears that a further period of 1-2 years is likely to elapse before it is finally enacted. The consultation document identifies age discrimination, in particular, in GFS as a pervasive problem (see paragraph 43). Congress opposes the suggestion that there should be any delay in bringing into force the GFS provisions relating to any of the equality grounds. Additional resources should be committed in order to make the necessary adjustments to service policy and procedures rather than delaying introduction of the statutory protection.

Chapter 8 – Addressing under-representation in employment

If it is to be an effective tool for eliminating inequalities the SEA must combine a clear prohibition on direct and indirect discrimination across all the equality grounds with a robust model for promoting equality of opportunity. That model should be a combination of *permissions* for those wishing to engage in affirmative action and *obligations* to do so where there is evidence of under-representation.

As already stated Congress considers that a common principle of equality underpinning all of the equality grounds is very important, and any positive duty model should aim to reflect this. Further we firmly believe that sufficient evidence already exists to sustain the case for establishing an effective regime of positive permissions/obligations across all of the equality grounds.

Chapter 2 of the consultation document identifies as one of the underlying principles *the need to minimize the tendency for hierarchies of inequality to develop*. Congress considers that under the existing framework such a hierarchy clearly already exists. The voluntary approach based on the limited permissions contained in the SDO and RRO models has done little to remove inequalities and there is no evidence to suggest that employers voluntarily avail of these limited permissions to any significant extent. Those very limited permissions appear to fall well short of what is permitted under Article 7(1) of the Framework Directive relating to equality in employment and training. In relation to disability the existence of a duty to make reasonable adjustments, which is relevant in the context of establishing unlawful discrimination, does not amount to an effective measure for positively promoting equality of opportunity; much more is needed.

By contrast the FETO model that places *positive obligations* on employers in relation to promoting equality of opportunity and fair participation (supported by effective enforcement mechanisms), has by and large proved workable and there is well documented evidence that it has produced significant improvements. Congress believes that favourable consideration should be given to extending this or a similar model across all of the equality grounds.

We are concerned that there exists real potential for the existing hierarchy of inequality to be maintained and reinforced if certain of the equality grounds

are excluded or given limited permissions/positive duties in contrast to others in the SEA.

Congress wishes to see in respect of all the equality grounds a model that has the twin objectives of addressing under-representation *and* promoting equality of opportunity. That model should comprise a combination of broad permissions and positive legal obligations.

The extension of the FETO model which is based on a system of monitoring, periodic review and wide scope for the development of suitable affirmative action measures may be the appropriate way forward. Whilst acknowledging that the extension of positive duties may have additional cost implications for some employers/organisations, this must not be overstated. Part of the attraction of extending the FETO approach is that it is a model with which many employers/organisations in Northern Ireland are familiar and already have HR systems in place to implement it. Its extension to all of the other grounds would not in our view be unduly onerous but would merely be a development of their existing practices. In any event Congress believes that the benefits that will flow from the imposition of a positive duty to promote equality of opportunity will significantly outweigh any additional burden in extending the FETO model across all the grounds in the SEA.

Contract compliance

There has been a long history of support for the use of contract compliance to encourage adherence to equal opportunities obligations and the duty on public authorities in Northern Ireland to have due regard to promote equality of opportunity in carrying out their functions includes contract and subsidy functions and grant giving functions. In response to the first consultation exercise Congress, whilst supporting a system of contract compliance in principle stated that the model under FETO has proved ineffective because it is too cumbersome. We are therefore disappointed that the opportunity has not been taken in this document to flag up potential modifications to this system or the introduction of alternatives. In any event we believe that an effective model should be put in place and apply across all of the equality grounds. This will require further full consideration.

Chapter 9 – Equality Commission for Northern Ireland: Functions and Powers

Duties

The protections, permissions and obligations contained in a SEA must be underpinned by a powerful and properly resourced enforcement agency. Otherwise, its effectiveness as a vehicle for change will be substantially curtailed. Congress believes that the Equality Commission's powers, duties and functions should be harmonized to the highest standards as far as practicable across all of the equality grounds. It therefore prefers option (b) as referred to at page 125 of the consultation document. However in relation to *duties* in particular, we recognise that there may have to be some

accommodation in relation to disability and the duty to promote equalisation of opportunities for disabled persons.

In our comments on Chapter 8 above we expressed our wish to see, in respect of all the equality grounds, an affirmative action model that has the twin objectives of addressing under-representation *and* promoting equality of opportunity. That model should comprise a combination of broad permissions and strong positive legal obligations to engage in positive/affirmative action. Consistent with this approach we believe that there should be placed on the Equality Commission, *across all of the equality grounds*, a general duty to promote affirmative/positive action.

In relation to a 'good relations duty', this is currently limited to the RRO. We believe that there is scope for the extension of this duty across all of the equality grounds, particularly in relation to religious/political belief and sexual orientation.

Codes of Practice

Codes of Practice are not a substitute for the law but they are a key practical tool to aid its implementation. Courts and tribunals are required to have regard to their contents and that should continue to be the case. They should not in our view be voluntary codes as has been suggested; to do so would be to diminish their existing status.

Congress believes that there should be a consistent approach to Codes of Practice across all of the equality grounds and that the Codes should adopt a 'highest standard' approach in relation to the elimination of discrimination *and* the promotion of equality of opportunity. The power to issue Codes should not be restricted to employment and training but should extend to all areas covered by the legislation across all of the equality grounds.

One of the current difficulties is that the different Codes issued under the separate statutes are not always consistent in their approach. This is totally unsatisfactory and totally undermines the idea of a Code of best practice. Congress believes that harmonized legislation should of course result in harmonized Codes.

Power to support complainants and other organisations

The Commission should have a wide discretion across all of the equality grounds to advise and assist complainants in relation to proceedings and prospective proceedings. A realistic level of resources should be made available to enable it to do so. It should not however, be the only possible funding source for equality cases as this potentially undermines its role as a *strategic* enforcement body. There is currently no legal aid available for tribunals. This situation, which combines the twin impediments of an under funded Commission and no legal aid amounts in our view, to a denial of access to judicial process as required under EU law.

Congress would wish to see the time limit in the RRO for consideration of applications for assistance applied across all of the equality grounds. Furthermore the Commission should be able to authorize any employee to exercise its functions in relation to providing assistance.

Investigations

Congress believes an effective investigation model is a potentially powerful tool for achieving change. Further it believes that the investigative powers of the Commission should apply in a consistent manner across all of the equality grounds and to all areas of the legislation. It does not accept, as suggested, that religious composition issues are sufficiently different to justify separate provision in relation to the conduct of investigations.

In general Congress favours the position adopted by the Commission in its August 2003 Position Paper as summarized at page 131 and further favours the setting of time limits for completing investigations subject to the Commission having the necessary powers to obtain information and the necessary resources to conduct investigations. The Commission must have wide powers to collect information if investigations are to be completed in an effective and timely manner.

Congress has reservations about extending across all grounds the requirement that investigations should be conducted in private. In any event the Commission should retain the discretion in all cases to make its investigation report public (subject to privacy law limitations) and that report should be available for inspection.

Persistent discrimination

Congress believes that the provisions in relation to persistent discrimination should be harmonized.

Discriminatory advertisements

Discriminatory advertising should be made unlawful across all of the equality grounds and in relation to all areas covered by the SEA.

Instructions and pressure to discriminate

The FETO model whereby instructions to discriminate and pressure to discriminate result in both the persuader and the perpetrator being liable for the unlawful act should be extended across all of the equality grounds.

Chapter 10 – Tribunals and Courts

It is undoubtedly the case that the Industrial Tribunals and the Fair Employment Tribunal have developed a particular legal expertise in dealing with equality law which is both complex and dynamic. The experience of the County Court, on the other hand, in dealing with the discrimination cases has

been limited as the number of GFS cases coming before the County Court has been relatively small. As we move towards an expanded equality law framework where both grounds and scope will be broadened, the case for a specialist tribunal to deal with all equality cases, in our view, becomes even more compelling. Congress believes that such a development would facilitate a better use of resources and more effective and efficient disposal of cases provided adequate resources are committed to support the work of such a specialist tribunal.

The question of legal aid (which is not currently available for tribunal cases) must also be addressed. To suggest that the Equality Commission, with its power to assist cases, should fill the gap by assisting *all* those applicants who do not have the means to pursue a case unaided is wholly unrealistic given the Commission's limited resources and the growing number of cases. Furthermore such an approach could potentially undermine the Commission's role as a strategic enforcement agency. However, in the absence of legal aid many vulnerable individuals are precluded from pursuing bona fide claims because they do not have the necessary expertise to bring claims unrepresented or the resources to engage legal representation. With the extension to tribunals' power to award costs up to a maximum of £10,000 the capacity of victims of discrimination to pursue claims has been further undermined. If we are to move to a single Equality Tribunal it is essential that legal aid is made available. Indeed to do otherwise will amount to a regression from the existing position as Legal Aid is currently available for actions in the County Court in respect of GFS.

Also linked to the resource debate is the important issue of representative or class actions. Our existing individual complaint based litigation limits the effectiveness of the legislation as an enforcement mechanism for achieving widespread structural change in patterns of discrimination and it is, moreover, resource intensive. Although the Equality Commission (and its predecessor organisations) and the trade unions have pursued many important test cases which have had potential ramifications for large numbers of individuals in similar or exactly the same circumstances, it has been necessary to lodge hundreds and sometimes thousands of individual claims in order to secure an individual's right to benefit from a successful outcome. This has been an administrative nightmare, not least for courts and tribunals, has been an unnecessary waste of limited resources and has exacerbated the problem of tribunal backlogs. This difficulty could be overcome in large measure by the introduction of representative or class actions.

Congress is also committed to the recommendation put forward by many organisations in the past that the Equality Commission, trade unions and other appropriate interest groups should have the standing to bring actions in their own name. Congress believes that on many occasions instances of discrimination that potentially affect large numbers of individuals go unchallenged because individuals do not have the means or the confidence to litigate; the wider the potential ramifications of a successful challenge, the more vulnerable the individual complainant. In any event Congress believes that in light of the wording of Article 7.2 and 9.2 of the Race and Framework

Directives that Government is now obliged to introduce measures to ensure that legitimate interest groups/organisations may engage *on behalf* of or in support of an individual in any judicial procedure. Failure to enact such a measure will give rise to a breach of Government's obligations under the Directives.

In our earlier submission we recommended that an equal treatment appeals tribunal be established that would allow decisions to be appealed without having to resort to the Court of Appeal. On further reflection we feel that this may merely serve to protract the litigation and increase the costs burden on those bringing cases in particular.

Articles 15 and 17 respectively of the Race Directive and the Framework Directives require Member States put in place a system of sanctions which is *effective, proportionate and dissuasive*. Congress believes that the existing sanctions regime, which is not consistent across all of the equality grounds, does not meet this standard and must therefore be strengthened in the SEA. As a minimum the remedies available in cases of employment discrimination should be harmonized up to the standard of those available under Article 39 of FETO and the power to make a recommendation that the Respondent (Defendant) takes action to obviate or reduce the adverse effect on a person other than the complainant should be extended to GFS across all of the equality grounds. This in our view would maximize the impact of a case towards achieving the overall goal of equality.

The power to order re-instatement or re-engagement, as per other employment cases, should be available in cases involving discrimination. The mere fact that such a remedy will not be suitable in all cases because of the nature of the discrimination that has occurred and the adverse affect it has had on relations is not in our view a justification for nor having the remedy available in all cases. Where relations have irreparably broken down one should expect to see that reflected in other aspects of the remedy awarded e.g. the level of compensation for injury to feelings and future loss.

Finally Congress believes that compensation should be available in cases of unintentional indirect discrimination across all of the equality grounds and that it should extend to GFS cases.

Chapter 11 – Alternative dispute resolution (ADR)

Congress is not opposed in principle to the development of an effective system of ADR as an option for aggrieved individuals provided it is strictly voluntary and acts as a genuine alternative, as opposed to a disincentive, to pursuing a claim through the tribunals/courts. Furthermore such a system should not be a substitute for developing a properly funded Legal Aid Scheme so that equality issues can be fully argued and determined before the courts. The development of an authoritative body of case law on the rights and obligations contained in a new SEA will be crucial to its effectiveness as a tool for eliminating discrimination and inequality in the long term.

Trade unions and the Equality Commission often commit substantial resources to test cases which potentially have far-reaching ramifications beyond the individual complainant who is pursuing the case. The mere payment of compensation to settle such claims without a tribunal/court decision or an undertaking, at the least, to change practices is not a particularly satisfactory outcome. Congress would therefore like to see a broadening of the remedies available in ADR to cover changes in practices and procedures.

Summary

1. The minimum goal of the SEA should be to eliminate unlawful discrimination and promote equality regardless of sex (including gender reassignment), race, colour, ethnic or national origin, religion, belief/political opinion, marital status, having or not having dependants, disability, age or sexual orientation.
2. The harmonization of the equality law framework should reflect the highest standards of protection against discrimination across all of the equality grounds and must not regress from existing standards.
3. The SEA should expand the permissions for engaging in positive/affirmative action thereby making it easier for those who proactively wish to pursue an equality goal to do so.
4. In addition to broadening permissions any new legislation must also include provisions imposing positive legal obligations on employers, service providers and other relevant organisations/bodies to take a proactive approach to achieving equality.
5. There should be no a hierarchy of inequalities and is quite clear that the core of any new equality law, whether it be definitions of discrimination, positive action measures, scope, remedies or means of enforcement, should be common across all the grounds.
6. Congress welcomes the proposed extension of the Race Relations (Northern Ireland) Order 1997(RRO) to cover 'nationality' and 'colour' but believes that the current anomalous situation (following the implementation of the Race Regulations) is unworkable. The anomaly should be addressed immediately and should not await the outcome of this consultation exercise.
7. Congress believes the existing exclusion for those who might condone the use of violence generally to further political ends in relation to Northern Ireland needs to be reviewed.
8. Discrimination on grounds of gender re-assignment which is currently limited to the areas of employment and training should be extended to all areas covered by the legislation.
9. There should be protection against disadvantage on grounds of gender identity. Although gender identity raises different issues than those relating to gender reassignment Congress considers that it may be appropriate to bring it within the scope of an extended definition of gender as is currently the case with gender reassignment.
10. As a minimum all of the section 75 grounds should be covered in the SEA and these should be extended to cover goods facilities services and premises.

11. As a fundamental matter of principle Congress is committed to protection against discrimination for a wide range of vulnerable groups that goes beyond the groups referred to in section 75 of the Northern Ireland Act 1998, but is not persuaded that the most effective means of protection in respect of all of the additional grounds referred to in paragraphs 19-32 is within the context of a SEA. Government must actively consider the most appropriate and most effective model for providing real protection in particular situations for particular forms of disadvantage.
12. Discrimination on grounds of marital or family/dependants status should be covered in the SEA
13. In the interests of clarity pregnancy should be expressly stated as a protected ground in a manner that reflects the jurisprudence of the European Court of Justice.
14. Congress believes that the aim of the review of the Rehabilitation of Offenders Order 1978 should be to put in place a specific legislative model to address in full the particular types of disadvantage suffered by those with convictions with proper safeguards in place through necessary exemptions
15. Action must be taken to develop an appropriate legislative model that properly addresses the disadvantage experienced by victims.
16. It may be difficult to address the causes and effects of socio-economic disadvantage within the constraints of the SEA and we believe that much more detailed consideration needs to be given as to what is needed in this area.
17. Given the close connection between genetic predisposition and disability consideration must be given to its inclusion in the SEA through a broadened definition of disability.
18. It is difficult to advance the argument that as far as practicable common concepts in terms of legal prohibitions on discrimination and positive obligations must underpin the Act on the one hand whilst at the same time saying that it should be suitable to cover other status grounds that have not yet been identified. Without some idea of what other status disadvantage might involve it is difficult to say that the SEA will be the appropriate model for addressing the issue.
19. Congress believes that the shortcomings of the Equal Pay Act (Northern Ireland 1970 (as amended) identified in 1990 by the EOCNI in its Recommendations for Change must now be comprehensively addressed in the context of the SEA
20. In accordance with the recommendation of the Equal Pay Taskforce (2001) pay audits should be put on a statutory footing

21. The scope of the SEA should be the same across all of the equality grounds and should be broadly defined.
22. In relation to employment, self employment and occupation the definition of those covered must be capable of the broadest interpretation. Congress would therefore prefer the use of the term 'employment relationship'.
23. Volunteers should be expressly brought within the scope of the SEA and that group should be widely defined.
24. Vocational guidance and training (including work experience) should be covered by the prohibition on discrimination and obligations in respect of promoting equality of opportunity and addressing under-representation.
25. The SEA should include social protection including social security, health care and social advantages but it is recognised that within some of the grounds careful consideration will have to be given to a limited number of exemptions.
26. All sectors of education should be brought within the scope of the SEA.
27. Private clubs/associations should be brought within the scope of the SEA.
28. The SEA should include a definition of direct discrimination which will give maximum protection across all of the equality grounds. The purpose of any such definition should be to outlaw reliance on the prohibited factor and to focus on the effects of discrimination i.e. the outcome rather than the treatment itself.
29. New definition of indirect discrimination should refer to the more stringent justification standard of 'necessary aim'.
30. A common definition of indirect discrimination should apply across all of the equality grounds and that common definition should also apply, to other areas of the legislation.
31. There should be an express common definition of harassment in the SEA which applies in relation to all areas covered by the SEA.
32. Comparisons should not be necessary in cases of harassment and we do not accept that it is legitimate or practical to draw a distinction between blatant harassment and more subtle harassment for this purpose.
33. There should be no need for a comparison in cases of victimization and the focus of any new definition, as with direct discrimination, should be

- on the ground for the treatment and the outcome rather than a comparative analysis of the treatment itself.
34. Derogations from the principle of equal treatment must be narrowly construed. Government must therefore ensure that this guiding principle of restrictive interpretation underpins its approach to exceptions in the SEA.
 35. There should be a move away from the long list of specific exceptions which appear in the Appendix to Chapter.8 to a narrowly drafted GOR where reliance on the GOR must be strictly justified on a case by case basis.
 36. There should be a GSR comparable to the GOR enacted in relation to GFS placing the onus on the service provider to justify their actions should a claim be made by a consumer of those services.
 37. If specific exceptions needed to accommodate the unique characteristics of the particular equality ground these should be subject to strict scrutiny and must be strictly justifiable. The Equality Commission should be under an obligation to keep those exceptions under review and where appropriate make recommendations to Government for their removal.
 38. The teachers' exemption should be repealed and any exemption should be based solely on a new GOR definition and justified in the context of the particular post that is being recruited.
 39. The provisions in the SEA relating to GFS should extend across all of the equality grounds.
 40. There should be a statutory presumption that an activity constitutes provision of goods, facilities or services unless demonstrated otherwise.
 41. All public functions should come within the GFS provisions regardless of whether they are carried out by public or private bodies.
 42. Congress opposes the suggestion that there should be any delay in bringing into force the GFS provisions relating to any of the equality grounds.
 43. There should be across all the equality grounds a positive/affirmative action model that has the twin objectives of addressing under-representation and promoting equality of opportunity. That model should comprise a combination of broad permissions and positive legal obligations.
 44. The FETO affirmative action model or a similar model should be extended across all of the equality grounds.

45. An effective contract compliance model should be put in place and apply across all of the equality grounds.
46. The Equality Commission's powers, duties and functions should be harmonized to the highest standards as far as practicable across all of the equality grounds.
47. There should be placed on the Equality Commission, across all of the equality grounds, a general duty to promote affirmative/positive action.
48. The power to issue Codes should not be restricted to employment and training but should extend to all areas covered by the legislation across all of the equality grounds.
49. The Equality Commission should have a wide discretion across all of the equality grounds to advise and assist complainants in relation to proceedings and prospective proceedings and should be provided with adequate resources to do so.
50. Congress favours the position adopted by the Equality Commission in its August 2003 Position Paper as summarized at page 131 and further favours the setting of time limits for completing investigations subject to the Commission having the necessary powers to obtain information and the necessary resources to conduct investigations. The Commission must have wide powers to collect information if investigations are to be completed in an effective and timely manner.
51. Discriminatory advertising should be made unlawful across all of the equality grounds and in relation to all areas covered by the SEA.
52. The FETO model whereby instructions to discriminate and pressure to discriminate result in both the persuader and the perpetrator being liable for the unlawful act should be extended across all of the equality grounds.
53. The development of a specialist tribunal to deal with all equality cases would facilitate a better use of resources and more effective and efficient disposal of cases provided adequate resources are committed to support the work of such a specialist tribunal.
54. Legal Aid should be extended to cover all cases dealt with by the Equality Tribunal.
55. It should be possible to pursue representative or class actions.
56. The Equality Commission, trade unions and other appropriate interest groups should have the standing to bring actions in their own name. Failure to enact such a measure will give rise to a breach of Government's obligations under the Directives.

57. As a minimum the remedies available in cases of employment discrimination should be harmonized up to the standard of those available under Article 39 of FETO and the power to make a recommendation that the Respondent (Defendant) takes action to obviate or reduce the adverse effect on a person other than the complainant should be extended to GFS across all of the equality grounds.
58. The power to order re-instatement or re-engagement, as per other employment cases, should be available in cases involving discrimination.
59. Compensation should be available in cases of unintentional indirect discrimination across all of the equality grounds and that it should extend to GFS cases.
60. Congress would therefore wish to see a broadening of the remedies available in ADR to cover changes in practices and procedures.