Submission to the Initial Consultation by the Office of the First Minister and Deputy First Minister on

'A Single Equality Bill for Northern Ireland'

Introduction

The Committee on the Administration of Justice, (CAJ), is a non-governmental organisation, established in 1981. It draws its membership from across the communities of Northern Ireland and beyond, and is concerned to ensure that the government meets its international obligations to protect and promote human rights in Northern Ireland. The organisation works across a broad range of civil, political, economic, social and cultural rights. In 1998, we were honoured to be awarded the prestigious Council of Europe Human Rights Prize.

CAJ very much welcomes this opportunity to respond to the consultation paper, 'Promoting Equality of Opportunity: A Single Equality Bill for Northern Ireland'. These are however very much our preliminary findings. It is likely that as the process moves forward and the discussions become more detailed in relation to specific areas of the legislation that we would wish to revisit some of the points that we have made here. We would also like to state that while we found the consultation paper a useful guide, we have chosen to formulate our response in a way which we feel most appropriately reflects our thinking at the present time. We have therefore chosen not to follow the questions in the way they have been presented, but rather to present our analysis in a way which we hope draws attention to all our areas of concern. We have however included in Appendix One a reference for the consultation questionnaire which should be useful for indicating generally where specific questions are addressed in our submission. This should be seen only as providing general guidance on where specific issues are addressed, clearly this submission will need to be considered in a holistic manner. CAJ very much looks forward to contributing further to future discussions around the Single Equality Bill. Securing effective economic and social rights for everyone in Northern Ireland has been central to the work of CAJ since its inception, and we believe that creating an effective Single Equality Act can do much to bring this about.

Background

With the passage of the Race Directive (2000) and the Employment Framework Directive (2000), the European Union has further committed itself to pursuing an equality framework. Northern Ireland is now required to provide a practical, workable model for implementing these equality principles. At the same time, the Single Equality Bill ("SEB") will provide much needed harmonizing and simplifying of existing anti-

discrimination legislation. It is worth remembering however that both Directives lay down *minimum* requirements, thus giving member states the option of introducing or maintaining more favourable positions. Indeed as a recent report pointed out,

'Like all other European measures, and especially those requiring unanimity, the Racial Equality Directive is the result of negotiations between the Member States and therefore a compromise. It is possible that individual governments would be willing to apply – in general or on specific issues – higher standards than those required by the Racial Equality Directive'.[1]

Furthermore, both Directives very clearly state that implementation, 'shall, under *no* circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States'. Any reductions in the level of protection existing currently within Northern Ireland would therefore be contrary to the Directives and unlawful.

I.A. Foundations

The establishment of a Single Equality Bill for Northern Ireland is in many respects a natural development of both the Good Friday Agreement and the Amsterdam Treaty. The Good Friday Agreement sets out firm commitments to the protection of rights and freedom from discrimination, founding Northern Ireland governance on "principles of full respect for, and equality of, civil, political, social and cultural rights, [and] of freedom from discrimination for all citizens…"[2].

The Amsterdam Treaty, which amended the Treaty establishing the European Community and the Treaty on European Union, provided the European institutions with considerable new powers to act on discrimination. Within one and a half years after the entry into force of the Amsterdam Treaty (1 May 1999), the Council of Ministers adopted the Racial Equality Directive and the Equality in Employment Directive, with which Member States are required to comply.

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

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[1] Chopin, I. & Niessen, J (Eds.). (2001). *The Starting Line and the Incorporation of the Racial Equality Directive into the National Laws of the EU Member States and Accession States.* Brussels/London: Belmont Press. [The Starting Line Group, created in 1991, was a coalition of more than 400 non-governmental actors, from across the European Union, active in the field of anti-discrimination. The Group based its activities on the belief that a well-informed policy debate among and between representatives of all sectors of society – public, private and business – could lead to the adoption of effective European anti-discrimination policies'.]

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

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

CAJ is of the view that the particular circumstances of Northern Ireland will benefit greatly from a more unified approach to equality. This is a society marked by great inequality and division, and the conflict has often eclipsed other equally harmful forms of discrimination and disadvantage. As a result, many groups, such as children, older people, and members of the minority ethnic communities have suffered even greater marginalisation than would have been the case, had Northern Ireland been a ''normal'' society. In this light, the strength of a Single Equality Bill becomes its ability to address the concerns of all constituencies and remedy any inadvertent hierarchy of discrimination.

I.B. Centralising Equality

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

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

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

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

I.C. Effective Implementation

Effective implementation of the equality provisions set out by the Single Equality Bill will hinge on the careful formulation of clear targets and timetables in relation to each of the protected constituencies. OFMDFM should also ensure the SEB is drafted so that it includes adequate funding and effective mechanisms for reaching these targets; a lack of resources or inappropriate implementation mechanisms would pose a risk of undermining the effectiveness of the entire Bill. In regards to timetables, CAJ suggests that instead of viewing the timetables set out in the EU Directives as schedules dictating the outer limit for extension of coverage, these dates be interpreted as review schedules for revisiting and evaluating the effectiveness of the SEB's provisions. For example, anti-discrimination and equality coverage on the grounds of sexual orientation, religion or belief, age and disability should be enacted immediately instead of waiting until the 2003 and 2006 deadlines set out by the Framework Directive, with review scheduled at the respective implementation deadlines.

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

I.D. Drafting Principles

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

We would like to stress the importance of harmonizing the anti-discrimination and equality legislation currently in force in Northern Ireland. Fair employment measures and protective provisions are as necessary as ever in addressing the systematic

disadvantage which has remained largely untouched by current discrimination-model legislation. The published examinations of anti-discrimination and equality legislation in Northern Ireland and the UK, conducted by scholars, policy makers, and the relevant Commissions, have come to the same conclusion. That is, this is not the time to roll back measures focused on disadvantage and inequality. Instead, these analyses focus on the dire need to strengthen, harmonize, reframe and simplify the current frameworks. In drafting this consultation response, CAJ has surveyed this literature for its suggestions of best practices and incorporated strategies useful to Northern Ireland's Single Equality Bill into our response. These sources include, among others, the Hepple Report[3], an independent review of UK anti-discrimination legislation; SACHR's review of employment equality legislation in Northern Ireland[4]; the Equal Opportunity Commission for Northern Ireland's (EOC(NI)) recommendations for changes to sex discrimination legislation[5]; the Disability Rights Task Force's Report on civil rights for disabled people;[6] the Starting Line Group's analysis of the Race Directive's incorporation into national law[7], and the NI Affairs Committee Report on the Operation of the Fair Employment Act (1989).[8]

We are encouraged by OFMDFM's reassurance that the Single Equality Bill consultation is not a prescriptive process. In this spirit, our consultation response highlights our general areas of concern. In many of these areas, there are EU Directives which Northern Ireland has an obligation to take into account and integrate into equality legislation. Recognizing this mandate, our response sets out suggestions on how to draft this new single equality framework so that

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

[3] Hepple, B., Coussey, M., & Choudhury, T. (2000). *Equality: A New Framework, Report of the Independent Review of the Enforcement of UK Anti-discrimination Legislation.* Oxford: Hart Publishing.
[4] Standing Advisory Commission on Human Rights. (1997). *Employment Equality: Building for the Future.*
[5] Equal Opportunity Commission for Northern Ireland. (1996). *The Sex Discrimination Legislation: Recommendations for Change.*
[6] Disability Rights Task Force (1999). *From Exclusion to Inclusion: A Report of the Disability Rights Task Force on Rights for Disabled People.*
[7] Chopin, I. & Niessen, J (Eds.). (2001). *The Starting Line and the Incorporation of the Racial Equality Directive into the National Laws of the EU Member States and Accession States.* Brussels/London: Belmont Press, hereafter referred to as 'Starting Line'.
[8] NI Affairs Committee, Fourth Report, 'The Operation of the Fair Employment (Northern Ireland) Act 1989: Ten Years On', Vol. 1, Report and Proceedings of the Committee, HC, Session 1998-99, London HMSO.

(7) the efficiency, stability, and productivity gains experienced by the public and the business sector are highlighted; and
(8) the resulting equality legislation corresponds with the forthcoming Bill of Rights.

II. Scope

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

II. A. Application

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

Although the actual drafting of such extensions may seem complicated, especially in harmonizing coverage across the various grounds, CAJ emphasizes the importance of drafting the legislation as simply as possible. As recommended by 'Starting Line' in their analysis of the Race Directive, a practical approach would be to extend discrimination and equality coverage using a non-exhaustive list of examples of the fields covered. This flexible approach would permit overt reference to the coverage mandated by the EU Directives, while allowing future extension of protection to areas where discrimination is thus far unseen and to discrimination that does not fit into existing categories.

II. B. Goods, Facilities and Services

The extension of coverage to the provision of goods, facilities and services for all covered groups, including age and sexual orientation, is essential to furthering the goal

of creating an ethos of equality in Northern Ireland. In its review of employment equality legislation, SACHR stressed the importance of correcting the anomaly at the time that discrimination in the provision of goods, facilities, and services was not covered by existing legislation. Further, the Equal Opportunity Commission of Northern Ireland (EOC(NI)), in its review of sex discrimination legislation, recommended that protection from discrimination should not just be prohibited in terms of employment, but also in respect to education and goods, facilities and services.

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

II. C. Coverage

1. Categories

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

It is also important to remember that the EU Directives set *minimum* standards which do not prevent Member States from setting a higher standard for discrimination protection. Therefore, the coverage required by the Framework and Race Directive should in no way be seen as limiting harmonization and coverage across Northern Ireland's identifiable, marginalised categories. It should also be pointed out that the Good Friday Agreement itself expresses the commitment to providing rights not covered by the European Convention to the people of Northern Ireland, reflecting an approach of updating and supplementing existing rights. Given the commitment to implementing best practices and surpassing coverage provided by European law, the extension of equality protection across the Section 75 and other categories will move towards incorporating the commitments of the Good Friday Agreement into the Single Equality Bill.

2. Multiple-discrimination

One important reason for this extension of coverage can be seen in the covert and multiple ways inequality operates. That is, discrimination on one ground often provides a backdoor for discrimination on another ground. For example, ‘Starting Line’ points out how religious discrimination often constitutes indirect racial discrimination, and recommends that national legislation implementing the Race Directive extend at least the same level of protection on the grounds of religion or

belief. Similarly, some sectors within Northern Ireland have alluded to the possibility of discriminating on the grounds of sexual orientation by utilizing the narrowly-worded religion or belief exemption in the Framework Directive. Although this is clearly not allowed under the Framework Directive, such examples demonstrate how different forms of discrimination are often linked and function together to exclude sectors of our society from full participation.

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

3. "Other Status"

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

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

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

4. Coverage of Public Sector Functions

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

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

III. Exemptions

CAJ believes it is imperative that all current exemptions be reexamined for the purpose of a Single Equality Bill. Given the short timeframe of the consultation process, clearly OFMDFM should make every effort to engage in consultation with each of the Section 75 constituencies on any exemptions which may be relevant to them. The two EU Directives set down the *maximum* scope of exemptions, but do not require that all available exemptions be incorporated into national legislation.

Furthermore, we feel a clear distinction should be made between the exemptions allowing discrimination and measures fostering positive actions. Actions aimed at remedying disadvantage should be framed as equality measures rather than permitted forms of discrimination or positive discrimination. It does not advance the aim of equality to refer to positive measures in the negative language of exemptions. Therefore, CAJ recommends the inclusion of provisions specifically legalizing measures designed to remedy disadvantage and promote equality of outcome. This set of provisions should be expanded on in the Codes of Practice accompanying the Single Equality Bill. Our response treats this topic more thoroughly in our section on positive action below (Section V(C)). Here, in the exemptions section of our response, CAJ will survey the current discrimination exemptions, most of which are remnants from the past several decades of anti-discrimination law and need close reassessment.

III. A. Employment Exemptions

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

1. Genuine Occupational Qualifications

In the area of employment, exemptions are usually classified as “Genuine Occupational Qualifications” (GOQ). The EOC(NI) illustrated how for many exemptions in relation to gender, such as where a job involves living on an employer’s premise, employers have had sufficient time to adapt since the passage of such legislation two decades ago. In relation to other areas of gender discrimination, such as personal services, the EOC(NI) recommended that the

exemptions should be greatly narrowed, so the gender of the employee must be directly relevant to the service provided.

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

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

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

2. Framework Directive's Provisions on Northern Ireland

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

III. B. Goods, Facilities and Services Exemptions

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

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

exemptions for discrimination in private clubs, associations, and voluntary bodies. Under the general provision, exemptions would only survive where the grounds of discrimination are relevant to the organization or body's purpose.

IV. Definitions

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

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

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

IV. A. Direct Discrimination

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

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

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

IV. B. Indirect Discrimination

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

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

Defining indirect discrimination in this way has several strengths. First, it does not contain a statistical requirement as an element of proving indirect discrimination, which is a weakness in the definition as set out in the Burden of Proof Directive. The requirement of statistical proof has the effect of neutralizing an indirect discrimination claim, as statistics are rarely available and/or costly to gather. This is especially relevant in the Northern Ireland context, where there is little statistical evidence yet available on many forms of discrimination. Second, the definition does not require the discrimination be overt, intentional or conscious. It sends a clear message that discrimination does not have to be direct or intentional to be highly damaging to society. Moreover, the provisions on indirect discrimination should make clear that the term "practice" refers to inaction as well as action. Thirdly, the definition, as adopted by the Equality Working Group, provides a strong definition of 'objective justification'. There are some areas of EU gender equality law in which the ECJ has accepted a 'legitimate aim' test, particularly in relation to welfare cases and some statutory employment schemes. However the pre-eminent test for 'objective justification' is still the test from Bilka-Kaufhaus[9], that is a necessary aim. In these circumstances, the Framework Directive involves a watering down of pre-existing ECJ case law. The CAJ believes that a strong indirect discrimination test is a vital component of the SEB. While other aspects of the SEB should facilitate those organizations which wish to pursue proactive equality policies, the threat of indirect discrimination actions provides strong encouragement to all organizations governed by the Act to conduct equality audits of their policies and practices.

How the SEB sets out its measures for indirect discrimination is of the utmost importance as this provision will function as a primary means of confronting Northern Ireland's institutional discrimination. CAJ sees no justification for excluding disability

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

from full protection from indirect discrimination, and for the sake of harmonization, does not recommend a completely separate approach to disability. There will be a clear need to articulate fully and ensure within the Codes of Practice the duty to make reasonable adjustments in regards to disability, but this should not work to exclude disabled people from indirect discrimination protection.

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

IV. C. Burden of Proof

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

IV. D. Victimization

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

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

at enforcing compliance with the principle of equal treatment." The SEB's Codes of Practice should ensure those brought within the ambit of victimization protection include

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

IV. E. Harassment

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

With this in mind, CAJ recommends a definition of harassment based on the Framework Directive's definition:

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

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

IV. F. Advertising

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

recommendation that in relation to advertising, the equality body should be given the power to apply to the tribunal in its own name for a decision as to whether the discrimination in advertisement provisions have been violated.

IV. G. Incitement of Discrimination

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

V. Addressing Under-representation

Although OFMDFM refers to this section of the consultation as "Addressing Under-representation", CAJ would caution re-enshrining language used in discrimination-focused legislation in a Bill whose focal point is equality. More appropriate terminology should be drawn from the equality discourse, where terms such as positive action, fair participation and equal access reframe affirmative measures in terms of creating lasting structural and institutional transformation. The EU Directives are committed to this equality model. Their positive action clauses (Art. 5 and 7) give Northern Ireland broad latitude to seek permanent institutional change throughout society by "adopting specific measures to prevent or compensate for disadvantage linked to any of the grounds." In effect, European law now offers a vast range of positive action options for national legislation, and even where there are limitations, Member States can provide more protection than set out in EU provisions.

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

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

V. A. Principles of Equality

The Single Equality Bill must overtly express a commitment to equality. Equality should be articulated as a positive, proactive concept, moving beyond the negative, remedial focus of discrimination language. It should embody a commitment to the prevention of

discrimination and the promotion of those who have suffered disadvantage as a result of the existing institutional structures in our society. For purposes of the Single Equality Bill, the definition of equality would best be set out as a series of principles indicative of the meaning of inclusive equality. Among these principles are:

- **Equality as recognizing difference** – Sectors to which the SEB applies should be given license to explore the most appropriate positive actions for addressing the particular disadvantage they are seeking to remedy. Positive action should not be constrained by a list of finite options, but given as wide a scope as possible. For example, the needs of ethnic minorities are very different to those of persons with a disability, so flexibility must be a guiding principle. Equality measures should carve out a space for the innovation necessary in effectively meeting the distinct needs and unique positioning of the different groups within Northern Ireland. The Canadian Employment Equality Act (1995) expresses this principle as a commitment to, "… the principle that…equity means more than treating persons in the same way, but requires special measures and the accommodation of difference."
- **A commitment to a diagnostic approach** – There is no one-size-fits-all solution to social disadvantage and exclusion. Layers of discrimination combine to position groups differently in relation to systems of privilege – inequality can be exacted and sustained via social invisibility, over-visibility, or selective exclusion. Formulating practical, tangible strategies for achieving equality will require a close assessment of particularities affecting each of the covered groups. This diagnostic approach would include a combination of monitoring, assessment and consultation with all relevant parties, and should be accompanied by statutory duty provisions. A diagnostic approach is the most effective means of revealing where fair participation is an issue and where positive action is appropriate.
- **Equality as fair and representative participation** – Equality as "fair participation" must accompany a commitment to equality of outcome. The SEB's framework should focus on achieving fair and representative participation at all levels within societal institutions. For example, in terms of employment, this translates into representation at all levels approximately in proportion with the numbers of a given constituency in the overall population. Representative participation will provide a useful yardstick by which to judge the successes and shortcomings of Single Equality Bill's equality framework.
- **Equality of outcome** - The past three decades of anti-discrimination law have focused on equality as equality of opportunity. This focus has not resulted in substantial or lasting change for those targeted by this legislation, because it fails to recognize the underlying structures which maintain inequality and prevent people from reaching the starting point from which accessing opportunity becomes possible. In contrast, an understanding of equality as equality of outcome recognizes that equality measures are only as real as the substantial, tangible change they produce and support. Equality of outcome has the potential for affecting real change as it pays attention to the wider processes of social exclusion and legacies of discrimination.

V. B. Monitoring

1. Scope and coverage

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

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

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

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

alternative methods to the traditional monitoring procedures, as long as those monitoring are held accountable for accurately and sensitively accessing the information required by a diagnostic approach to equality.

2. A statutory duty to monitor

If Northern Ireland is to develop an equality framework committed to achieving lasting equality of outcome, then the Single Equality Bill must include a statutory requirement to register and monitor. When monitoring is voluntary or seen as supplemental to an organization's processes, only a limited number of organizations may chose to make use of it. A statutory requirement to monitor facilitates the mainstreaming of equality commitments into organizational and institutional culture. The EOC (NI) pointed out how a duty to register alone encouraged larger employers to take a more rigorous approach to monitoring. SACHR's survey of employers' experiences with fair employment legislation discovered that the overwhelming majority of employers (88%) found it 'easy to register', while the vast majority also reported no difficulties in gathering information and returning it to the FEC.[10] Given the benefits organizations often experience as a result of the monitoring process, a statutory duty to monitor would only strengthen Northern Ireland's progress toward equality.

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

- Setting a schedule for revisiting these exemptions. At the time they are reassessed, there will have been much more experience gained in monitoring and a large range of best practices to draw on in adapting monitoring to smaller organizations.
- In the interim, modified equality duties and mechanisms should be implemented for smaller organizations, such as the retention of complaints. These could then serve as an alternative source of data for the purpose of formulating positive action plans.

For those whom the SEB establishes a statutory duty to monitor, the legislation must also provide for occasions where monitoring is difficult to collect on covered groups. Specifically, if organizations are encountering difficulties in monitoring particular constituencies or have not been able to collect adequate data for certain groups,

[10] Hutson, N. et. al. (1996). "Employer Perspectives on Fair Employment in Northern Ireland". In J. McVey & N. Hutson (Eds.), *Public Views and Experiences of Fair Employment and Equality Issues in Northern Ireland.* Belfast: SACHR.

they should be required to justify to the equality body some alternative means of collecting the monitoring data. At this juncture, the equality body should be empowered to suggest and grant permission for the use of alternative monitoring procedures. These could include getting feedback directly from the covered groups themselves (focus groups, advisory committees or the use of independent auditors)**.** It is here, again, that thorough treatment of monitoring procedures in the Codes of Practice becomes important.

3. Fully utilizing the potential of monitoring

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

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

- Codes of Practice accompanying the legislation should clearly delineate the substance to be covered by all reviews and require a written report of the findings and conclusions drawn from the triennial review.
- The equality body should be required to acknowledge all submitted reviews. When reviews are inadequate, they should be obligated to provide specific feedback and suggestions on positive action measures. This system of timely acknowledgement will involve the equality body more closely in the strategic work central to a diagnostic approach to equality, allowing it to serve as a mechanism for fostering debate.
- Parties involved with the monitoring entities, such as trade unions, employees, and service recipients, should have the right to be consulted in such reviews, to see the review and comment on the review to the equality body.
- There should not be a defence of reasonable excuse for failing to complete a monitoring return or returning it beyond the proscribed time.
- The equality body should be empowered to impose sanctions for not registering and fulfilling the duty to monitor.

4. Effect on Employers

The burden created by monitoring is often alluded to in arguments against advancing positive action measures. Monitoring is an important method for the equality body's gathering of information and for facilitating employers' focus on the progress being made towards securing equality. SACHR illustrated how, for both sides, monitoring is a helpful and informative process. Too often, the debate around

positive measures emphasises the supposed burden on employers, rather than highlighting the gains experienced as a result of monitoring in terms efficiency, work force diversity, and increased employee retention.

V. C. Positive Action

1. Protection for positive action measures

Under present anti-discrimination law, direct discrimination is unlawful unless it falls within a specific legislative exemption. As we pointed out earlier, most evaluations of the significant pieces of anti-discrimination legislation call for more aggressive positive action measures. Clearly this is an opportunity to integrate these recommendations across the various categories. The Single Equality Bill should contain express provisions carving out a general exemption for positive action measures. Building on the Hepple Report's formulation, the clause protecting positive action should allow for positive measures intended to provide specific advantage for persons from a designated group in order to prevent or compensate for disadvantage in the covered areas. The Codes of Practice should provide examples of positive action measures. This open-ended protection is much preferable to a finite list, because it allows for the protection of a wide range of positive action strategies.

2. Scope and coverage of positive action measures

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

CAJ would particularly wish to see promoted positive inclusionary measures to be undertaken by equality-conscious organisations. Such measures, while not involving direct reliance upon an otherwise prohibited category to achieve equality of outcome, nevertheless are based upon a diagnosis of obstacles to representative participation and seek actively to reverse the effect of previous discriminatory regimes. An example from the existing fair employment regime is the protection for recruitment of the long-term unemployed, a measure justifiable in terms of employment policy but also having the effect of being more likely to bring about the

recruitment of Catholics than Protestants. CAJ and SACHR (and indeed the Patten Report) all approved of protection of recruitment policies based upon geographical criteria. Clearly under-representation, in a deeply segregated society, can be counteracted by 'post code' recruitment. Indeed, such a measure can be much more targeted than an arguably cruder direct reliance on religion, such as the quota on police recruitment which has been accepted as a permissible element of Northern Ireland equality policy. In both cases, such strategies require protection from indirect and possibly direct discrimination actions. In another context, employers and other organisations should be free to promote the inclusion of those who have had actively to reconcile working life and family or private life. Inevitably, a wider range of women with a greater spectrum of life skills would be included. Organisations, possibly in consultation with the Equality Commission, should be free to undertake such affirmative action programmes on the basis of a rigorous equality diagnosis. CAJ believes that these positive inclusionary measures are well within any limits of EU law and can be applied across all of the equality categories.

3. Statutory Duty to Promote Equality

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

4. Enforcement

Where a monitoring report indicates clear disadvantage, the Single Equality Bill should first presume and encourage voluntary compliance, including the formulation and implementation of positive action plans to address the particular equality concerns. It should be recognized, however, that certain organizations or sectors may be resistant to equality measures, so a series of enforcement mechanism must back up any positive statutory duty. The first level of enforcement should take the form of enforced self-regulation. This would require the organization, business, or body to formulate a positive action plan when equality concerns are identified and being held accountable for this process by the equality body. This process must be supported by statutory Codes of Practice and practical recommendations. Thereby, the formulation of remedies and the proactive promotion of equality specifically for and within the context at which they are aimed is encouraged.

If the equality body determines a plan is inadequate for addressing the specific equality concerns, it should be permitted to issue specific recommendations and

have effective sanctions at its disposal when recommendations are not complied with. Hepple suggests an enforcement structure resembling an enforcement pyramid, based on voluntary compliance and then building towards stronger sanctions.

V. D. Contract Compliance

According to the document issued by OFMDFM Contract Compliance is not addressed in this consultation and the Department of Finance and Personnel which is currently taking forward a review of public procurement will be consulting on this review in due course. We anticipate that OFMDFM will be liaising with the DFP in relation to how the outcome of the proposed consultation can be integrated into the Single Equality Bill. We will no doubt be responding to this review, however given the importance of contract compliance in relation to furthering equality, we would like to highlight a number of previous recommendations in relation to this issue.

It is worth remembering that in their review of employment equality for example, the Standing Advisory Commission on Human Rights, (SACHR), considered that, when awarding public contracts and grants, Government and public bodies exercise considerable economic power. SACHR concluded that this power could be better used to secure 'fair participation' in employment. SACHR for example recommended that the 1989 Fair Employment Act be amended to broaden the scope of contract compliance, linking access to contracts and grants to the promotion of affirmative action and fair participation measures by employers, and made a number of specific recommendations. The SACHR report also recommended substantial changes in the sanctions provisions of the 1989 legislation relating to Government contracts and grants.

Among the specific recommendations from SACHR was the proposal that:

> The 1989 Act should be amended to broaden the scope for contract compliance. This should be linked to the promotion of affirmative action measures to facilitate the recruitment of long-term unemployed people (para. 2.35).

SACHR also argued that the rigid interpretation of the EU public procurement directives in the UK Public Supply Contracts Regulations 1995 should be loosened to allow this to happen. While acknowledging that there was a risk that these recommendations might have the effect of displacing other job seekers, the SACHR argued that this risk was outweighed by the need to tip the scales in favour of people who have been out of work for a long time.

Specifically SACHR recommended that within public contracts, targets should be set for the recruitment of long-term unemployed people, based on increasing the proportion of such people who obtain work with the employer who wins the contract. This recommendation was of course restricted to contracts over £100'000. Furthermore,

SACHR acknowledged that while recruitment could not be restricted to local long-term unemployed people because of the EU public procurement directive, targets could be based on factors such as:

- The proportion of long-term unemployed residing near where the contract work was to take place

- The catchment areas associated with the occupations involved

- Restraints on likely labour flows

It is also worth noting that in investigating the impact of competitive tendering on women the EOC made the following findings from the 20 contracts they examined:

- There was differential impact on women and men's weekly wages, with 87% of women and 67% of men receiving lower weekly wages after competitive tendering.

- Contracting out resulted in differential impact on women and men as there was a 37% female job loss compared with a 2% male gain.

- Hourly wage rates were decreased on a number of job titles in private contracts. Women were more likely than men to be employed in those titles where there were decreases. Only 10% of women compared with 21% of men were employed on jobs in private companies where there were hourly wage increases.

- Women's working hours were reduced by 11%, a much greater percentage than men's at 5%.

Recommendations from the EOC included:

- Those responsible for implementing the competitive tendering policy should conduct a gender analysis of the total existing workforce, including those to be subject to market testing. Issues such as pay, hours of work, terms and conditions of employment, benefits and pension arrangements should be considered in this analysis.

- An estimate should be made of the likely effect of market testing and/or contracting out on the above features of the existing workforce. Any adverse effect of a policy decision on equality of opportunity or treatment for women and men should be identified and justified in a clear and explicit statement, which should also demonstrate that other approaches which would have had a lesser effect on equality between the sexes were considered, and why there were rejected.

Other recommendations from the EOC included that Boards and Trusts responsible for the provision of services should seek details of unlawful sex discrimination against the contractor or its agents by any court or Industrial Tribunal in the last five years. In the event of such findings having been made, explanations from contractors on any such findings and details of specific steps taken by the contractor in consequence of findings to prevent the repetition of unlawful sex discrimination should be provided. Before putting contracts out to tender, Boards and Trusts should make provision for the development of professional job descriptions/specifications in order to ensure that work generally done by women and work generally done by men is treated equally.

Clearly it is imperative that in relation to the SEB, OFMDFM examine the extent to which all the recommendations outlined above in the various reports have been implemented. Where the recommendations have not been implemented, the SEB should ensure that this is rectified. Furthermore, the measures above should apply to all section 75 categories. Clearly findings of unlawful discrimination could well have been made on grounds of politics, religion or race. It will also be important that additional categories covered by the SEB are also included fully in relation to general contract compliance provisions.

We also believe that it is worth revisiting the recent report of the NI Affairs Committee, which recommended that the Government look again at the potential contribution of contract compliance to achieving fair employment objectives. The Committee argued that the present limited provisions could, and should, be developed into a more effective mechanism for helping to deliver fair employment policy objectives (Para. 101). They went on to state:

> 'We note that Government and public bodies award public contracts on behalf of the communities that they serve. It is not therefore, in our view, unreasonable that these communities might expect that public contracts should, all other things being equal, go to contractors who further such a basic policy aim as fair employment. We do not consider the award of public contracts as simply an economic activity by the Administration, in which the Administration can consider itself as equivalent to a private sector organisation' (Para. 103).
>
> 'We find it difficult to see how public purchasing activity can in principle be regarded as a separate area of state activity in which equality criteria are ignored that are considered self-evident in other areas of state activity, such as public sector employment' (Para. 104).

Again, we would stress the point above in relation to the awarding of public contracts on grants on behalf of the communities that are served by Government and public bodies. Clearly, such communities will contain people of different gender, race, sexual orientation etc as well as people of different religious

belief/political opinion. We agree with the NI Affairs Committee that such communities might expect that contracts should go to contractors who are furthering equality. It is imperative that the SEB reflect this fact.

V. E. The Burden on Employers

It is necessary to confront the often-voiced fear that too many legislative measures in regards to positive action will hamper business development. CAJ realizes voluntary compliance must serve as the bedrock of any equality framework that seeks to sustain the active promotion of equality within society. However, voluntary measures and statutory measures should be seen as complementary strategies – part of a larger system aimed at creating the institutional conditions necessary to support the self-development and self-determination of all members of society.

SACHR's thorough research into employers' perspectives on fair employment legislation is very helpful when considering the effect of positive action measures on employers. When asked by SACHR about the costs and benefits of implementing the fair employment legislation, "employers generally indicated increased harmony in the workplace, the positive results of good recruitment and selection practices, and the improved perception of their organization in fair employment terms as a major benefit."[11] Only 6.3% of employers indicated the legislation had affected their competitiveness.

The assumptions often made about the incapability of positive action measures and economic development drastically underestimates business's ability to adapt and transform its organizational structure and culture. Markedly, SACHR found, "...in spite of the extra costs, employers view their role in achieving a climate of fair employment very positively, often enthusiastically."[12] Such research indicates it is long-past time to leave behind the rhetoric of burdening employers and businesses with positive measures, talk which only serves to sidetrack and stall further refining of measures from which employers are already benefiting. The Single Equality Bill should instead focus attention on how best to frame equality measures so the private and government sectors can reap even greater productivity and efficiency gains. This will involve

- Focusing on smaller employers and businesses, whom SACHR found had not benefited as much from existing monitoring and positive action measures.
- Determining how best to effectively increase the equality body's role in facilitating positive action and monitoring. For example, this may involve expanding the equality body's expertise and knowledge of the intricacies of business and industry and ensuring they have adequate resources to fulfill their important role in the equality framework.
- Increasing funding and grants available to organizations to help off-set the initial costs of implementing the legislation.

[11] Hutson, N. et. al. (1996). "Employer Perspectives on Fair Employment in Northern Ireland". In J. McVey & N. Hutson (Eds.), Public Views and Experiences of Fair Employment and Equality Issues in Northern Ireland. Belfast: SACHR.
[12] Id.

VI. Structures

As with other areas addressed in this consultation, the Single Equality Bill will require a complete reassessment of the structures and enforcement bodies currently created by anti-discrimination and equality legislation. Northern Ireland has already harmonized much of its Commission functions under the Equality Commission Northern Ireland (ECNI). Given this development, CAJ recommends that this area be examined carefully and analyzed thoroughly so that all protected categories are adequately safeguarded and promoted within the new equality regime.

VI. A. Body for the Promotion of Equality

1. **A Single Commission**

CAJ expressed some reservations initially about the amalgamation of the existing Commissions into a single Equality Commission when the proposal appeared in the White Paper 'Partnership for Equality'. Not least this is because of the fact that the Commission's were effectively being harmonized while the various pieces of legislation covering the different categories remained disparate. Clearly, the creation of the Equality Commission has proceeded ahead of harmonizing legislation, however we now have an opportunity, with the SEB to examine how structures can most effectively deliver equality for the various groups covered by the proposed legislation.

Although CAJ accepts that the formation of a Single Equality Commission should eventually be the goal, the initial phases of the new Single Equality Commission should, we believe, include intermediate directorates. These directorates should be devoted specifically to the new categories covered by the SEB. This would allow newer areas of anti-discrimination and equality law to become more fully developed. The newer covered groups would have a chance to formulate their own unique concerns before their eventual merger within the Single Equality Commission. Throughout these considerations of further institutional changes, it must be emphasized that the equality regime is there to protect the most vulnerable members of society who are highly unlikely to be in a position to protect themselves.

2. **Powers**

In order for a single equality body of this size to function efficiently, careful consideration must be given to its organizational structure, while availability of adequate funding becomes vital. As an organ charged with promoting societal and organizational change, in addition to helping individuals protect their rights and seek redress, the basic functions the Single Equality Commission should include:

- A statutory role in monitoring, assessing, and reporting on equality issues.
- The power to receive and investigate complaints.
- The power to initiate independent investigation of their own accord.

- Providing advice and assistance on anti-discrimination and equality issues to individuals and the private and public sectors.
- A statutory duty to keep equality legislation under review.
- The power to prepare and revise the SEB's Codes of Practice, which any tribunal or court hearing a relevant proceeding should be obliged to take into account.
- The right to become involved in any relevant proceeding, subject to the agreement or at the request of the court or tribunal. As either an intervenor or amicus curiae, the equality body should be allowed to share its expertise where litigation may have a substantial impact.
- The power to pursue litigation on behalf of the equality body or in support of individuals.
- The power to enforce compliance, including compliance with positive duties by private actors or public authorities – this should include serving notice and then having recourse to a tribunal if the notice is not complied with on any matter.

VI. B. Tribunals and the Courts

1. An Equality Tribunal

CAJ recommends the development of a system of anti-discrimination or equality tribunals along the lines of the Industrial Tribunal, which currently hears employment cases related to sex, race and disability discrimination. Drawing on the experience of the Industrial Tribunal and the Fair Employment Tribunal, this reform system of tribunals should combine these tribunals into an equality tribunal system. The equality tribunal, which may perhaps require fair employment and goods, facilities and service divisions, would aid in harmonizing procedures across the areas of anti-discrimination law.

A harmonized equality tribunal system is essential for the effective adjudication of claims by those who face multiple discrimination. For example, where a Catholic woman feels she has been disadvantaged on the grounds of gender and religious belief/political opinion, she would be able to have her particular claims adjudicated within the same tribunal using one set of procedures. This not only simplifies the process for all involved but also discourages the compartmentalization of identity that can so often be fostered by discrimination proceedings.

Finally, in terms of anti-discrimination and equality claims, there is a concern for the amount of familiarity and expertise possessed by the body adjudicating these cases. A system of equality tribunals would facilitate the accumulation of experience and expertise on the part of the adjudicating bodies. Continuing with separate tribunals or unharmonized procedures runs counter to the spirit of a single equality framework.

2. Adjudicating goods, facilities and services cases

Discrimination cases related to goods, facilities and services should also be heard within the new tribunal structure. Currently, county courts hear discrimination cases related to the provision of goods, facilities and services. The costs, formality and complicated nature of county court procedures serve as a barrier to bringing these types of cases. Claimants must pay their own fees and face costs if they are unsuccessful, while county court judges have little experience and training in equality and anti-discrimination issues.

The Hepple Report voiced the important reminder that many types of discrimination cases raise common themes and share similar sensitivities. In this sense, employment and non-employment discrimination cases share much more in common than goods, facilities, and services discrimination cases share with the other cases within the jurisdiction of the county courts. Moreover, as anti-discrimination legislation is simplified and made more understandable, there is likely to be an increase in number of cases brought, without the matching increase in the county courts' capacities to handle the increased caseload. The new tribunal system will be much better prepared to meet this increased demand with the requisite sensitivity and expertise.

3. Codes of Practice

The Codes of Practice accompanying the Single Equality Bill will be essential to explaining and detailing the practical applications and nuances of the legislation. To ensure effective adjudication of proceedings under the legislation, any tribunal or court hearing anti-discrimination proceedings should have a duty to take into account the Codes of Practice accompanying the legislation.

VI. C. Alternative Dispute Resolution Mechanisms

1. Preliminary Complaint, Conciliation and Investigation Structure

While CAJ believes that litigation is at the heart of ensuring that the rights contained in equality legislation are delivered in practice we also believe that the Single Equality Bill should create structures which directly address the current problems with the tribunal system's accessibility. Therefore, the equality tribunal structure should be supplemented by a preliminary complaint, conciliation and investigation structure.

One option would be setting up an equality investigations body, which could function as the first stop for those with complaints of discrimination. If this structure were to provide for simple, low cost or free complaint filing, a significant barrier to seeking redress could be removed. There is also the option of giving this investigation body the power to encourage mediation, undertake investigation, and issue redress when

discrimination is found. If such a structure is included in the SEB, the right to a court appeal of any decision must be provided for. These alternative dispute resolution mechanisms would make the claims and investigation structure more accessible, facilitate timely investigation and resolution of complaints, conserve resources, and alleviate the workload of the equality body. An interesting model to consider for the purposes of the Single Equality Bill would be the Office of the Director of Equality Investigations set up in the Republic of Ireland.

Pursuing a claim using this administrative alternative should in no way, however, mean relinquishing the right to pursue litigation. The EU Directives require Member States to provide the right to a "judicial and/or administrative remedy." As discussed in more detail below (Section VI(1)), mechanisms focused on increasing the efficiency and cost effectiveness of procedures cannot be allowed to eclipse a person's right to fair and impartial adjudication of their claims.

2. Mediation and Conciliation Procedures

Mediation and conciliation procedures are an increasingly discussed alternative for resolving discrimination complaints. This is in part due to the expensive and drawn-out nature of tribunal and court proceedings. Such an approach has proved attractive to both complainants and to parties facing allegations of discrimination. While CAJ agrees that mediation and conciliation procedures are a viable means of addressing equality concerns, the place of these procedures in the single equality framework must be clearly articulated so as to protect the defence of rights of all involved.

CAJ's main concerns are two-fold. First, although conciliation procedures are less costly, the process itself is often difficult and stressful. Second, mediation and conciliation structures tend to perpetuate, and can even magnify, the relative power imbalances and relations of inequality between the two parties. There may be some situations (eg harassment cases) within which alternative dispute resolution measures could extend to arbitration processes. However CAJ is not in favour of complex equality cases being dealt with by what is called an arbitration process but what is in reality an attempt to save on the costs of a proper adjudicated process. In view of this, any provision for alternative dispute resolution mechanisms should include:

- Mediation or conciliation procedures initiated when requested by both parties of a complaint.
- If mediation or conciliation is encouraged because the equality body or investigation body feels there is likelihood of resolution, entering into these proceedings should be seen neither as agreeing to binding arbitration nor forfeiting the right to initiate tribunal or court proceedings.
- The details of mediation or conciliation proceedings should remain confidential and be barred from presentation to a tribunal or court as evidence.

VI. D. The Role of NGO's

The consultation document does not address the role NGO's will play in the new equality structures. NGO's have been and continue to be vital in catalyzing, developing and articulating the equality and rights agenda in Northern Ireland. EU law, including both the Race and Framework Directive, protect NGOs' roles in bringing impact litigation and participating in social dialogue and consultation. In total, there are four key areas where provisions related to NGOs are imperative.

1. **Legal Standing and Representative Claims** – The Race Directive makes clear that legal standing must extend beyond simply allowing an equality body the right to bring litigation on behalf of injured parties. The SEB should provide legal standing for all relevant organizations for the purposes of bringing litigation both on behalf of complainants and in their own name. More detailed specifications as to which organizations have a legitimate interest in legal standing can be further clarified within the Codes of Practice. Such a provision would allow for a more proactive approach in addressing equality issues through litigation. CAJ believes it is imperative that there is full recognition of the burden bringing discrimination litigation often has on individuals, particularly given that the individuals concerned are least likely to be in a position to be able to bring cases themselves.

2. **Legal Persons** – Accompanying the above provision on legal standing, the SEB should also ensure its provisions apply both to individuals and legal persons/organizations. The Race Directive extends coverage to legal entities. This provision should be incorporated into the Single Equality Bill. NGOs who represent disadvantaged constituencies can often find themselves the objects of discriminatory practices, and should enjoy the same protection extended by the legislation towards individuals. By expressly providing protection for legal persons and allowing NGO

3. s to bring litigation in their own names, the SEB will provide for an important mechanism in fighting institutionalized discrimination. It will also extend adequate legal recourse to a key sector within the equality framework.

4. **Social Dialogue and Consultation** – The Race and Framework Directives include provisions for promoting social dialogue or consultation with NGOs. If the equality framework set up by the SEB is to result in perceivable movement towards the consistent promotion of equality, then NGOs should play a vital role in the process. This should extend from an expressly defined role in the equality body to a clearly articulated role in the formulation of monitoring and equality promotion strategies.

5. **Resources for NGO participation in the equality framework** – NGOs representing those who have been disadvantaged by institutional structures often

struggle for funding to meet the needs of their constituencies. Participating in the equality framework is of utmost importance to many organizations, but it acts as a further drain on already over-extended staff and resources. A commitment to equality by the government of Northern Ireland must include recognizing the duty it has to provide adequate resources and support for the NGOs who contribute their knowledge and expertise in this area. A Single Equality Bill that overtaxes or exploits organizations serving disadvantaged groups or NGOs that work for the advancement of equality neither addresses disadvantage nor furthers this society's progress towards greater equality for all.

VII. Investigation, Remedies and Enforcement

VII. A. Defence of Rights

In the consultation document OFMDFM does not specifically address the defence of rights. Both the Race Directive and the Framework Directive require the guarantee of access to a "judicial and/or administrative remedy" for victims of discrimination. The reference to "administrative remedy" is directed towards Member States using specific agencies to adjudicate complaints. Although conciliation procedures are allowed under the Directives, these types of dispute resolution mechanisms cannot be the only avenue of redress available. The Single Equality Bill should overtly provide those with discrimination claims with the guarantee of access to a judicial remedy. It should also avoid embedding any form of mandatory arbitration system in the Single Equality Bill.

VII. B. Assistance with Legal Costs

Accompanying the right to a judicial remedy must be provisions for assistance with legal costs. There are currently no legal aid provisions for cases brought before the Fair Employment Tribunal or the Industrial Tribunal. The EOC (NI) identified the unavailability of legal aid for proceedings in front of the tribunal as a probable denial of legal process as required by European equality law. Given the complexity of discrimination law, SACHR had concluded it is completely unrealistic to expect parties to appear without legal representation. Therefore, CAJ advises incorporating the recommendations of bodies like SACHR, FEC, EOC, and the CRE into the Single Equality Bill by making free legal aid available for proceedings brought under the bill.

VII. C. Formal Investigation

As addressed above in the section on a "Preliminary Complaint, Conciliation and Investigation Structure" (Section VI(C)(1)), CAJ stresses the importance of alternative investigation mechanisms in addition to the formal system already in place. Modifications of the current investigation structure should include:

- The equality and investigation bodies should be empowered to make a finding of discrimination based on their investigations.

- The reasonable belief requirement, which requires a reasonable belief that discrimination is occurring before investigation can commence, should be dispensed with. There is no reasonable belief requirement under FETO and this should be harmonized for investigations across all covered categories.
- The equality body should be empowered to initiate investigations for any purpose connected with carrying out their duties.

VII. D. Time Limits

For much of the current anti-discrimination legislation, the time limit for making a claim is three months from the date of the discriminatory act. Although tribunals may extend this period, Hepple mentions how this discretion is rarely exercised. Because initiating a complaint about discrimination is often an agonizing and complicated decision, the time limits for filing a complaint should be extended to six months from the occurrence of the discriminatory act. This length of time still encourages prompt filing of the complaint, while respecting the difficulties of those making complaints of discrimination. The time limit for discrimination claims should be harmonized across all of the covered grounds.

VII. E. Codes of Practice

As stressed throughout our response, the Codes of Practice accompanying the Single Equality Bill will be indispensable in articulating the details and practical applications of the legislation. The Codes of Practice should be set out using lists of examples and understandable language. In their survey of employers on fair employment legislation, SACHR found that 90% of the employers indicated their use of the FEC Code of Practice.

CAJ feels it is crucial that these Codes of Practice be a matter for consultation within the covered constituencies and social partners, especially where harmonization across the covered sectors presents obstacles which must be worked out in the Codes of Practice. Indeed, with the passage of Section 75, we presume that such consultation will become obligatory. Furthermore, as suggested by SACHR, any tribunal or court hearing a relevant proceeding should be required to take the Codes of Practice into account.

VII. F. Enforcement

As detailed more specifically under the section on “Body for the Promotion of Equality” (Section VI(A)), there must be adequate enforcement and sanctioning mechanisms available to the equality body and investigation body. This will involve an increase in the current sanctioning mechanisms available. For example, the equality body should have the power to issue notices once an investigation finds an unlawful act has been committed. The scope of this notice should extend beyond the unlawful acts covered by the investigation, so enforceable directions to promote equality can be issued in addition to notices on discrimination.

VII. G. Remedies

CAJ recommends a complete reassessment of the remedies available under current anti-discrimination and equality legislation. Both EU Directives allow for a broad set of remedies, while the European Court has concluded that remedies for anti-discrimination must have a real deterrent effect. That is, remedies should not only provide redress for the immediate claim, but also include provisions for effective deterrence and prevention of discriminatory practices in the future.

The Single Equality Bill should provide for a broad range of practical and flexible remedies ranging from retrospective remedies, such as financial compensation, to prospective remedies, such as injunctions and mandatory reviews of equality policies. In addition, as suggested by the EOC (NI), tribunals decisions should be treated as binding precedent. This would allow other employers to benefit from tribunal decisions while facilitating the adjudication of similar anti-discrimination claims. The expansion of remedy provisions will bring the powers of the tribunals, courts and equality bodies under the Single Equality Bill in line with European standards.

Appendix One

Consultation Questionnaire References

CAJ's response addresses each major area of OFMDFM's consultation, which presents many complex issues not adequately addressed by the format of the questionnaire. However, for ease in the consultation process, we include the reference list below, which links key topics from the questionnaire with CAJ's response.

Consultation Questionnaire	Specific Responses/ Corresponding Sections in CAJ's Response
1.1-1.5	See Scope; Goods, Facilities and Services (Section II (B))
1.6- 1.10	The SEB should prohibit discrimination on the grounds of gender reassignment in all covered areas, including GFS. The European Court has ruled under the Equal Treatment Directive that the scope of the Directive was not confined to discrimination on the grounds that a person was one sex or another. The SEB should clearly define gender as including gender reassignment and also include a wider concept of 'gender identity'.
1.11-1.13	See Scope; Coverage; Categories (Section II (C)(1))
1.14	See Scope; Coverage; Categories (Section II (C)(1))
1.15-1.16	See Scope; Coverage; Other Status (Section II (C)(3))
1.17- 1.20	See Scope; Coverage; Other Status (Section II (C)(3))
1.21-1.22	See Scope; Coverage; Coverage of Public Sector Functions (Section II (C)(4))
1.23-1.24	See Scope; Coverage; Coverage of Public Sector Functions (Section II (C)(4))
2.1-2.4	See Exemptions (Section II); Also See Exemptions; Employment Exemptions; Genuine Occupational Qualifications (Section II (A)(1))
2.5-2.7	See Exemptions; Employment Exemptions; Framework Directive's Provisions on Northern Ireland (Section III (A) (2))
2.8-2.9	See Exemptions; GFS Exemptions (Section II (B))

2.10-2.31	See Exemptions; (Section III)
3.1-3.5	See Definitions; Direct Discrimination (Section IV (A))
3.6-3.11	See Definitions; Indirect Discrimination (Section IV (B))
3.12-3.21	See Definitions; Victimization (Section IV (D))
3.22-3.26	See Definitions; Harassment (Section IV(E))
3.27-3.28	See Definitions; Advertising (Section IV(F))
3.29	See Definitions; Incitement to Discriminate (Section IV (G))
4.1	See Addressing Under-representation; Monitoring; Scope and Coverage (Section V (B)(1))
4.2-4.10	See Addressing Under-representation; Monitoring; Scope and Coverage (Section V (B)(1 - 4))
4.11-4.21	See Addressing Under-representation; Monitoring; A statutory duty to monitor (Section V (B)(2-3))
4.22-4.31	See Positive Action (Section V)
5.1-5.15	See Structures; Body for the Promotion of Equality; A Single Commission (Section VI (A)(1))
5.16-5.19	See Structures; Alternative Dispute Resolution Mechanisms (Section VI (C))
6.1-6.3	See Structures; Body for the Promotion of Equality; Powers (Section VI (A)(2))
6.4-6.11	See Structures; Body for the Promotion of Equality; A Single Commission (Section VI (A)(1)); Also See Structures; Alternative Dispute Resolution Mechanisms; Preliminary Complaint, Conciliation and Investigation Structure (Section VI (C)(1))
6.12-6.14	See Investigations, Remedies and Enforcement; Codes of Practice (Section VII (E)); Also See Structures; Tribunals and Courts; Codes of Practice (Section VI (B)(3))

6.15-6.18	See Structures; Body for the Promotion of Equality; A Single Commission (Section VI (A)(1)); Also See Structures; Alternative Dispute Resolution Mechanisms; Preliminary Complaint, Conciliation and Investigation Structure (Section VI (C)(1))
6.18-6.24	See Investigations, Remedies and Enforcement; Time Limits (Section VII (D))
6.25-6.26	See Investigations, Remedies and Enforcement; Remedies (Section VII (G))
6.27-6.32	See Structures; The Role of NGO's; Legal Standing and Representative Claims (Section VI (D)(1))
6.33-6.34	See Addressing Under-representation; Burden on Employers (Section V(D)); See also Structures; Body for the Promotion of Equality; Powers (Section VI (A)(2)) and Addressing Under-representation; Monitoring; A Statutory Duty to Monitor (Section V(B)(2))