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Out of the “Troubles” and into Rights: Protection For Gays, Lesbians, and Bisexuals in Northern Ireland Through Equality Legislation in the Belfast Agreement

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Out of the “Troubles” and into Rights: Protection For Gays, Lesbians, and Bisexuals in Northern Ireland Through Equality Legislation in the Belfast Agreement

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Abstract

Part I of this Note explores the history of LGB rights in Northern Ireland, focusing on the development of domestic equality legislation stemming from the recent peace process. Part II examines the statutory framework of this legislation, concentrating on what protections and rights it provides for sexual minorities in Northern Ireland. Part II also looks at a recent European Directive prohibiting discrimination against LGB persons in employment. Part III argues that for truly effective change to occur, LGB individuals need both policy-based and rights-based legislation encompassing the human rights principles of equality and non-discrimination. Part III further argues that the political divisions in the region ultimately hinder the drafting, passing, and effectiveness of such legislation.

NOTE

OUT OF THE "TROUBLES" AND INTO RIGHTS: PROTECTION FOR GAYS, LESBIANS, AND BISEXUALS IN NORTHERN IRELAND THROUGH EQUALITY LEGISLATION IN THE BELFAST AGREEMENT*

McKenzie A. Livingston **

INTRODUCTION

Northern Ireland is a province known more for its years of political and religious conflict, commonly referred to as the Troubles,¹ than for a gay and lesbian rights movement.² Yet, or-

* This Note does not address Northern Ireland's treatment of transgender individuals, since being "trans" deals with gender identity rather than sexual orientation. This principle was established by the European Court of Justice in *P v. S and Cornwall County Council*, Case C-13/94 (1996), where the Court held the dismissal of an individual following gender reassignment was unlawful discrimination on the grounds of sex. Thus, the proper analysis for addressing transgender rights and equality is through the lens of gender, and not sexual orientation.

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1. For an in-depth, detailed discussion of the conflict in Northern Ireland, see J. BOWYER BELL, *THE IRISH TROUBLES: A GENERATION OF VIOLENCE 1967-1992* (1993). For a brief synopsis of the troubles, see Cara Hirsch, Comment, *Policing Undercover Agents in the United Kingdom: Whether the Regulation of Investigatory Powers Act Complies with Regional Human Rights Obligations*, 25 *FORDHAM INT'L L.J.* 1282, 1288-95 (2002). See also Jane Winter & Natasha Parassram Concepcion, *Current Human Rights Concerns Arising from the Conflict and Peace Process in Northern Ireland*, 9 *HUM. RTS. BR.* 6, 6 (2002) (defining "Troubles" as series of political upheavals from late 1960s through 1990s relating to territorial dispute expressed along religious lines). The Troubles have resulted in the deaths of 3,500 people and injuries to at least 40,000. *Id.*

2. See *THE THIRD PINK BOOK: A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION* 54 (Aart Hendriks et al. eds., 1993) [hereinafter *THIRD PINK BOOK*] (quoting Roger E. Biery who describes lesbian and gay rights movement as struggle to achieve equality, freeing lesbian and gay people from oppressive standards of homophobic culture); see also Philip Britton, *The Rainbow Flag, European and English Law: New Developments on Sexuality and Equality*, 8 *IND. INT'L & COMP. L. REV.* 261, 272 (1998) (observing that goal of gays and lesbians is legal equality across board because it covers government, treatment by employers, provision of services, criminal law, as well as familial issues); Suzanne Breen, *Gay Curate's Story Not All That It Seems*, *IRISH TIMES*,

ganizations have been socially and politically active on behalf of gays and lesbians in Northern Ireland since the early 1970s.³ Until recently, however, this activism was quite minimal for two reasons. First, is what many commentators regard as an intolerant attitude towards sexual minorities in Northern Ireland.⁴ This alleged intolerance manifests itself in many forms — physical violence,⁵ verbal abuse⁶ and discrimination in many areas of

Jan. 31, 2003, at 16 (asserting that it will take time for Northern Ireland to become better known for its tolerance of sexual diversity than for its bombs and bullets).

3. See Belfast Gay Liberation Society, Collective Report on the Attitude of the Student's Representative Council to the Gay Liberation Society in the Queen's University of Belfast 3, June 5, 1974 [hereinafter Belfast Gay Liberation Report] (on file with author and Northern Ireland Gay Rights Association ("NIGRA") Archive, located at Public Records Office of Northern Ireland) [hereinafter NIGRA Archive] (describing formation in 1971 of committee of gay students in Queen's University, Belfast to look at situation of gays at Queen's). This eventually led to the creation of the Gay Liberation Society — the first gay group in Ireland — at Queen's University. *Id.* There was also the formation of Cara — an information and befriending telephone service formed to meet the needs of socially and geographically isolated gays in Ireland — in April 1974. *Id.* at 6-8. See also 1974 Committee for Homosexual Law Reform in Northern Ireland, *First Annual Report* (n.d.) (on file with author and NIGRA Archive) (detailing establishment of 1974 Committee for Homosexual Law Reform and its mission of organizing support and campaigning to extend social and moral law reform occurring in England and Wales to Northern Ireland).

4. See NEIL JARMAN & ALEX TENNANT, INSTITUTE FOR CONFLICT RESEARCH, AN ACCEPTABLE PREJUDICE? HOMOPHOBIC VIOLENCE AND HARASSMENT IN NORTHERN IRELAND 5 (2003) [hereinafter AN ACCEPTABLE PREJUDICE?] (describing homophobic harassment and discrimination as normal and justified by many in Northern Ireland). Commentators refer to homophobia in Northern Ireland as the last acceptable prejudice. *Id.* See also Britton, *supra* note 2, at 261 (describing how, until recently, United Kingdom had one of worst records concerning treatment of sexual minorities within Europe because it offered no legal protections from discrimination and homophobia, both of which were rooted in its legal system); THIRD PINK BOOK, *supra* note 2, at 285 (observing that 1992 European study found that 48% of Northern Irish object to having homosexuals as neighbors, second-highest figure in Western Europe); Vincent Quinn, *On the Borders of Allegiance: Identity Politics in Ulster* in DE-CENTERING SEXUALITIES: POLITICS AND REPRESENTATIONS BEYOND THE METROPOLIS 260-63 (Richard Phillips, et al. eds., 2000) (noting sexuality is highly regulated in Northern Ireland and gays and lesbians have been persistently targeted by Nationalist and Unionist extremists, as well as by Northern Ireland's legislature); Northern Ireland Office, Explanatory Document for a Proposal for a Draft Homosexual Offences (Northern Ireland) Order 1978, foreword (stating that Northern Irish government has always recognized that homosexuality is issue about which some people in Northern Ireland hold strong conscientious or religious opinions); see generally Marie Foy, *Report Calls for Ulster Gay Rights Reforms*, BELFAST TELEGRAPH, Aug. 24, 2001 (reporting that Social Services Inspectorate found social intolerance to gay and bisexual men in Northern Ireland startling in its raw viciousness and ignorance).

5. See AN ACCEPTABLE PREJUDICE?, *supra* note 4, at 7-10 (finding that most common forms of homophobic physical violence experienced are being targeted by missiles (35%), subject to assault (30%) or attempted assault (29%), and being spat at (18%).

life, such as employment and in family matters⁷ — creating an adverse environment, where a majority of sexual minorities find it difficult to be open about their sexuality.⁸ The second reason

In September and December 2002, two gay men were murdered in a gay cruising area. *Id.* See also E. Lester, *Gays in North Suffer Violence, Reveals Survey*, BELFAST TELEGRAPH, May 13, 1996, at 4 (reporting that 1996 survey found that 39% of gay and lesbian respondents in Northern Ireland claimed to have been violently attacked); *Focus On Attacks On Gay Community*, BBC NEWS ONLINE, Aug. 1, 2000, available at http://news.bbc.co.uk/1/hi/uk/northern_ireland/861138.stm (reporting increase in attacks on homosexuals, particularly in areas surrounding Belfast's gay venues); *Lesbians Face Discrimination in NI*, BBC NEWS ONLINE, Mar. 19, 2002, available at http://news.bbc.co.uk/1/hi/uk/northern_ireland/1880795.stm (stating how report on lesbians in Northern Ireland found that over 20% of women interviewed had been violently assaulted in public); Ciaran McGuigan, *Young Gays Face Threats*, BELFAST TELEGRAPH, Sept. 14, 2000 (reporting homophobic bullying of teenagers as widespread problem across Northern Ireland); Kathryn Torney, *Young Gay Men 'More Susceptible to Suicide'; Research Findings Revealed*, BELFAST TELEGRAPH, Dec. 15, 1999 (revealing that 1999 study found gay men were thirty times more likely to attempt suicide than their heterosexual counterparts).

6. See AN ACCEPTABLE PREJUDICE?, *supra* note 4, at 6 (claiming that verbal abuse, experienced by 71% of respondents, is most common form of harassment). Other forms of harassment include being followed on foot, subjected to graffiti, and receiving offensive phone calls. See also Lester, *supra* note 5, at 4 (reporting that same 1996 survey found two-thirds of respondents in Northern Ireland had been verbally abused, while one-third had been harassed).

7. See FEENAN ET AL., NORTHERN IRELAND HUMAN RIGHTS COMMISSION, ENHANCING THE RIGHTS OF LESBIAN, GAY, AND BISEXUAL PEOPLE IN NORTHERN IRELAND 4 (2001) [hereinafter NIHRC REPORT] (finding laws, policies, and practices in Northern Ireland discriminate extensively against gays, lesbians, and bisexuals in areas such as employment, education, criminal law, health care, housing, immigration, and family life); see also GEOFFREY ROBERTSON, QC, FREEDOM, THE INDIVIDUAL AND THE LAW 483 (7th ed. 1993) (stating that in United Kingdom discrimination on grounds of sexual orientation is widespread in both law and community); Todd R. Nicholis, *Mighty Silence Gives a Voice to Gay Women*, IRISH NEWS, Mar. 20, 2002, at 11 (reporting that study on gay and bisexual women in Northern Ireland revealed that they suffered discriminatory measures in various fields and were more likely than straight women to suffer prejudice at work); Stephen King, *The Cost of Daring to Be Different; "Legal Equality Is Being Denied to Gays and Lesbians at Every Turn"*, BELFAST TELEGRAPH, Oct. 15, 1999 (describing how in United Kingdom, of which Northern Ireland is part, it is not unlawful to fire, refuse to hire or harass someone at work because of their sexuality). Sexual minorities cannot benefit from public pension schemes or tenancy succession because homosexual relationships are not publicly recognized. *Id.*

8. See NIHRC REPORT, *supra* note 7, at 4 (describing how discrimination that sexual minorities face has harmful effect on their emotional, physical, social, economic rights, entitlements, needs and interests and causes fear of facing further discrimination if they are "out" about their sexuality); see also AN ACCEPTABLE PREJUDICE?, *supra* note 4, at 7 (describing how homophobic harassment generates wide range of emotions such as fear, anger, and depression, with only 27% of respondents feeling safe on street at night and 48% feeling unsafe in non-gay bar). This results in individuals adopting strategies, such as avoiding holding hands in public, appearing gay, lesbian, or bisexual, and leaving a gay venue alone, in order to avoid harassment. *Id.* The perceived widespread homophobia in Northern Ireland makes it tough for many individuals to be

that gay, lesbian, and bisexual activism has been impeded until only recently is Northern Ireland's preoccupation with its religious and political differences, causing scholars to observe that the only identity groups of national significance are based on religious belief or national identity and their subsequent political affiliation.⁹ The recent peace process, however, marks a new era of political and social discourse in Northern Ireland, which may offer guarantees of equality and protection of rights for lesbian, gay, and bisexual ("LGB") individuals and organizations.¹⁰

open about their sexual orientation and for those who are open, it can cause problems among friends, family, and co-workers. *Id.* at 11. See also 2001 Northern Ireland Life & Times Survey, at <http://www.ark.ac.uk> (showing that when asked about their sexuality, 1% claimed to be homosexual, 0% claimed to be bisexual, 95% claimed to be heterosexual, and 4% wished not to answer the question); Quinn, *supra* note 4, at 263 (describing having deviant sexual identity in Northern Ireland as dangerous); Eamonn McCann, *Stepping Out of the Closet Takes on a Special Form of Bravery in Ulster*, BELFAST TELEGRAPH, June 12, 1996 (mentioning how hatred of gay people is commonly and openly expressed in Northern Ireland to such degree that it would draw outrage if it were any other group and describing how many sexual minorities lead double lives, constantly in fear that their sexuality will be exposed).

9. See STANDING ADVISORY COMMISSION ON HUMAN RIGHTS, THE PROTECTION OF HUMAN RIGHTS BY LAW IN NORTHERN IRELAND 4, Cmnd. 7009 (1977) [hereinafter SACHR REPORT] (presenting Northern Ireland as place with two distinct communities). There is a Protestant community looking to Great Britain for its national identity, and thus Protestants are often called Unionists. *Id.* In contrast, the Catholic community looks to Ireland for its national identity, and Catholics are referred to as Nationalists. *Id.* See also Stephen Farry & Sean Neeson, *Beyond the "Band-Aid" Approach: An Alliance Party Perspective Upon the Belfast Agreement*, 22 FORDHAM INT'L L.J. 1221, 1223 (1999) (noting that Northern Ireland cannot be described as pluralist society because political — Unionist/Nationalist — cleavage dominates society and religion has very high correlation with politics). Crosscutting cleavages in Northern Ireland, such as class, ideology, gender, or simple differences of opinion on socio-economic issues, are of limited significance. *Id.* See also Stephen Livingstone, *The Northern Ireland Human Rights Commission*, 22 FORDHAM INT'L L.J. 1465, 1471 (1999) (noting that Standing Advisory Commission on Human Rights — Northern Ireland's first human rights body established in 1973 — had statutory mandate limited to consideration of discrimination on religious and political grounds only); AN ACCEPTABLE PREJUDICE?, *supra* note 4, at 67 (noting that little publicity is given to homophobic harassment, citing 2002 government report on aggravated assaults, which only mentioned racist and sectarian violence, and did not include homophobic violence in its analysis); Quinn, *supra* note 4, at 261-63 (arguing that "coming out" in Northern Ireland entails bargaining process which casts light on sectarianism). Homosexual identity, in theory, represents an evasion of traditional sectarian divisions that neither Nationalists nor Unionists are likely to accept. *Id.* See also Committee on the Administration of Justice ("CAJ"), *A Single Equality Bill for Northern Ireland* 3 (Aug. 2001) (on file with author) [hereinafter CAJ SEB Submission] (claiming that conflict in Northern Ireland has concealed other just as harmful forms of discrimination, resulting in many groups suffering greater marginalization than they would have had Northern Ireland been "normal" society).

10. See Paul Connolly, *Landmarks on the Rocky Road to Deal*, BELFAST TELEGRAPH,

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I. A MOVEMENT BEGINS

The LGB rights movement in Northern Ireland began with the civil rights movement of the late 1960s, which many commentators mark as the beginning of the Troubles.¹¹ The conflict at the root of the Troubles began when the United Kingdom

Apr. 10, 1998 (asserting, in reference to peace process, that Northern Ireland stands on brink of epoch-making agreement); *see also* *The Peace Deal: Ahern "We have seized the initiative from the men of violence"*, GUARDIAN (U.K.), Apr. 11, 1998 (quoting Irish Prime Minister, Bertie Ahern, referring to Belfast Agreement as "historic" and marking new beginning for all in Northern Ireland, Ireland, and rest of United Kingdom); *We'll Push for Peace and Be Tough on Terror*, BELFAST TELEGRAPH, May 28, 1998 (claiming that Belfast Agreement presents Northern Ireland with best chance to achieve peace, political stability and prosperity, marking major step towards making vision of better future reality); AN ACCEPTABLE PREJUDICE?, *supra* note 4, at 9 (citing recent dramatic changes within lesbian, gay, bisexual ("LGB") population, predominantly during peace process, making it more visible and creating greater sense of community).

11. *See* DERMOT P.J. WALSH, BLOODY SUNDAY AND THE RULE OF LAW IN NORTHERN IRELAND 24 (2000) (describing how discrimination faced by Northern Irish Catholic minority in employment, housing, voting and other areas led to civil rights movement of 1960s); *see also* Winter & Parassram Concepcion, *supra* note 1, at 6 (arguing that Troubles began with struggle of Catholic minority in Northern Ireland for civil liberties in late 1960s); E-mail from Sean McGouran, founding member of NIGRA (Nov. 17, 2002) (on file with author) (stating that early gay activists were involved in and influenced by civil rights movement). The influence the civil rights movement had on early LGB activism is demonstrated by Northern Ireland Gay Rights Association's acronym's, NIGRA, close resemblance to the acronym of the Northern Ireland Civil Rights Association, NICRA. *Id.*; E-mail from Jeff Dudgeon, founding member of NIGRA (Mar. 5, 2004) (on file with author) (stating that NIGRA consciously copied NICRA's intialling in order to piggyback on success and reputation of NICRA). It was an attempt to make early LGB activism respectable. *Id.*

created the political entity of Northern Ireland in 1920.¹² Believing that independence had not been granted to the whole of Ireland, many Catholics were reluctant to recognize the Northern Irish government and discord between Protestants and Catholics emerged based on differences in their political, social, and cultural beliefs.¹³ In the late 1960s, the Northern Irish Catholic minority began to push for civil rights against a Protestant majority and government, which developed into a violent struggle that has continued to present day.¹⁴ Although the civil rights

12. See WALSH, *supra* note 11, at 16 (noting that British Government of Ireland Act of 1920 separated Ireland into two governments). Of the thirty-two counties comprising the island, twenty-six, mostly populated by Catholics, became Ireland. *Id.* The remaining six, mostly populated by Protestants, became Northern Ireland. *Id.* The Anglo-Irish Treaty of 1921 solidified this new border, by recognizing the twenty-six counties as the free state of Ireland, no longer subject to British rule. See also Barry A. Feinstein & Mohammed S. Dajani-Daoudi, *Permeable Fences Make Good Neighbors: Improving a Seemingly Intractable Border Conflict Between Israelis and Palestinians*, 16 AM. U. INT'L L. REV. 1, 42-43 (2000) (observing that British Government of Ireland Act of 1920 and Anglo-Irish Treaty of 1921 separated Ireland into two governments with different national aspirations and how national identity continues to be primary reason for dispute in Northern Ireland); see generally Gerry Adams, *To Cherish a Just and Lasting Peace*, 22 FORDHAM INT'L L. J. 1179, 1181 (1999) (claiming partition of island to be one of root causes of conflict); MARK RYAN, *WAR & PEACE IN IRELAND: BRITAIN AND THE IRA IN THE NEW WORLD ORDER* 51 (1994) (stating division of Ireland brought about carnival of reaction); TOM F. BALDY, *BATTLE FOR ULSTER* 40 (1987) (describing discord that grew between Catholic minority and Protestant majority in Northern Ireland after Irish Partition).

13. See CHRIS RYDER, *INSIDE THE MAZE* 4-5 (2001) (explaining that after Irish Partition, Republicans [Nationalists] still desired Ireland united); BALDY, *supra* note 12, at 44 (describing how Catholic population questioned legitimacy of Northern Irish government after Irish Partition); Feinstein & Dajani-Daoudi, *supra* note 12, at 43 (explaining that majority of Protestants identify themselves as British, while most Catholics identify themselves as Irish and these competing identities lead to divisions on political, social, and cultural levels). This intractable and incessant division is perpetuated by the perceived threat each community has regarding the other. *Id.*

14. See Winter & Parassram Concepcion, *supra* note 1, at 6 (stating that civil rights movement made evident that Catholics would no longer accept discriminatory laws and practices of Protestant Parliament and Protestant state). The violent reaction of Protestant extremists to peaceful civil rights demonstrators and the subsequent failure of primarily Protestant police force to defend the demonstrators set the battle lines for conflict. *Id.* See also Hirsch, *supra* note 1, at 1292-93 (describing how Catholics responded to discriminatory practices of Protestant government through peaceful civil rights demonstrations and Protestant response to protests soon became violent); see generally *Loyalists Admit Killing Man in Sectarian Attack*, BELFAST TELEGRAPH, July 23, 2002 (reporting Ulster Freedom Fighters, loyalist paramilitary group, claimed responsibility for murder of Catholic man in response to earlier shooting of Protestant man); *Borough Violence As Bad as the Balkans*, BELFAST TELEGRAPH, Aug. 10, 2002 (detailing summer of sectarian violence in borough of Newtownabbey as including murder of several young men, destruction of number of churches, and desecration of cemeteries and graves); Warren

movement primarily focused on discrimination between a Catholic minority and a Protestant majority, some commentators explain that it brought forth a dialogue on human rights and equality protection, which attracted sexual minorities, though most were not open about their sexual orientation at the time.¹⁵

Hoge, *Two More Are Slain in Protestant Gang Feud in Belfast*, N.Y. TIMES, Feb. 3, 2003, at A2 (reporting internal feuds between Protestant paramilitaries leading to bombings, armed attacks, forced evictions, and killings).

Recently, Northern Ireland's power-sharing government has experienced problems, causing Britain to reintroduce direct rule over the Province. See Brian Lavery, *Belfast Police, in Unusual Move, Raid Sinn Fein Offices and Homes*, N.Y. TIMES, Oct. 5, 2002, at A5 (reporting that police raided legislative offices of Sinn Fein, political wing of IRA, and homes of party supporters). Documents and computer disks were seized and four individuals were arrested in connection with an investigation into whether the IRA had infiltrated the Northern Ireland Office, Britain's headquarters in the province. *Id.* The province was already in political turmoil, with the main Protestant party threatening to withdraw from the power-sharing government unless the IRA immediately decommissioned its weapons. *Id.* The alleged IRA spying may lead Britain to reinstate direct rule from London. *Id.* See also *Charting the Rocky Political Path Ahead*, BELFAST TELEGRAPH, Oct. 11, 2002 (reporting that strong divisions presently exist between Unionists and Republicans, making impending suspension of government longest and most difficult to resolve); Brian Walker, *Assembly Put on Ice As Hopes Focus on Recovery*, BELFAST TELEGRAPH, Oct. 14, 2002 (describing reinstatement of direct rule as plunging Northern Ireland into its biggest political crisis in twenty-eight years). The decision to reinstate direct rule was inevitable since the discovery of alleged IRA spying in the government triggered the Unionists' refusal to remain in a power-sharing government with Sinn Fein. *Id.*; *Direct Rule Re-introduced*, BELFAST TELEGRAPH, Oct. 15, 2002 (reporting that Britain suspended power-sharing executive in Northern Ireland). The First Minister, David Trimble, and Deputy First Minister, Mark Durkan were stripped of their powers, leaving the province to be governed by direct rule from London. *Id.*; Warren Hoge, *The Troubles in Ulster Shift From Street to Assembly*, N.Y. TIMES, Oct. 14, 2002 (describing impasse as worst in four-year history of Belfast Agreement). Although it will be the fourth time the government has been suspended, it is expected that this shutdown of provincial government will take longer than previous suspensions, which lasted three months the first time and a day the next two times. *Id.*

15. See WALSH, *supra* note 11, at 24 (discussing how civil rights movement was begun by Northern Irish Catholic minority); see also Christopher McCrudden, *Mainstreaming Equality in the Governance of Northern Ireland*, 22 FORDHAM INT'L L.J. 1696, 1704 (describing Northern Ireland civil rights campaign as concentrated on eradication of discrimination between Catholics and Protestants); COLIN KNOX & PADRAIC QUIRK, PEACE BUILDING IN NORTHERN IRELAND, ISRAEL, AND SOUTH AFRICA: TRANSITION, TRANSFORMATION, AND RECONCILIATION 30 (2000) (explaining that grievances of Catholic minority led to emergence of Civil Rights Movement, which attempted to redress discrimination through demonstrations and marches); Colin J. Harvey, *The New Beginning: Reconstructing Constitutional Law and Democracy in Northern Ireland*, in HUMAN RIGHTS, EQUALITY AND DEMOCRATIC RENEWAL IN NORTHERN IRELAND 20 (Colin J. Harvey ed., 2001) (describing how Civil Rights Movement of 1960s highlighted discriminatory nature of status quo and articulated demand for equality and human rights protection); McGouran, *supra* note 11 (stating that LGB individuals were not "out" in civil rights movement; very few people were in those dark days).

As gay liberation movements began to emerge in the United States and Europe in the early 1970s, the first gay and lesbian organizations began to appear in Northern Ireland.¹⁶ In 1975, the Northern Ireland Gay Rights Association (“NIGRA”) formed and its members made the initial steps towards repealing laws criminalizing sodomy that harmed gays and lesbians.¹⁷ In the mid-1970s, NIGRA brought a case to the European Court of Human Rights¹⁸ (“ECHR”) to challenge Northern Ireland’s

16. See Belfast Gay Liberation Report, *supra* note 3, at 3 (discussing formation of first homosexual organizations in Northern Ireland during early 1970s); see also LAUD HUMPHREYS, *OUT OF THE CLOSETS: THE SOCIOLOGY OF HOMOSEXUAL LIBERATION* 5-7 (1972) (describing Stonewall Riots in New York of June 1969 as birth of gay liberation movement and how following years saw rise in homosexual activism); JEFFREY WEEKS, *COMING OUT: HOMOSEXUAL POLITICS IN BRITAIN FROM THE NINETEENTH CENTURY TO THE PRESENT* 185 (1977) (explaining how early 1970s marked turning-point in evolution of homosexual consciousness). Gay and lesbian organizations that tiptoed through the liberal 1960s were superseded in the 1970s by a much more defiant, active, and prideful movement. *Id.*

17. See Letter from Richard K. Kennedy, President NIGRA, to Northern Ireland’s LGB community (Aug. 11, 1975) (on file with author and NIGRA Archive) (describing formation of NIGRA in reaction to lack of single organization that represented views and interests of gay men and women in region); see generally NIGRA, *Gays in Ulster: A Report on Recent Developments*, May 1976 (on file with author and NIGRA Archive) [hereinafter NIGRA Report] (showing that NIGRA consisted of: Northern Ireland Council on Religion and Homosexuality; Belfast Gay Liberation Society of Queens University; 1974 Homosexual Law Reform Committee, which had already been campaigning for homosexual law reform for two years; as well as other groups of gays, lesbians, and bisexuals); Press Release, Belfast Gay Liberation Society, *Reforms of the Law in Northern Ireland Relating to Homosexuality* (Mar. 23, 1975) (on file with author and NIGRA Archive) (discussing Belfast Gay Liberation Society’s letter-writing campaign to members of Northern Ireland Assembly). The goal of the campaign was to assess Assembly Members views on homosexual law reform and whether or not they would support such legislation. *Id.*; NICHOLAS BAMFORTH, *SEXUALITY, MORALS & JUSTICE: A THEORY OF LESBIAN AND GAY RIGHTS LAW* 272 (1997) (commenting that punitive laws based on sexual orientation clearly harm gays and lesbians by reinforcing social prejudices); NIGRA Report, *supra*, at 2 (mentioning harassment of LGB individuals by police). From January through May of 1976, eighteen individuals had their houses searched by the police and they were then taken in for questioning. *Id.* In one instance, a man was arrested for refusing to allow the police into his home without a search warrant and for declining to go to a police station for questioning. *Id.*; Derek Brown, *Ulster “Gays” Seek Equality*, *GUARDIAN* (LONDON), Apr. 29, 1976 (reporting allegations by homosexuals in Northern Ireland that they were victims of organized campaign of harassment by police). They claimed that the harassment began in January 1976 when the mother of a young homosexual man handed over his personal papers, containing names of other homosexuals, to the police. *Id.* A series of police raids began producing others’ personal letters and papers with new names. *Id.*

18. The European Court of Human Rights (“ECHR”) is a judicial enforcement mechanism created under the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention on Human Rights”). The

criminal laws prohibiting male homosexual activity.¹⁹

A. First Taste of Victory: Initial Judicial Recognition of LGB Rights

In *Dudgeon v. United Kingdom*,²⁰ the plaintiff — Jeffrey Dudgeon, one of Northern Ireland's early gay rights activists — challenged the Offences Against the Person Act of 1861 ("1861 Act") and the Criminal Law Amendment Act of 1885 ("1885 Act"), both of which criminalized private consensual male homosexual activity.²¹ Dudgeon claimed that the provisions of the 1861 Act

European Convention on Human Rights, Nov. 4, 1950, 312 U.N.T.S. 221, art. IXX states: "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights . . . It shall function on a permanent basis."

19. See Press Release, NIGRA News (May 1976) (on file with author and NIGRA Archive) (discussing how case against United Kingdom government alleging violation of European Convention on Human Rights had been lodged at ECHR in Strasbourg); see also Ann McVeigh, Summary of NIGRA Archive, Public Records Office Northern Ireland (Nov. 1999) (on file with author and NIGRA Archive) (discussing how shortly after its formation, NIGRA set about first steps in taking ultimately successful case to Strasbourg); Letter from Brian Gilmore, Secretary, 1974 Homosexual Law Reform Committee, to Lionel Jacobs, Standing Advisory Commission on Human Rights in Northern Ireland (Nov. 16, 1976) (on file with author and NIGRA Archive) (describing inequality of gay people in Northern Ireland and stating that these issues of inequality are included in their case against United Kingdom government before ECHR).

20. 4 Eur. H.R. Rep. 149 (Oct. 22, 1981) [hereinafter *Dudgeon*].

21. See Offences Against the Person Act 1861 — An Act to consolidate and amend the Statute Law of . . . Ireland relating to Offences against the Person, Aug. 6th 1861 [hereinafter 1861 Act]. Section 61 states "whoever shall be convicted of the abominable crime of buggery, committed either with mankind, or with any animal, shall be liable to imprisonment for life." *Id.* Section 62 holds any attempt to commit buggery as an offense carrying a sentence of up to 10 years' imprisonment. *Id.* See also Criminal Law Amendment Act 1885 — An Act to make further provision for the Protection of Women and Girls, the suppression of brothels, and other purposes, Aug. 14th 1885 [hereinafter 1885 Act]. Section 11 provides, in relevant part:

Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years

Id.; *Dudgeon*, *supra* note 20, at ¶ 13 (stating that Mr. Dudgeon's complaint was against existence of laws in Northern Ireland, which have effect of making homosexual acts between consenting adult males criminal offenses). The ECHR cited the 1861 Act and 1885 Act as the relevant statutory provisions to the case. *Id.* at ¶ 14.; MADGE DAVISON & BRICE DICKSON, CIVIL LIBERTIES IN NORTHERN IRELAND: THE CAJ HANDBOOK 278, 288 (Brice Dickson ed., 3d ed. 1997) [hereinafter CAJ HANDBOOK] (describing 1861 Act as Victorian in nature and noting there were no laws prohibiting homosexual conduct between adult women); Memorandum from Belfast Gay Liberation Society, Homosexual Law Reform in Northern Ireland (May 19, 1974) (on file with author and NIGRA Archive) (observing that although 1861 Act did not apply to lesbians, lesbian mothers

and 1885 Act directly interfered with his right to privacy, violating Article VIII of the European Convention on Human Rights.²² Despite the fact that the prohibition was rarely enforced, and the majority of people in Northern Ireland morally objected to the decriminalization of homosexuality, the ECHR nevertheless held that Northern Ireland's prohibition on male homosexual activity breached Article VIII of the European Convention on Human Rights.²³

Commentators consider *Dudgeon* to be one of the first major legal victories for sexual minorities in Northern Ireland and throughout Europe, viewing it as a seminal case in recognizing gay rights.²⁴ As a result of the ECHR's holding in *Dudgeon*,

suffered losing their children if father contested guardianship on grounds of mother's homosexuality).

22. See *Dudgeon*, *supra* note 20, at ¶ 34 (laying out Dudgeon's argument that existence of criminal laws prohibiting male homosexual activity in Northern Ireland constitutes unjustified interference with his right to respect for his private life, in breach of Article VIII of European Convention on Human Rights); see also European Convention on Human Rights, *supra* note 18, at 229. Art. VIII provides:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence; (2) There shall be no interference by public authority with the exercise on this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others.

Id.

23. See *Dudgeon*, *supra* note 20, at ¶¶ 29-30 (discussing how government records indicated that no one was prosecuted for homosexual acts during period in question). There still, however, existed strong opposition to homosexual law reform in Northern Ireland, exemplified by a "Save Ulster from Sodomy" petition, collecting close to 70,000 signatures. *Id.* at ¶¶ 25-26. Even so, the restriction imposed on Mr. Dudgeon under Northern Ireland law is an unjustified interference with his right to respect for his private life. *Id.* at ¶¶ 61-63. See also Stephen Livingstone, *Reviewing Northern Ireland in Strasbourg 1969-1994*, in *IRISH HUMAN RIGHTS YEARBOOK* 15 (Gerard Quinn ed., 1995) (remarking that prohibition on homosexual activity between men was matter which all political groups in both Northern Ireland and Republic of Ireland were against); Carlos A. Ball, *The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community's Legal Order*, 37 *HARV. INT'L L.J.* 307, 378-79 (1996) (explaining that ECHR found statute violated Art. VIII because (i) consensual homosexual conduct in great majority of signatory states was no longer criminalized; (ii) statute in question was so broad that it criminalized all male homosexual sex regardless of age of participants or whether consent was involved; and (iii) law was rarely enforced in cases of consensual sex of individuals over twenty-one).

24. See Robert Wintemute, *Sexual Orientation Discrimination*, in *INDIVIDUAL RIGHTS AND THE LAW IN BRITAIN* 525 (Christopher McCrudden & Gerald Chambers eds., 1994) (claiming that judgment of ECHR in *Dudgeon* prompted significant decriminalization of sexual activity between men throughout United Kingdom); see also Larry Cata

Northern Ireland passed the Homosexual Offenses (Northern Ireland) Order 1982 ("1982 Order"), which legalized certain categories of homosexual activity for males at least twenty-one years of age.²⁵ In spite of these accomplishments, though, commentators note that homosexuals still faced a number of restrictions in areas outside the sphere of criminal law, which in effect discouraged their lifestyle.²⁶

Backer, *Inscribing Judicial Preferences Into Our Fundamental Law: On the European Principle of Margins of Appreciation as Constitutional Jurisprudence in the U.S.*, 7 TULSA J. COMP. & INT'L L. 327, 355 (2000) (claiming *Dudgeon* to be politically pivotal homosexual sodomy case); Carole J. Petersen, *Hong Kong and the Unprecedented Transfer of Sovereignty: Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong*, 19 LOY. L.A. INT'L & COMP. L. REV. 337, 348 (1997) (asserting *Dudgeon* to be leading international decision regarding right to privacy and homosexual offenses). See generally *Lawrence v. Texas*, 123 S. Ct. 2472 at 2481-83. The United States Supreme Court cites *Dudgeon* in support of its decision to overturn *Bowers v. Hardwick*, 106 S. Ct. 342 (1985), which had upheld sodomy laws in the United States. *Id.* The Court reasoned that the holding in *Bowers* had been rejected in other nations, and there was no showing that the United States' governmental interest was any more legitimate or urgent. *Id.*

25. See Homosexual Offenses (Northern Ireland) Order 1982, art. 3, 1982 No. 1536 (N.I. 19), Oct. 27, 1982 [hereinafter 1982 Order]. Article 3 — Homosexual Acts in Private — sets the age of consent for homosexual males at twenty-one years old. *Id.* See also CAJ HANDBOOK, *supra* note 21, at 282 (discussing how following *Dudgeon* decision, government introduced 1982 Order); Wintemute, *supra* note 24, at 525 (noting adoption of 1982 Order was direct result of *Dudgeon*); Livingstone, *supra* note 23, at 16 (attributing passage of 1982 Order to ECHR's decision in *Dudgeon*).

26. See CAJ HANDBOOK, *supra* note 21, at 287-88 (noting that age of consent for homosexual males was lowered to eighteen in 1994, while age of consent for heterosexual females is seventeen, and there is no age of consent for heterosexual males nor homosexual females); see also Ball, *supra* note 23, at 378 (claiming that although ECHR's opinion in *Dudgeon* was vital for acknowledgment of self-determination and autonomy of sexual minorities, extent and applicability of these rights, outside sphere of criminal law, was limited); ROBERTSON, *supra* note 7, at 486-87 (describing how legal system's reluctance to associate permanent homosexual relationships with marriage or with permanent heterosexual relationships causes discrimination in many areas of civil law, including family disputes, housing, taxation, immigration and employment); AN ACCEPTABLE PREJUDICE?, *supra* note 4, at 10 (mentioning existence of laws and regulations that treat LGB people in Northern Ireland different from heterosexual people and from LGB individuals in rest of United Kingdom). The personal experiences of many LGB persons makes clear that homophobia is still effectively tolerated in many workplaces, schools and other institutional settings. *Id.* at 11. See also Wintemute, *supra* note 24, at 498 (distinguishing between discrimination that prohibits same-sex emotional or sexual conduct and discrimination which discourages choice through other means, such as inadequate protection against violence or denial of jobs, housing, local-authority funding, benefits for partner, and custody of children).

B. *Equality for All: LGB Rights in the Wake of the Belfast Agreement*

Throughout the 1980s and 1990s the LGB community in Northern Ireland became more active and visible.²⁷ While Northern Ireland's LGB community was successful in getting criminal sanctions against male homosexuality repealed, sexual minorities still lacked affirmative legal protections.²⁸ Though the Northern Irish Civil Rights movement of the late 1960s inspired a discourse on the protection of human rights and equality, commentators argue that resulting legislation protecting religious belief, political opinion, and gender, was inadequate.²⁹

27. See AN ACCEPTABLE PREJUDICE?, *supra* note 4, at 9 (noting dramatic changes in LGB population in Northern Ireland in recent years, especially during peace process). LGB individuals are more visible and there is a greater sense of community, with a growing number of LGB and LGB-friendly social venues, support organizations, annual pride parades and festivals. *Id.* This growing visibility is reflected in an expanding body of literature documenting LGB experiences. However, along with increased visibility comes a greater vulnerability to homophobic attacks. *Id.* at 10. See also Jeffrey Dudgeon, *Gay Rights in Northern Ireland* (n.d.) (unpublished report on file with author and NIGRA Archive) (noting successes of gay pubs and clubs in 1980s and 1990s); Gail Walker, *Ulster's Out for a Party*, BELFAST TELEGRAPH, June 16, 1998 (reporting that Northern Ireland's first Gay Pride Week was in 1991 and event has been held annually since, culminating in Gay Pride Parade through Belfast's city center); Rainbow Project, *Who are we?*, available at <http://www.rainbow-project.com/> (describing organization's establishment in 1994 to address physical, mental and emotional health of gay and bisexual men in Northern Ireland); Gay Lesbian Youth Northern Ireland ("GLYNI"), *About GLYNI*, available at <http://www.glyni.org.uk> (describing organization, established in November 1999, as social/support group for young men and women coming to terms with their non-heterosexuality).

28. See ROBERTSON, *supra* note 7, at 486 (noting that in early 1990s, United Kingdom was one of only four remaining countries in European Community, which offered no legal protection to homosexuals in discrimination cases); see also Britton, *supra* note 2, at 262 (commenting on how United Kingdom law has failed to adopt any guidelines to protect gays and lesbians against negative consequences resulting from their sexuality); Sandra Fredman, *Equality: A New Generation*, 30 INDUSTRIAL L.J. 145 (2001) (remarking that sexual orientation is absent from U.K. discrimination law and equality guarantees).

29. See SACHR REPORT, *supra* note 9, at 13-14 (stating that Northern Ireland Constitution Act of 1973 made unlawful all executive and legislative actions which were discriminatory on political or religious grounds). The Fair Employment Act made it unlawful for both private and public employers to discriminate based on political or religious grounds. *Id.* The Sex Discrimination Order made it unlawful to discriminate on grounds of sex in employment, training, education, and provision of goods, facilities, and services. *Id.* This body of legislation was insufficient to meet the human rights needs of Northern Ireland. *Id.* See also McCrudden, *supra* note 15, at 1705-06 (describing the 1973 Act as limited and the 1976 Fair Employment Act as ineffectual). The Northern Ireland Constitution Act of 1973 offered protection only in a religious-political context and was largely confined to obvious, or direct, discrimination, versus indirect discrimination. *Id.* The Fair Employment Act of 1976 had little effect on employ-

When the Nationalist/Catholic and Unionist/Protestant communities reached an agreement, in 1998, more equality-oriented legislation began to appear in Northern Ireland.³⁰

The signing of the Agreement Reached in the Multi-Party Negotiations ("Belfast Agreement")³¹ in April 1998 marked a new beginning for a State that had been plagued by violent conflict for more than thirty years.³² The Belfast Agreement was a settlement among the United Kingdom, the Republic of Ireland, and the political parties of Northern Ireland³³ that focused heav-

ers' practices because there were no appropriate enforcement measures. *Id.*; Equality Commission for Northern Ireland, *Position Paper: The Single Equality Bill 3* (Oct. 2001), available at <http://www.equalityni.org/publications/recentpub.cfm> [hereinafter *ECNI SEB Paper*] (stating existing equality legislation as far from ideal and subject to extensive criticism because it has not prevented discrimination, nor has it delivered substantive equality to particular groups); ROBERTSON, *supra* note 7, at 486 (claiming that law has been slow in developing protections for homosexuals). The equality principles designed to combat race and sex discrimination have not taken the next logical step, protecting the rights of homosexuals, as a result of both religious taboos and secular prejudices. *Id.*

30. See Brice Dickson, *Protection of Human Rights — Lessons from Northern Ireland*, 3 E.H.R.L.R. 220 (2000) [hereinafter Dickson 2000] (noting immense change in legal system of Northern Ireland due mostly to Belfast Agreement); see also McCrudden, *supra* note 15, at 1697-98 (observing that during formation of agreement in 1998 discussions about equality and human rights moved from margins into mainstream). The Belfast Agreement, using the best of international and European practice, identified equality and human rights as central elements to the dispute settlement and peace process in Northern Ireland. *Id.* By 1997 a new politics was emerging in Northern Ireland with a new concentration on equality, supplementing previous approaches to resolving the Troubles. *Id.* at 1723. See generally Colin Harvey, *Legality, Legitimacy, and Democratic Renewal: The New Assembly Context*, 22 FORDHAM INT'L L.J. 1389, 1400 (1999) (maintaining that because of its democratic legitimacy and strong emphasis on human rights and equality, Belfast Agreement presents one of best opportunities for lasting peace).

31. Agreement Reached in the Multi-Party Negotiations, Apr. 10, 1998 [hereinafter Belfast Agreement].

32. See Paul Mageean & Martin O'Brien, *From the Margins to the Mainstream: Human Rights and the Good Friday Agreement*, 22 FORDHAM INT'L L.J. 1499, 1499 (1999) (quoting former United Nations High Commissioner for Human Rights, Mary Robinson, describing Belfast Agreement as "conspicuous by the centrality it gives to equality and human rights . . . few documents emerging from divisive and difficult political negotiations have so well captured the importance of fairness in creating right relationships."); see also Duncan Shipley-Dalton, *The Belfast Agreement*, 22 FORDHAM INT'L L.J. 1320, 1320 (1999) (depicting Belfast Agreement as important document of Irish history); Seamus Dunn & Jacqueline Nolan-Haley, *Conflict in Northern Ireland After the Good Friday Agreement*, 22 FORDHAM INT'L L.J. 1372, 1372-73 (1999) (describing Belfast Agreement as historic and ground-breaking accomplishment).

33. See Belfast Agreement, *supra* note 31, Constitutional Issues, at ¶ 2 (listing parties to Belfast Agreement); see also AUSTEN MORGAN, THE BELFAST AGREEMENT — A PRACTICAL LEGAL ANALYSIS 6 (2000) (discussing eight political parties of Northern Ireland,

ily on the principles of equality and human rights.³⁴ It addressed human rights and equality issues not only on a political and religious level, but also mentioned equality of opportunity in relation to a number of other identity groups.³⁵ In total, nine identity groups (“nine categories”) — gender, race, disability, age, political opinion, religious belief, marital status, sexual orientation, and those with dependants — receive protection from the Belfast Agreement’s equality of opportunity provision, prompting commentators to describe the Agreement as expansive and progressive.³⁶ The Belfast Agreement was given legal

U.K., and Irish governments as participants); *see also* Brice Dickson, *New Human Rights Protection in Northern Ireland*, 3 E.L.R. 3 (1999) [hereinafter Dickson 1999] (discussing parties involved in Agreement and adding that it was later endorsed by people in both Northern Ireland and Republic of Ireland through referenda).

34. *See* McCrudden, *supra* note 15, at 1698 (noting Belfast Agreement identified equality and human rights as central element in dispute settlement process and search for peace in Northern Ireland); Dickson 1999, *supra* note 33, at 3 (describing Belfast Agreement as containing many provisions tackling human rights issues); Mageean & O’Brien, *supra* note 32, at 1519 (remarking on how there are few segments of Belfast Agreement that do not make reference to centrality of human rights concerns).

35. *See* Belfast Agreement, *supra* note 31, at Rights, Safeguards and Equality of Opportunity. Human Rights, paragraph 3 provides, in relevant part:

[T]he British Government intends, as a particular priority, to create a statutory obligation on public authorities in Northern Ireland to carry out all their functions with the due regard to the need to promote equality of opportunity in relation to religion and political opinion; gender; race; disability; age; marital status; dependants; and sexual orientation.

Id.

36. *See* Mageean & O’Brien, *supra* note 32, at 1524 (describing equality of opportunity provisions as among most innovative of broad range of human rights provisions contained within Belfast Agreement); *see also* McCrudden, *supra* note 15, at 1733 (discussing how peace process went beyond classical, narrow definition of rights — centered around civil and political rights — to include social, cultural, and economic rights); Beatrix Campbell, *Straw’s Redemption; The Home Secretary’s U-turn Over Racism in the Police Can Be Traced to the Influence of Ireland*, *GUARDIAN* (London), Feb. 24, 2000, at 22 (reporting that equality provisions of Belfast Agreement are being recognized and used as model by British government); Jonathan Freedland, *Comment: They’ve Made One Good Friday. Let’s Hope They Can Make Another*, *GUARDIAN* (London), Mar. 31, 1999, at 31 (illustrating Belfast Agreement as offering enlightened approach to civil rights and describing British gay groups as envious of Belfast Agreement’s equality provisions on sexual orientation); Christopher McCrudden, *Equality, in HUMAN RIGHTS, EQUALITY AND DEMOCRATIC RENEWAL IN NORTHERN IRELAND* 111 (C. Harvey ed., 2001) (noting that provisions of Belfast Agreement are promises, not reality) [hereinafter McCrudden, *Equality*]. The Belfast Agreement does not directly deliver change, rather it represents the potential for change. *Id.*

Compare Belfast Agreement, *supra* note 31, at Rights, Safeguards and Equality of Opportunity, Human Rights, ¶ 3 (listing sexual orientation as grounds deserving equality of opportunity) with European Convention on Human Rights, *supra* note 18, art. XIV (failing to explicitly provide protection for persons on basis of disability or sexual orienta-

expression in the United Kingdom, including Northern Ireland, through the Northern Ireland Act of 1998 ("NI Act 1998"); and its equality of opportunity provision gained legislative force through Section 75 of the NI Act 1998.³⁷

II. INSTITUTIONALIZING EQUALITY

The NI Act 1998 serves as the legal framework for ensuring equality for all of the nine categories by establishing two institutions to deal with equality and human rights issues in Northern Ireland: the Equality Commission for Northern Ireland ("Equality Commission") and the Northern Ireland Human Rights Commission ("NIHRC").³⁸ The Equality Commission brings together four pre-existing equality organizations³⁹ and is charged with ad-

tion). Article XIV uses the term "other status" leaving the protection of such groups to the determination of the ECHR. In 1997, the ECHR did interpret "other status" to include sexual orientation in *Sutherland v. United Kingdom* (1997) 24 EHRR CD 22. For a discussion of the inability of Article XIV to serve as an adequate anti-discrimination provision in Northern Ireland, see Stephen Livingstone, *Article 14 and the Prevention of Discrimination in the European Convention on Human Rights*, 1 E.H.R.L.R. 25 (1997).

37. See Northern Ireland Act, 1998, ch. 47 (Eng.) [hereinafter NI Act 1998]; see also MORGAN, *supra* note 33, at 11 (describing how provisions of Belfast Agreement became part of United Kingdom law through passage of NI Act 1998); Livingstone, *supra* note 9, at 1465-66 (stating how Belfast Agreement has been given legislative expression in NI Act 1998); Dickson 1999, *supra* note 33, at 3 (discussing how human rights provisions of Belfast Agreement became part of constitutional landscape through NI Act 1998); Colin Harvey, *On Law, Politics and Contemporary Constitutionalism*, 26 FORDHAM INT'L L.J. 996, 1002 (2003) (stating that NI Act 1998 reflected key aspects of Belfast Agreement); see generally Barry Fitzpatrick, *Recent Legislation — The Fair Employment and Equal Treatment (NI) Order 1998 — The Northern Ireland Act 1998*, 28 INDUSTRIAL L.J. 336 (1999) [hereinafter Fitzpatrick 1999] (discussing how NI Act 1998 further enhances province's progressive equality regime). For a detailed discussion of the legislative process behind passage of Northern Ireland Act, see McCrudden, *supra* note 15, at 1741-55.

38. See NI Act 1998, *supra* note 37, at Part VII — Human Rights and Equal Opportunities (establishing Equality Commission for Northern Ireland ("Equality Commission") and Northern Ireland Human Rights Commission ("NIHRC")); see also Dickson 1999, *supra* note 33, at 3 (describing Equality Commission and NIHRC as two most important institutions established by Belfast Agreement); Fitzpatrick 1999, *supra* note 37 (mentioning establishment of Equality Commission on October 1, 1999); Winter & Parassram Concepcion, *supra* note 1, at 8 (noting NIHRC established on March 1, 1999); Livingstone, *supra* note 9, at 1481 (asserting that most significant aspect of Rights, Safeguards, and Equality of Opportunity section of Belfast Agreement was creation of Equality Commission and NIHRC).

39. See NI Act 1998, *supra* note 37, § 74(2) (listing bodies combining to form part of Equality Commission as: Fair Employment Commission for Northern Ireland; Equal Opportunities Commission for Northern Ireland; Commission for Racial Equality for Northern Ireland; and Northern Ireland Disability Council).

ministering Section 75 of the NI Act 1998.⁴⁰ The NIHRC has many duties relating to ensuring the respect for human rights in Northern Ireland, including advising the Secretary of State of Northern Ireland on whether additional rights beyond those guaranteed in the Human Rights Act of 1998⁴¹ should be incorporated into a Bill of Rights for Northern Ireland.⁴² Additionally, the NI Act 1998 establishes an executive authority — the Office of First Minister and Deputy First Minister (“OFMDFM”) — that prepares legislation and has the task of drafting a Single Equality Bill, which will incorporate existing equality legislation, as well as Northern Ireland’s regional obligations regarding anti-discrimination legislation, into a single legislative act.⁴³

40. See NI Act 1998, *supra* note 37, at Schedule 9. Schedule 9 requires that the Equality Commission for Northern Ireland keep under review the effectiveness of the duties imposed by Section 75, as well as offer advice to public authorities and others in connection with those duties. *Id.*

41. See Human Rights Act, 1998, ch. 42 (Eng.). See also Livingstone, *supra* note 9, at 1466 (noting that Human Rights Act 1998 incorporates substantive rights provisions of European Convention on Human Rights into U.K. law). The NIHRC is charged with the task of advising the Secretary of State on a Bill of Rights for Northern Ireland. *Id.* For a detailed discussion of the incorporation of the European Convention on Human Rights into United Kingdom law, through the Human Rights Act of 1998, see Britton, *supra* note 2, at 236-39.

42. See NI Act 1998, *supra* note 37, at § 69 (listing functions of NIHRC). See also Livingstone *supra* note 9, at 1466 (summarizing duties of NIHRC as: analyzing proposed legislation for its compliance with human rights standards, assisting litigants in bringing human rights complaints before courts, and conducting investigations into matters that give rise to human rights concerns); Winter & Parassram Concepcion, *supra* note 1, at 8 (stating that NIHRC must assist Secretary of State on developing scope for defining rights supplementary to European Convention on Human Rights that should be included in Bill of Rights for Northern Ireland); Dickson 1999, *supra* note 33, at 4 (explaining that any rights beyond those in Human Rights Act 1998 will be combined with the European Convention on Human Rights to form a Bill of Rights specific to Northern Ireland).

43. See NI Act 1998, *supra* note 37, at Part III — Executive Authorities (creating Northern Ireland Executive titled Office of First Minister and Deputy First Minister (“OFMDFM”)); see also OFMDFM, Functions, available at <http://www.ofmdfmi.gov.uk/index.htm> (listing one of OFMDFM’s ministerial departments as Equality Unit, which works towards implementing EU equality obligations in Northern Ireland through “Promoting Equality of Opportunity” campaign that includes creating Single Equality Bill); CAJ SEB Submission, *supra* note 9, at 1 (describing how Single Equality Bill will implement equality principles required by recent European Union directives as well as harmonize and simplify existing anti-discrimination legislation); OFMDFM, *Promoting Equality of Opportunity: Implementing EU Equality Obligations in Northern Ireland: Summary Document 1-3* (Jan. 2003), available at <http://www.ofmdfmi.gov.uk/equalityofopportunity/index.htm> [hereinafter *EU Obligations Summary Document*] (outlining OFMDFM’s obligations under European Union’s Framework Employment Directive (2000) to implement anti-discrimination legislation on grounds of sexual orientation).

A. Section 75 Statutory Duties: Mainstreaming Equality
into Policy-Making

Section 75 of the NI Act 1998 creates a statutory duty on all public authorities⁴⁴ to carry out their functions with due regard to the need to promote equality of opportunity between the nine categories, which include sexual orientation.⁴⁵ Schedule Nine further requires the Equality Commission to oversee and advise public authorities in fulfilling this duty.⁴⁶ The statutory duty imposed by Section 75 is intended to guarantee that equality con-

44. See NI Act 1998, *supra* note 37, § 75 — Statutory Duty on Public Authorities. Section 75(3) defines public authorities as:

- (a) any department, corporation or body listed in Schedule 2 to the Parliamentary Commissioner Act 1967 (departments, corporations and bodies subject to investigation) and designated for the purposes of this section by order made by the Secretary of State;
- (b) any body (other than the Equality Commission) listed in Schedule 2 to the Commissioner for Complaints (Northern Ireland) Order 1996 (bodies subject to investigation);
- (c) any department or other authority listed in Schedule 2 to the Ombudsman (Northern Ireland) Order 1996 (departments and other authorities subject to investigation);
- (d) any other person designated for the purposes of this section by order made by the Secretary of State.

Id.; see also EQUALITY COMMISSION FOR NORTHERN IRELAND, GUIDE TO THE STATUTORY DUTIES 55 (2002) [hereinafter EC GUIDE] (listing all public authorities to which statutory duty applies). The purpose of the EC GUIDE is to help individuals and organizations understand the obligations, which Section 75 and Schedule 9 impose, and further, to provide guidelines regarding the form and content of equality schemes. *Id.* at 3; McCrudden, *Equality*, *supra* note 36, at 99 (stating that statutory duty automatically applies to Northern Ireland departments, local authorities, and quangos).

45. See NI Act 1998, *supra* note 37, at § 75. Section 75(1) states:

A Public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity –

- (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- (b) between men and women generally;
- (c) between persons with a disability and persons without; and
- (d) between persons with dependants and persons without.

Id.

46. See NI Act 1998, *supra* note 37, Schedule 9. Schedule 9, ¶ 1 requires:

The Equality Commission for Northern Ireland shall (a) keep under review the effectiveness of the duties imposed by section 75; (b) offer advice to public authorities and others in connection with those duties; and (c) carry out the functions conferred on it by the following provisions of this Schedule.

Id.; see also EC GUIDE, *supra* note 44, at 1 (explaining that Schedule 9 sets out detailed procedure for enforcement of Section 75 duties); Fitzpatrick 1999, *supra* note 37 (commenting that baldness of duty in Section 75 of Northern Ireland Act is improved by Schedule 9, which sets out elaborate framework for implementation of duty).

siderations are central to the process of policy development.⁴⁷

1. Schedule Nine Process

Schedule Nine requires public authorities in Northern Ireland to draft equality schemes in which they assess the equality impact of their policies on the nine categories.⁴⁸ During this

47. See EC GUIDE, *supra* note 44, at 6 (explaining that Section 75 statutory duty makes equality central to public policy decision-making). The statutory duty conditions, as well as influences, policy-making in all areas and at all levels of Government activity. *Id.*; see also Equality Commission for Northern Ireland, Public Release, Putting Equality at the Centre of Public Policy (n.d.) (on file with author) [hereinafter Equality Commission Public Release] (stating that Section 75 is new legal obligation on public authorities designed to ensure that considerations of equality are central to their policy-making); Barry Fitzpatrick, PowerPoint Presentation — Developments in Anti-Discrimination Legislation 13, *presented at* Coalition on Sexual Orientation (“CoSO”) Seminar — Sharing the Learning: LGBT Anti-Discrimination Legislation and Campaigning (June 8, 2002) [hereinafter CoSO Seminar] (notes on file with author) (summarizing Section 75 statutory duty as legal net through which all policies must pass). If policies have adverse effects on certain groups or individuals, they will not pass. *Id.*

48. See NI Act 1998, *supra* note 37, at Schedule 9, ¶ 4. Paragraph 4 states, in relevant part:

- (1) A scheme shall show how the public authority proposes to fulfill the duties imposed by Section 75. . .
- (2) A scheme shall state, in particular, the authority’s arrangements—
 - (a) for assessing its compliance with the duties under Section 75 and for consulting on matters to which a duty under that Section is likely to be relevant (including details of the persons to be consulted);
 - (b) for assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of equality of opportunity;
 - (c) for monitoring any adverse impact of policies adopted by the authority on the promotion of equality of opportunity;
 - (d) for publishing the results of such assessments as are mentioned in paragraph (b) and such monitoring as is mentioned in (c);
 - (e) for training staff;
 - (f) for ensuring, and assessing, public access to information and to services provided by the authority.
- (3) A scheme shall—
 - (a) conform to any guidelines as to form or content which are issued by the Commission with the approval of the Secretary of State. . .

Id.; see also EC GUIDE, *supra* note 44, at 29-30 (summarizing key elements of equality scheme). An equality scheme must include:

1. a general introductory statement specifying the purpose of the Scheme and the public authority’s commitment to the statutory duties;
2. the authority’s arrangements for assessing its compliance with the Section 75 duties and for consulting on matters to which a duty under that Section is likely to be relevant;
3. the authority’s arrangements for assessing and consulting on the impact of policies adopted or proposed to be adopted on the promotion of equality of opportunity;

drafting stage, the public authorities must consult persons and groups whom its policies affect.⁴⁹ The public authority submits its drafted equality scheme to the Equality Commission, which is required to either give its consent to the scheme or, if it does not approve, refer it to the Secretary of State.⁵⁰ If an equality

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4. the authority's arrangements for monitoring any adverse impact of policies adopted by the authority on the promotion of equality of opportunity;
 5. the authority's arrangements for publishing the results of equality impact assessments and of monitoring any adverse impact of policies adopted by the authority on the promotion of equality of opportunity.
This must include a commitment to including in the published results of an equality impact assessment:
 - a statement of the aims of the policy to which the assessment relates;
 - details of any consideration given by the authority to measures which might mitigate any adverse impact of that policy on the promotion of equality of opportunity;
 - details of any consideration given by the authority to alternative policies, which might better, achieve the promotion of equality of opportunity.
 6. a commitment that in making any decision with respect to a policy adopted or proposed to be adopted by it, that the public authority shall take into account any equality impact assessment and consultation carried out in relation to the policy;
 7. the authority's arrangements for training staff on issues relevant to the duties;
 8. the authority's arrangements for ensuring, and assessing, public access to information and to services provided by the authority;
 9. the authority's timetable for measures proposed in the Scheme;
 10. details of how the Scheme will be published;
 11. the authority's arrangements for dealing with complaints arising from a failure to comply with the Scheme;
 12. a commitment to conducting a review of the Scheme within five years of its submission to the Equality Commission and to forwarding a report of this review to the Equality Commission.

Id. at 29-30. The Schedule 9 process is basically divided into two stages: first is the preparation of the equality scheme and second is the implementation of the equality scheme. *Id.* at 15.

49. See NI Act 1998, *supra*, note 37, at Schedule 9, ¶ 5. Paragraph 5 provides, in part: "Before submitting a Scheme a public authority shall consult, in accordance with any directions given by the Commission (a) representatives of persons likely to be affected by the scheme." *Id.*; see also EC GUIDE, *supra* note 44, at 12-13 (explaining that legislation requires consultation on matters to which statutory duties are likely to be relevant, on equality schemes themselves, and on impact of policies). Consultation enables evaluations to be made regarding the views of those who are affected by policy decisions or the design of services. *Id.* It makes public authorities aware of issues and problems, which policies may pose for various groups that the authority might not otherwise discover. *Id.*

50. See NI Act 1998, *supra* note 37, at Schedule 9, ¶ 6(1). Paragraph 6(1) requires the Equality Commission upon receipt of an equality scheme to either: (a) approve it; or (b) refer it to the Secretary of State. *Id.*

scheme is referred to the Secretary of State, he or she can approve it, request the public authority to make a revised scheme, or create a scheme for the public authority.⁵¹ Once a public authority's scheme has been accepted, by action of either the Equality Commission or the Secretary of State, it is implemented, and "equality impact assessments" are conducted.⁵²

Schedule Nine also provides a complaints process, allowing individuals to file a complaint with the Equality Commission if a public authority fails to comply with its equality scheme.⁵³ Upon

51. See NI Act 1998, *supra* note 37, at Schedule 9, ¶ 7(1). Paragraph 7(1) requires the Secretary of State upon receipt of a referred scheme to either: (a) approve it; (b) request the public authority to make a revised scheme; or (c) make a scheme for the public authority. *Id.* See also EC GUIDE, *supra* note 44, at 18 (dictating that public authorities have six months to respond to requests by Secretary of State for a revised equality scheme). The public authority must submit a revised scheme to the Equality Commission within six months beginning with the date of the request. *Id.*

52. See NI Act 1998, *supra* note 37, at Schedule 9, ¶ 4(2)(b). For text of, Paragraph 4(2)(b) of Schedule 9 of NI Act 1998 see *supra* note 48. See also EQUALITY COMMISSION, PRACTICAL GUIDANCE ON EQUALITY IMPACT ASSESSMENT 6 (n.d.) (on file with author) [hereinafter EQIA GUIDANCE] (defining equality impact assessment as thorough and systematic analysis of policy in relation to nine equality categories defined in Section 75 of NI Act 1998, whether that policy is written or unwritten, formal or informal, and irrespective of scope of that policy or size of public authority). The primary function of an equality impact assessment is determining whether the public authority's policy has a differential impact upon the nine categories and whether that impact is adverse. *Id.*; EC GUIDE, *supra* note 44, at 15 (discussing second stage of Schedule 9 process as implementation of equality scheme). Part of the implementation process is requiring public authorities to conduct the equality impact assessments laid down in their approved equality scheme. *Id.* at 16. Further consultation, with groups and individuals affected by the public authority's equality scheme, is encouraged during the equality impact assessment. *Id.* Annex 1 provides the procedure for conducting equality impact assessments:

The Commission considers that equality impact assessment requires seven separate elements:

1. consideration of available data and research
2. assessment of impacts
3. consideration:
 - of measures which might mitigate any adverse impact; and
 - alternative policies which might better achieve the promotion of equality of opportunity
4. formal consultation
5. decision by public authority
6. publication of results of equality impact assessment
7. monitor for adverse impact in the future and publication of the results of such monitoring.

Id. at 41.

53. See NI Act 1998, *supra* note 37, at Schedule 9, ¶ 10. Paragraph 10 reads:

- (1) If the Commission receives a complaint made in accordance with this par-

receiving a complaint, the Commission must either investigate the complaint or give the complainant reasons for not investigating.⁵⁴ If the Equality Commission makes recommendations based on an investigation, which are not followed by the public authority, the matter can go before the Secretary of State, where orders of compliance may be issued to the public authority.⁵⁵

Furthermore, the Equality Commission has the power to carry out ad hoc investigations into a public authority's compliance with its equality scheme.⁵⁶ The Equality Commission's authority to carry out such an investigation is taken from its gen-

agraph of failure by a public authority to comply with a scheme approved or made under paragraph 6 or 7, it shall —

- (a) investigate the complaint; or
 - (b) give the complainant reasons for not investigating.
- (2) A complaint must be made in writing by a person who claims to have been directly affected by the failure.
- (3) A complaint must be sent to the Commission during the period of 12 months starting with the day on which the complainant first knew of the matters alleged.
- (4) Before making a complaint the complainant must —
- (a) bring the complaint to the notice of the public authority; and
 - (b) give the public authority a reasonable opportunity to respond.

Id.

54. See NI Act 1998, *supra* note 37, at Schedule 9, ¶ 10(1). For the text of, ¶ 10(1) of Schedule 9 of NI Act 1998 see *supra* note 53.

55. See NI Act 1998, *supra* note 37, at Schedule 9, ¶ 11. Paragraph 11 reads, in relevant part:

- (1) This paragraph applies to —
 - (a) investigations required by paragraph 10; and
 - (b) any other investigation carried out by the Commission where it believes that a public authority may have failed to comply with a scheme approved or made under paragraph 6 or 7.
- (2) The Commission shall send a report of the investigation to —
 - (a) the public authority concerned;
 - (b) the Secretary of State; and
 - (c) the complainant(if any).
- (3) If a report recommends action by the public authority concerned and the Commission considers that the action is not taken within a reasonable time —
 - (a) the Commission may refer the matter to the Secretary of State; and
 - (b) the Secretary of State may give directions to the public authority in respect of any matter referred to him.

Id.

56. See NI Act 1998, *supra* note 37, at Schedule 9, ¶ 11(1)(b). For the text of, ¶ 11(1)(b) of Schedule 9 of NI Act 1998, see *supra* note 55. See also EC GUIDE, *supra* note 44, at 21 (stating that in addition to investigating on basis of complaint, Equality Commission itself has power to conduct investigations into compliance by public authority with equality scheme).

eral responsibility to review the effectiveness of the duties imposed by Section 75, paragraph 1(a), of Schedule Nine.⁵⁷ The public authority, as well, must review its equality scheme and report its findings to the Equality Commission on a regular basis.⁵⁸

2. Mainstreaming Equality

The statutory duty mainstreams equality into public policy by requiring public authorities to weave policies of equality and non-discrimination into the fabric of decision-making across all areas of government.⁵⁹ Commentators characterize the main-

57. See NI Act 1998, *supra* note 37, at Schedule 9, ¶ 1(a). For the text of, ¶ 1(a) of Schedule 9 of NI Act 1998 see *supra* note 46. See also EC GUIDE, *supra* note 44, at 21 (stating that Equality Commission's power to carry out investigation into public authorities compliance with their equality schemes is derived from Commission's general duty to keep effectiveness of Section 75 statutory duties under review).

58. See NI Act 1998, *supra* note 37, at Schedule 9, ¶ 8(3). Paragraph 8(3) states: A public authority shall, before the end of the period of five years beginning with the submission of its current scheme, or the latest review of that scheme under this sub-paragraph, whichever is the later, review that scheme and inform the Commission of the outcome of the review.

Id.

59. See EC GUIDE, *supra* note 44, at 6 (adopting Council of Europe's definition of mainstreaming). Mainstreaming is the (re)organization, improvement, development and evaluation of policy processes, so that an equality perspective is incorporated into all policies at all levels and at all stages, by the actors normally involved in policy-making. *Id.*; see also NORTHERN IRELAND HUMAN RIGHTS COMMISSION, MAKING A BILL OF RIGHTS FOR NORTHERN IRELAND: A CONSULTATION BY THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION 144 (2001) [hereinafter NIHRC CONSULTATION] (defining "mainstreaming rights" as process of incorporating equality rights into everyday policy-making and practice of both public and private bodies); McCrudden, *supra* note 15, at 1768-69 (describing mainstreaming as government pro-actively taking equality into account). The approach is intended to be anticipatory, rather than retrospective, and participatory, rather than limited to a select few policy-makers. *Id.*; CAJ SEB Submission, *supra* note 9, at 2 (describing how Section 75 mainstreams equality issues by requiring public bodies to carry out their functions relating to Northern Ireland with due regard to need to promote equality of opportunity for all nine categories); BOB HEPPLER, QC, ET AL., EQUALITY: A NEW FRAMEWORK — REPORT OF THE INDEPENDENT REVIEW OF THE ENFORCEMENT OF UK ANTI-DISCRIMINATION LEGISLATION 59 (2000) [hereinafter UK EQUALITY REPORT] (stating primary reason for "mainstreaming" is to reduce risk that equality issues, central to whole range of public policy debates, become sidelined); European Region of International Lesbian & Gay Association ("E-ILGA"), *After the Framework Directive: Combating Discrimination Outside Employment* 25 (Apr. 2002) [hereinafter *E-ILGA Policy Paper*] (defining mainstreaming as equality being taken into account at every stage of policy formulation, implementation and evaluation); McCrudden, *Equality*, *supra* note 36, at 103-04 (discussing differences between traditional anti-discrimination approach to addressing inequality and more recent approach of mainstreaming). Countries have sought to address the situation of disadvantaged groups by developing anti-discrimination laws in specific areas, such as employment, housing, or private sec-

streaming approach of the statutory duty as a significant and progressive development, granting all those affected an opportunity to influence public policy and decision-making.⁶⁰ They add that this results in a more transparent, accountable, and democratic process.⁶¹ Commentators however note that the statutory duty is policy-based rather than rights-based legislation, and thus fails to make discrimination based on sexual orientation illegal

tor. *Id.* Anti-discrimination legislation, with its aim to prevent discrimination, is essentially negative in contrast to a positive approach that promotes equality. *Id.* The Northern Ireland experience is that anti-discrimination legislation by itself is insufficient. *Id.* Mainstreaming, however, goes several steps further by requiring government and public bodies to institute policies of equality and non-discrimination into their decision-making. *Id.* Mainstreaming is particularly helpful in addressing not only discrimination but also the larger issue of unacceptable inequalities, whether caused by discrimination or not. *Id.* The motivation for mainstreaming arises from the understanding that unless special attention is paid to equality in policy-making, it becomes sidelined by the day-to-day concerns of policy makers who do not view equality as central to their affairs. *Id.* at 109.

60. See EC GUIDE, *supra* note 44, at 7 (listing advantages to mainstreaming). Mainstreaming "encourage[s] greater openness in government" as well as a "greater transparency in decision-making," and it "assist[s] public authorities" in "effectively and efficiently address[ing] issues of equality. . ." *Id.* See also Dickson 2000, *supra* note 30, at 223 (claiming that process of drafting equality schemes ensures that public authorities promote equality of opportunity by examining any possible adverse impact their policies may have on certain persons and groups through consultation with those individuals and groups); Kieran McEvoy & John Morison, *Beyond the 'Constitutional Moment': Law, Transition, and Peacemaking in Northern Ireland*, 26 *FORDHAM INT'L L.J.* 961, 977 n.52 (2003) (describing Northern Ireland's equality system, with its mainstreaming approach as going well beyond traditional anti-discrimination approach). While similar developments exist elsewhere, the depth and breadth of Northern Ireland's system is new and could be of considerable international importance. *Id.*; McCrudden, *supra* note 15, at 1768 (asserting that statutory duty goes several steps further than traditional approaches taken by Western nations to deal with issues of inequality); Dickson 1999, *supra* note 33, at 10 (noting that Section 75 is first statutory provision in Northern Ireland to recognize that discrimination based on sexual orientation needs to be combated); *E-ILGA Policy Paper*, *supra* note 59, at 25 (describing Northern Ireland's approach to mainstreaming equality as one of most innovative).

61. See McCrudden, *supra* note 15, at 1771 (commenting how Northern Ireland's statutory duty promotes greater participation in decision-making by marginal groups, thus lessening democratic deficit); see also Barry Fitzpatrick, PowerPoint Presentation, Legal Issues on Sexual Orientation Discrimination 10 (n.d.) (copy on file with author) [hereinafter Fitzpatrick PowerPoint] (listing transparency of decision-making as among values of statutory duty); Fitzpatrick 1999, *supra* note 37 (summarizing statutory duty as intricate process of assessment, consultation and transparency surrounding anticipated effects of policies). The statutory duty is the most adventurous experiment in open government amongst European democracies. *Id.* See generally Equality Commission Public Release, *supra* note 47 (describing creation of Section 75 statutory duty as significant development). It makes the policy-making process more transparent and accountable. *Id.*

or to give victims of such discrimination the ability to make a legal claim in court it.⁶² They also critique approved equality schemes for repeating the general terms found in the Equality Commission's *Guide to Statutory Duties* without detailing explicit provisions for the nine categories.⁶³

3. Effectiveness Regarding Sexual Orientation: CoSO's Response to Section 75 Statutory Duty

The Coalition on Sexual Orientation ("CoSO")⁶⁴ argues

62. See Fitzpatrick PowerPoint, *supra* note 61, at 10 (pointing out that statutory duty provides no new rights but rather more intensive and structured analysis of policies); see also Dickson 2000, *supra* note 30, at 223 (explaining that one aggrieved by equality scheme or public authority's failure to abide by scheme does not have right to go to court). The statutory duty is essentially non-justiciable. *Id.*; Dickson 1999, *supra* note 33, at 10 (arguing that although Section 75 is first statutory recognition that discrimination based on sexual orientation needs to be combated, it falls short of making such discrimination unlawful). Individual victims of such discrimination are unable to claim compensation in court. *Id.*; Fitzpatrick 1999, *supra* note 37 (arguing that statutory duty does not create any substantive rights, particularly in regards to issues of sexual orientation and age); Fitzpatrick, *supra* note 47, at 13 (depicting Section 75 as policy-based rather than rights-based legislation). In spite of statutory duty, LGB individuals facing discrimination still do not have legal claim in court. *Id.*; McCrudden, *Equality*, *supra* note 36, at 110 (discussing dangers and limitations to mainstreaming approach to ensuring equality). Mainstreaming could result in over-fragmentation equality policy, especially if it used as a substitute to anti-discrimination and other equality measures. *Id.* Furthermore, building a mainstreaming requirement into civil service decision-making requires considerable cultural change. *Id.* Many jurisdictions experimenting with mainstreaming approaches to equality have not clarified the legal status of such an approach. *Id.* In these countries, the status of mainstreaming, at best, is that of soft law. *Id.* In Northern Ireland, the success of such an approach will rely on the political will at all levels of government. *Id.* at 111.

63. See CoSO, *Response to Draft Equality Schemes*, at 2, available at <http://www.coso.org.uk/publications.php> (Apr. 2001) [hereinafter *CoSO § 75 Response*] (claiming that many equality schemes repeat terminology of EC GUIDE without explaining how schemes will operate in practice); see also Interview with Barbary Cook, Conveyor of CoSO, in Belfast, Northern Ireland (July 2002) (describing many public authorities' equality schemes as skeletal); Gerry Adams, Opinion, *Equality Cannot Be an Illusion; It Must Be a Fact*, BELFAST TELEGRAPH, Jan. 17, 2001 (arguing that Equality Commission lacks requisite resources to investigate and enforce compliance with Section 75). Consequently, there is a growing potential that equality schemes that identify inequalities from their policies and functions will exclude provisions necessary to correct those inequalities. *Id.*

64. See CoSO, *About Us*, available at <http://www.coso.org.uk/index.php> (describing organization's formation and activities in which they are involved). CoSO was established by Lesbian, Gay, Bisexual and Trans (LGBT) groups in Northern Ireland in order to provide a voice for the LGBT community in debates and consultations surrounding the rights of the community. *Id.* It acts as an umbrella body with which public authorities may consult in order to fulfill their statutory duty to promote equal opportunities irrespective of sexual orientation. *Id.* In particular, CoSO represents the LGBT

that the invisibility of sexual minorities as well as the heteronormative structure of society has led to substantial deficiencies in public authorities' equality schemes and equality impact assessments regarding sexual orientation.⁶⁵ Commentators claim LGB communities are often undetectable because, unlike many other groups, sexual minorities can hide their minority status, and they often may choose to do so because of intolerant attitudes towards homosexuality.⁶⁶ This, they say, results in very little research, both quantitative and qualitative, on the LGB community in Northern Ireland.⁶⁷ Many public authorities, as a re-

community in consultations with the Equality Commission on matters concerning issues of sexual orientation. *Id.* It also has an ongoing dialogue with the NIHRC regarding human rights for sexual minorities in the proposed Bill of Rights. *Id.* It regularly publishes response papers on policies and legislation affecting LGBT community. *Id.*

65. See *CoSO § 75 Response*, *supra* note 63, at 1-2 (claiming that invisible nature of LGBT community and society's presumption that everyone is heterosexual has caused sexual orientation to be excluded from public authorities' equality schemes and impact assessments).

66. See Ursula Barry & Ali Jarvis, Lecture on Monitoring: Issues Around Collection of Quantitative and Qualitative Data on Sexual Orientation, *presented at CoSO Seminar* (notes on file with author) (mentioning ability of LGB persons to mask their minority status, making it difficult to conduct research on "invisible population"); see also McCann, *supra* note 8 (describing how severity of homophobia in Northern Ireland causes many LGB individuals to choose not to disclose their sexuality to others); see generally AN ACCEPTABLE PREJUDICE?, *supra* note 4, at 5-10 (discussing pervasiveness and tacit acceptance of homophobia in Northern Ireland); NIHRC REPORT, *supra* note 7, at 4 (asserting that extent of discrimination likely to be hidden because of absence of research and LGB individuals' fear of sexual orientation being known by others).

67. See *CoSO § 75 Response*, *supra* note 63, at 4 (observing that inequality based on sexual orientation is new area about which little evidence has been accumulated); see also EC GUIDE, *supra* note 44, at 42 (noting absence of extensive data on sexual orientation in Northern Ireland); AN ACCEPTABLE PREJUDICE?, *supra* note 4, at 13-19 (reviewing research on LGB communities in United Kingdom and Republic of Ireland and noting limited but growing research on LGB community in Northern Ireland). The current data in Northern Ireland, however, is scant. *Id.* The LGB community within the Province is difficult to survey because there are few organized and visible communities and pervasive homophobia in the region keeps more from emerging. *Id.* at 35; Barry & Jarvis, *supra* note 66 (addressing lack of research, especially quantitative data on gays, lesbians, and bisexuals and difficulty involved in analyzing "invisible" community); OFMDFM, PROMOTING EQUALITY OF OPPORTUNITY — A SINGLE EQUALITY BILL FOR NORTHERN IRELAND — INITIAL CONSULTATION BY OFFICE OF FIRST MINISTER AND DEPUTY FIRST MINISTER 51 (May 2001), available at <http://www.ofmdfmi.gov.uk/equality> [hereinafter OFMDFM INITIAL CONSULTATION] (mentioning that lack of data on composition of economically active population of sexual minorities in Northern Ireland may make it difficult for employers to assess their equal opportunities policies regarding sexual minorities); CHRISTINE LOUDES, NORTHERN IRELAND HUMAN RIGHTS COMMISSION, LEARNING TO GROW UP: MULTIPLE IDENTITIES OF YOUNG LESBIANS, GAY MEN AND BISEXUAL PEOPLE IN NORTHERN IRELAND 9 (2003) [hereinafter LGB YOUTH REPORT] (as-

sult, have excluded impact assessment on the basis of sexual orientation on the grounds that they have no evidence of adverse impact.⁶⁸ The Equality Commission requires public authorities, in the absence of sufficient data, to institute a system of information gathering to supplement available data and specifically requires them to conduct research and discussion with groups representing sexual minorities.⁶⁹ With the existence of CoSO, as well as the recent publication of reports dealing with LGB issues in Northern Ireland, public authorities now have additional sources of information regarding LGB issues.⁷⁰

serting that lack of both qualitative and quantitative data contributes to invisibility of LGB community).

68. See *CoSO § 75 Response*, *supra* note 63, at 4 (expressing CoSO's concern that many public authorities have excluded equality impact assessments based on sexual orientation from their equality schemes on basis that there is no evidence of negative impact on LGB individuals); see also NIHRC REPORT, *supra* note 7, at 14, 63 (mentioning how, as of 2000, Department of Education, Northern Ireland Court Service, and Probation Board for Northern Ireland had no specific policies or provisions in relation to lesbians, gays, and bisexuals); Marie Foy, *Call for Task Force to Help Gay Rights*, BELFAST TELEGRAPH, Aug. 23, 2001 (quoting co-author of NIHRC REPORT, Dermot Feenan, as claiming that many public authorities showed little evidence of policies or practices that even related to lesbian, gay, and bisexual people); EQIA GUIDANCE, *supra* note 52, at 14 (admitting that public authorities' gathering of data on sexual orientation is likely to be time-consuming as there is little information available, but adding that lack of data is no excuse for public authorities' lack of action).

69. See EC GUIDE, *supra* note 44, at 42 (explaining that relevant, reliable and up-to-date information is essential to equality impact assessments). Public authorities must institute a system of information gathering in addition to available statistical and qualitative research. *Id.* Public authorities must realize the benefit of discussion and information gathering with groups representing sexual minorities, particularly in the absence of data. *Id.* See also *CoSO § 75 Response*, *supra* note 63, at 5 (discussing how sensitivities surrounding sexual orientation can make data collection taxing); EQIA GUIDANCE, *supra* note 52, at 13 (explaining how collecting data on sexual orientation can be problematic due to issues regarding sensitivity and confidentiality of collected information). A public authority is expected to be flexible in its response to these issues. *Id.*; Northern Ireland Statistics and Research Agency, Equality Data Sources, *available at* <http://www.nisra.gov.uk/statistics/eqdatasources.html> (showing that, as of September 2002, numerous public authorities had not included category of sexual orientation when conducting research in areas where Section 75 statutory duty applies). The Department of Health, Social Services and Public Safety, the Department for Social Development, the Northern Ireland Court Service, the Department of Education, the Department of Employment and Learning, and the Northern Ireland Office were among the public authorities that did not include sexual orientation in any of the research they conducted. *Id.*

70. See *CoSO*, *supra* note 64 (discussing one reason for its formation was to be voice for LGBT Community in consultations with public authorities aiming to fulfill their statutory duty). Recent studies on LGB community in Northern Ireland and the issues they face include: AN ACCEPTABLE PREJUDICE?, *supra* note 4 (revealing level of homophobic harassment and violence in Northern Ireland); NIHRC REPORT, *supra*

CoSO claims another hindrance to effective equality impact assessments is heterosexism — society's presumption and prescription of heterosexuality.⁷¹ Commentators assert that heterosexism causes government, society, and institutions to be structured around a heterosexual norm, thus making it difficult for policy-makers to understand how certain decisions may adversely affect sexual minorities.⁷² CoSO was formed, in part, to aid public authorities in overcoming their blindness to issues facing sexual minorities through a consultation that allows public authorities to see the adverse effects their policies may have on gays,

note 7 (detailing level of discrimination LGB individuals face in all areas of their private and public life); LESBIAN ADVOCACY SERVICES INITIATIVE ("LASI"), A MIGHTY SILENCE (2002) (reporting on experiences of lesbian and bi-sexual women in Northern Ireland); and LGB YOUTH REPORT, *supra* note 67 (detailing experiences of LGB youth in Northern Ireland).

71. See *CoSO § 75 Response*, *supra* note 63, at 1 (arguing that because of society's presumption that everyone is heterosexual, public authorities are unlikely to take into account sexual diversity in society); see also Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 195 (1988) (defining heterosexism as pervasive cultural presumption and prescription of heterosexual relationships and corresponding silencing and condemnation of homosexual erotic, familial and communitarian relations); Darren Lenard Hutchinson, *Homophobia in the Halls of Justice: Sexual Orientation Bias and Its Implications within the Legal System — Dissecting Axes of Subordination: The Need for a Structural Analysis*, 11 AM. U.J. GENDER SOC. POL'Y & L. 13, 16 (2003) (defining heterosexism as institutionalized domination of gay, lesbian, bisexual, and transgender individuals); Jennifer L. Nye, *The Gender Box*, 13 BERKELEY WOMEN'S L.J. 226, n.83 (1998) (arguing that best definition of heterosexism was offered by Audre Lorde). She defined heterosexism as "the belief in the inherent superiority of one pattern of loving and thereby its right to dominance." *Id.*; Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 199-202 (1996) (tracing heterosexism in Euro-American societies to rise of Roman Empire and Christianity).

72. See Law, *supra* note 71, at 195 (differentiating homophobia from heterosexism). Opposition to homosexuality is often characterized as "homophobia," which suggests a fear and hatred of homosexuals. *Id.* Heterosexism is a much broader phenomenon, structured into basic familial, economic and political relationships. *Id.* It shapes the lives, choices, beliefs and attitudes of many, who experience neither fear nor hatred of LGB people. *Id.* Condemnation of gay and lesbian people is not simply a matter of individual attitude or idiosyncrasy, but rather is deeply rooted in legal and cultural structures. *Id.* Legal rules and cultural institutions reinforce the assumption that heterosexual intimacy is the only natural and legitimate form of sexual expression. *Id.* Culture and law presume and prescribe an absence of sexual attraction between people of the same sex. *Id.* at 196. See also LGB YOUTH REPORT, *supra* note 67, at 9 (asserting that prevailing assumption of heterosexuality by society renders LGB people invisible and seemingly non-existent); Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 ASIAN L.J. 65, 77 (2003) (arguing that heterosexism, like patriarchy, privileges some groups through law and policy on basis of identity-based classifications).

lesbians, and bisexuals.⁷³

B. *A Bill of Rights for Northern Ireland*

The NI Act 1998 calls for the creation of the NIHRC and stipulates as one of its duties assisting the Secretary of State with creating a Bill of Rights for Northern Ireland.⁷⁴ This duty has been described as one of NIHRC's most crucial responsibilities, as Northern Ireland, and the United Kingdom, generally, lack any constitutional framework outlining individuals' rights in relation to government.⁷⁵ The NIHRC is explicitly required to

73. See CoSO, Pamphlet, *Equality and Sexual Orientation: A Guide to Involving and Consulting the Lesbian, Gay, Bisexual and Trans Community* (2d ed. 2003) available at <http://www.coso.org.uk/publications.php> (explaining that CoSO was established in order to provide voice for the LGBT community in debates and consultations about rights of community); see also CoSO, *supra* note 64 (describing CoSO as umbrella body with which public authorities may consult in order to fulfill their statutory duty).

74. See NI Act 1998, *supra* note 37, at Sections 68(1) and 69(7). Section 68(1) states: "There shall be a body corporate known as the Northern Ireland Human Rights Commission." Section 69(7) provides: "The Secretary of State shall request the Commission to provide advice of the kind referred to in paragraph four of the Human Rights section of the Belfast Agreement." See also Belfast Agreement, *supra* note 31, at Rights, Safeguards and Equality of Opportunity, Human Rights, ¶ 4. Paragraph 4 states, in relevant part:

The new Northern Ireland Human Rights Commission will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights are to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and — taken together with the ECHR [European Convention on Human Rights] — to constitute a Bill of Rights for Northern Ireland. . .

Id.; Dickson 1999, *supra* note 33, at 4 (declaring the NIHRC to be the first institution of its kind in Western Europe); Winter & Parassram Concepcion, *supra* note 1, at 7 (mentioning NIHRC as first human rights commission in the United Kingdom).

75. See Committee on the Administration of Justice, *Submission to the NIHRC on Making a Bill of Rights for Northern Ireland 2* (Jan. 2002) [hereinafter *CAJ Bill of Rights Submission*] (characterizing importance of Bill of Rights for new beginning in Northern Ireland, especially because unlike most societies, Northern Ireland, and United Kingdom more generally, do not have any type of constitutional framework that limits exercise of State power); see also Dickson 1999, *supra* note 33, at 6 (commenting that although its role in creating Bill of Rights is only advisory, NIHRC has weight of Belfast Agreement behind it); CONSTITUTIONAL LAW AND HUMAN RIGHTS 7, 12 (Lord Lester of Herne Hill QC & Dawn Oliver eds., 1997) (describing United Kingdom as unusual because it lacks written constitution as sole or supreme source of legal authority for all public action, whether executive, legislative or judicial). The United Kingdom has an incomplete system, consisting of piecemeal legislation, ancient common law doctrines, and constitutional conventions, which are binding in a political rather than in a legal

consider, in drafting a Bill of Rights, a clear formulation of the right not to be discriminated against and the right to equality of opportunity in both the public and private sector.⁷⁶

1. Consultation

In March 2000, the NIHRC undertook a large-scale consultation process in order to canvas views from various political parties, interest groups, church groups, community groups, and statutory bodies.⁷⁷ This consultation included developing over 400 trainers, publishing a trainer's manual, as well as other activities to help spread awareness of the Bill of Rights consultation process throughout Northern Ireland.⁷⁸ By July 2001, the

sense. *Id.* All of the other thirty-three member States in the Council of Europe have written constitutions. *Id.*

76. See Belfast Agreement, *supra* note 31, at Rights, Safeguards and Equality of Opportunity, Human Rights, ¶ 4. Paragraph 4 provides:

The new Northern Ireland Human Rights Commission will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and — taken together with the ECHR — to constitute a Bill of Rights for Northern Ireland. Among the issues for consideration by the Commission will be:

- the formulation of a general obligation on government and public bodies fully respecting, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and
- a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.

Id.

77. See NIHRC CONSULTATION, *supra* note 59, at 8-9 (detailing NIHRC's year-long consultation process, officially launched on March 1, 2000); see also *Viewpoint: Respecting Cultural Diversity*, BELFAST TELEGRAPH, Mar. 2, 2000 (reporting launch of NIHRC's public consultation on a Bill of Rights); Colin Harvey, *Trimble on Trial*, BELFAST TELEGRAPH, Nov. 22, 2000 (describing NIHRC's ongoing consultation process as exercise that will have lasting significance). The consultation gives people the opportunity to have a say on the rights they wish to see guaranteed in the law. *Id.*

78. See NIHRC CONSULTATION, *supra* note 59, at 8-9 (listing measures taken by NIHRC to canvas views on Bill of Rights). Trainers were involved in spreading awareness of the consultation process within their own communities and organizations. *Id.* There was the publication of eleven explanatory pamphlets, the establishment of nine advisory Working Groups on different types of rights, and the production of a thirty-minute informational video. *Id.* In addition, the NIHRC met with political parties and various interest groups and also attended numerous conferences to promote discussion and answer questions. *Id.* See also Harvey, *supra* note 77 (reporting that NIHRC is encouraging wide-ranging popular participation in consultation exercise); Dickson 2000, *supra* note 30, at 224 (describing NIHRC's role in developing human rights culture in

NIHRC had received over 200 submissions from various groups and organizations throughout the province commenting on what they thought should be included in a Bill of Rights.⁷⁹ In September 2001, the NIHRC published a consultation document containing an initial draft of a Bill of Rights for Northern Ireland and requested further discussions with individuals and organizations.⁸⁰

2. First Draft

The first draft of a Bill of Rights for Northern Ireland contains a preamble and eighteen subsequent sections, dealing with a range of issues from democratic rights, to the rights of victims of the Troubles, to criminal and administrative justice.⁸¹ Com-

Northern Ireland through creation of Bill of Rights). The NIHRC wants the consultation process "to be as inclusive and participative as possible." *Id.*

79. See NIHRC CONSULTATION, *supra* note 59, at 9 (noting how NIHRC's received one-hundred-thirty written submissions by initial deadline at end of February 2001, followed by eighty-five additional ones between March and July 2001). The NIHRC was enormously impressed by the effort put into the submissions received, which overall were positive and enthusiastic. *Id.*

80. See NIHRC CONSULTATION, *supra* note 59 (containing drafted Bill of Rights and explaining purpose of its publication is for public examination and response before NIHRC submits its final advice to Secretary of State); see also Maggie Beirne, Workshop on Bill of Rights, *presented at CoSO Seminar*, (June 8, 2002) (notes on file with author) (revealing that NIHRC requested further comments from public because it wanted to ensure full and effective participation by various groups and individuals in Northern Ireland, in order to enhance legitimacy of final Bill of Rights); Patrick Corrigan & Martin O'Brien, Editorial, *All Should Take Part in Bill of Rights Consultation*, BELFAST TELEGRAPH, Sept. 29, 2001 (describing consultation document as major contribution to public discourse on inclusive Bill of Rights and encouraging public to participate in continuing debate to ensure Bill of Rights reflects their needs and concerns).

81. See NIHRC CONSULTATION, *supra* note 59, at 110-33 (containing nineteen sections for consultation). The sections are divided as follows:

1. Preamble
2. Democratic Rights
3. Rights Concerning Identities and Communities
4. Equality and Non-Discrimination
5. The Rights of Women
6. Rights to Life, Freedom from Torture, Inhuman or Degrading Treatment or Punishment, Freedom from Slavery and Freedom from Forced Labour
7. Criminal Justice and Administrative Justice
8. The Rights of Victims
9. Rights to Family Life and Private Life
10. The Rights of Children
11. Education Rights
12. Rights to Freedom of Thought, Expression, Information and Association
13. Language Rights
14. Social, Economic and Environmental Rights

mentators consider the draft Bill of Rights a far-reaching piece of legislation⁸² for including among its provisions social, economic, and environmental rights — such as the right to health care,⁸³ the right to a healthy and sustainable environment,⁸⁴ and the right to an adequate standard of living.⁸⁵ The draft Bill of

15. Interpretation
16. Limitations
17. Emergencies
18. Enforcement
19. Entrenchment and Amendment

Id.

82. See *Ulster Bill of Rights Plans Are Unveiled*, BELFAST TELEGRAPH, Sept. 4, 2001 (describing proposals in draft Bill of Rights as radical and going considerably further than European Convention on Human Rights); see also Fitzpatrick PowerPoint, *supra* note 61 (describing draft Bill of Rights as quite progressive); Beirne, *supra* note 80 (characterizing the drafted Bill as sweeping and extremely inclusive).

83. See NIHRC CONSULTATION, *supra* note 59, at 129, § 14(c). Section 14(c) — Right to Health Care states:

1. Everyone is entitled to the highest attainable standard of physical and mental health and well-being.
2. Government shall take all reasonable steps to promote good health and well-being, and to ensure adequate prevention and treatment of ill-health.
3. Equality of access to health promotion, treatment and prevention of ill-health shall be assured.
4. Everyone has the right to be consulted about decisions which affect his or her physical or mental health.
5. Everyone has the right to have equal and free access to sexual and reproductive health care and to information and education relating to sexual and reproductive matters at all levels, free of coercion, discrimination or violence.

Id.

84. See NIHRC CONSULTATION, *supra* note 59, at 130, § 14(g). Section 14(g) — Right to Healthy and Sustainable Environment provides:

1. Everyone has the right to a healthy, safe and sustainable environment.
2. The State has a duty to provide accurate and timely information and to communicate, consult and foster participation in planning and decision-making on matters which concern the environment.

Id.

85. See NIHRC CONSULTATION, *supra* note 59, at 130, § 14(d). Section 14(d) — Right to an Adequate Standard of Living asserts:

1. Everyone is entitled to an adequate standard of living sufficient for that person and those dependent on him or her.
2. Material provision for each person should be sufficient to ensure esteem for his or her health and dignity.
3. Everyone has the right to social and civic care.
4. Persons receiving assistance from the State shall be accorded respect. The State shall endeavor to accommodate the particular needs of ethnic and minority groups in the provision of material needs.
5. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided to ensure enforcement of these rights.

Rights, however, has also been criticized for the extensiveness of its provisions because the political reality is that a drafted Bill of Rights must be approved by Westminster,⁸⁶ and many believe that a Bill with such far-reaching social, economic, and environmental rights may not fare successfully in the British Parliament.⁸⁷

3. Effectiveness in Securing and Protecting Rights Based on Sexual Orientation: CoSO's Response to the Draft Bill of Rights

Although, there was barely any mention of sexual orientation in the NIHRC's consultation document, and no LGB groups or organizations are listed among those who participated in the initial consultation process, commentators believe that the drafted Bill of Rights holds promise for Northern Ireland's LGB community, as it will enshrine individuals' rights in a constitu-

Id.

86. Westminster is the palace in London that houses the British Parliament comprised of the House of Commons and the House of Lords.

87. See Belfast Agreement, *supra* note 31, at ¶ 4 (requiring NIHRC to advise Secretary of State on scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights); see also Beirne, *supra* note 80 (mentioning that downfall to such sweeping legislation is that it might not ultimately be accepted by United Kingdom government in London). One reason that may be of concern to politicians is that passing such sweeping legislation in Northern Ireland will put pressure on them to pass similar social, economic, and environmental provisions in England, Wales, and Scotland. *Id.*; Steven King, *The Wannabe Factor*, BELFAST TELEGRAPH, Dec. 4, 2001 (critiquing draft Bill of Rights as providing too many rights). Every public grievance and every aspiration for social justice becomes redefined as a right. *Id.* This rights inflation devalues the meaning and value of human rights. *Id.*; Jeffrey Donaldson, MP, Editorial, *A Common Sense Bill of Rights*, BELFAST TELEGRAPH, Oct. 1, 2001 (expressing disappointment and concern over draft Bill of Rights, especially in regards to cost of implementation). The draft Bill of Rights allows groups or individuals to take legal action to challenge any failure by government and public bodies to take reasonable and proportionate steps to deliver social and economic rights. *Id.* The clear consequence of this Section is that the limited resources of the State will be further dissipated with the end result of the deterioration of public services. *Id.*; Peter Gray, Northern Ireland Vice-Chairman, Conservative Party, Editorial, *Is the Primary Agenda Politics and Not Rights?*, BELFAST TELEGRAPH, Feb. 11, 2002 (criticizing draft Bill of Rights for emphasizing individual rights over responsibilities).

Grandiose statements concerning social economic and environmental rights are meaningless when ghetto areas are trashed daily by some of those who live there, and riots strain police and health service resources. Nothing in the Commission's [NIHRC] advice will improve the lives of decent people made a misery by bullies, vandals, thieves, agitators and the feckless, more conscious of rights than responsibility.

Id.

tional context.⁸⁸ CoSO focuses on three sections — Section 3 Rights Concerning Identities and Communities,⁸⁹ Section 4

88. See CoSO, *Response to NIHRC's Making a Bill of Rights for Northern Ireland* 1 (n.d.) (on file with author) [hereinafter *CoSO Bill of Rights Response*] (describing CoSO's disappointment that there was little mention of lesbian, gay, bisexual or transgender/transsexual people in consultation document, while other minority groups were frequently mentioned); see also *CAJ Bill of Rights Submission*, *supra* note 75, at 2 (mentioning that Northern Ireland has no type of constitutional framework that limits exercise of state power in protection of individual); see also Fitzpatrick 1999, *supra* note 37 (highlighting how, in spite of Section 75 statutory duty, substantive rights based on one's sexual orientation still do not exist); see also Beirne, *supra* note 80 (discussing how Bill of Rights, if approved, will provide LGB individuals with legal protections).

89. See NIHRC CONSULTATION, *supra* note 59, at 112, § 3. Section 3 — Rights Concerning Identity and Communities reads:

- (a) The right to national identity
 1. Individuals born in Northern Ireland have the right to identify themselves and be accepted as Irish or British citizens, or both, as they may so choose.
- (b) The rights of members of communities
 1. Nothing in this section shall be used to negate equality commitments, including positive action provisions, in this Bill of Rights or in legislation. Nor shall anything in this section negate voting mechanisms designed to ensure representivity in political institutions and decision-making.
 2. Everyone belonging to a national, ethnic, religious or linguistic community shall have the right in common with other members of that community to enjoy his or her own culture, to profess and practise his or her own religion and to use his or her own language.
 3. Everyone has the right to be nomadic or sedentary and a right to change from one mode of living to the other.
 4. Everyone has the right freely to choose to be treated or not to be treated as a member of what might otherwise be perceived to be their national, ethnic, religious or linguistic community and no disadvantage shall result from this choice or from the exercise of the rights which are connected to this choice.
 5. The Government and public bodies shall, without prejudice to existing legal requirements and to the positive action clause 4(8) of this Bill, adopt effective and appropriate measures to:
 - (a) promote equality in all areas of economic, social, cultural and political life among and between persons belonging to national, ethnic, religious or linguistic communities and the conditions necessary for them to maintain and develop their culture;
 - (b) preserve the essential elements of the identity of such persons, namely their religion, language, traditions and cultural heritage; and
 - (c) promote tolerance, mutual respect, understanding and co-operation among all persons living in Northern Ireland, irrespective of their cultural, ethnic, religious or linguistic identity, in particular in the fields of education, culture and the media.

The following clause is offered as an alternative to clauses 2 to 4, above:

Equality and Non-Discrimination,⁹⁰ and Section 9 Rights to Fam-

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2. The Government and public bodies shall adopt effective and appropriate measures to ensure:
 - (a) mutual respect for all people in the diversity of their identities and traditions; and
 - (b) parity of esteem and just and equal treatment for the identity, ethos and aspirations of both communities; the programmatic standards in the Framework Convention shall provide a guide as to how this is to be achieved.

Id.

90. See NIHRC CONSULTATION, *supra* note 59, at 113, § 4. Section 4 — Equality and Non-Discrimination creates a prohibition on discrimination stating:

1. The enjoyment of the rights and freedoms set forth in this Convention [European Convention on Human Rights] shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. Everyone is equal before and under the law and has the right to equal protection and equal benefit of the law. Equality includes the full and equal access to and enjoyment of all rights and freedoms.
3. Equality between men and women must be assured in all areas. The State shall take all necessary measures to promote the equal employment, benefit, and protection of all human rights and fundamental freedoms for women and girls.
4. Everyone has the right to be protected against any direct or indirect discrimination whatsoever on any ground (or combination of grounds) such as race or ethnic origin, nationality, colour, gender, marital or family status, residence, language, religion or belief, political or other opinion, possession of criminal conviction, national or social origin, birth, disability, age, parentage, sexual orientation, status as a victim or any other status.
5. Direct discrimination shall be taken to occur when a person has suffered, will suffer, or would suffer disadvantage on the basis of any of the grounds in clause 4(4) (the non-discrimination clause).
6. Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put any person at a disadvantage by virtue of their status, as defined by clause 4(4) (the non-discrimination clause) and as limited by clause 4(9) (the exceptions clause).
7. Harassment or bullying shall be deemed to be a form of discrimination when unwanted conduct related to any of the grounds referred to in clause 4(4) (the non-discrimination clause) 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.
8. Laws, policies, programmes or activities aimed at achieving and sustaining full and effective equality, in particular by reducing inequalities affecting groups disadvantaged on the grounds specified in clause 4(4) (the non-discrimination clause) or on socio-economic grounds, and which may include specific measures for individuals from such groups, shall be required or may be adopted. Such policies, programmes or activities shall not constitute unlawful discrimination.
9. A difference of treatment which is based on a characteristic related to any of the grounds referred to in the non-discrimination clause 4(4) shall not

ily Life and Private Life⁹¹ — in addressing the draft Bill of Rights ability to protect LGB rights in Northern Ireland.⁹²

Section 3 provides for the right to a national identity⁹³ and rights of members of communities.⁹⁴ CoSO and other commentators have criticized this section for putting forth limited notions of identity (national only) and community (national, eth-

constitute discrimination where, by reason of the nature of the particular activities concerned, or of the context in which they are carried out, such characteristic constitutes a genuine and determining requirement, provided that the objective is legitimate and the requirement is proportionate.

Id.

91. See NIHRC CONSULTATION, *supra* note 59, at 121, § 9. Section 9 — Rights to Family Life and Private Life provides:

(a) Rights to family and private life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this rights except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
3. Everyone has the right to protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law.
4. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

(b) Right to marry

1. Men and women of marriageable age have the right to marry and to found a family, according to the laws governing the exercise of this right.
2. The State shall adopt legislation to recognize and guarantee equality of rights and responsibilities of a private character for persons living together in marriage and in long-term domestic partnerships. Such legislation shall provide for the formal recognition of the relationship and the rights and responsibilities of the partners during the relationship and in the event of dissolution.
3. Everyone who is married has the right to have the marriage terminated in accordance with the law.

Id.

92. See *CoSO Bill of Rights Response*, *supra* note 88, at 3-16 (focusing on provisions of Sections 3, 4, and 9 in reviewing effectiveness of draft Bill of Rights in protecting LGB individuals); see also Fitzpatrick PowerPoint, *supra* note 61 at 8-9 (highlighting clauses 4(2) and 4(4) in discussing combating discrimination based on sexual orientation).

93. See NIHRC CONSULTATION, *supra* note 59, at 112, § 3(a)(1). For text of Section 3(a)(1) of draft Bill of Rights, see *supra* note 89.

94. See NIHRC CONSULTATION, *supra* note 59, at 112, § 3(b). For text of Section 3(b) of draft Bill of Rights, see *supra* note.89.

nic, religious or linguistic only), arguing that this limits both society's recognition of the multiple identities existing in Northern Ireland and the treatment of sexual minorities as a community.⁹⁵ In order to make the drafted Bill of Rights more comprehensive in protecting all groups, CoSO has requested that the NIHRC include a clause recognizing one's right to self-identity.⁹⁶ CoSO has also suggested that the term "other communities" be added to clauses in Section 3(b).⁹⁷

Section 4 prohibits discrimination and is the only chapter to specifically mention sexual orientation as a protected group.⁹⁸ CoSO applauds this Section for making both direct (clause 4(5))

95. See *CoSO Bill of Rights Response*, *supra* note 88, at 3-4 (arguing that drafted provisions regarding communities cannot naturally embrace language of sexual identity and sense of community that LGB people experience). The Bill of Rights should expand the protection granted to encompass an expression of multi-identity in Northern Ireland. *Id.* The existing terminology places unnecessary constraints upon the realities of identity in Northern Ireland. *Id.* See also *CAJ Bill of Rights Submission*, *supra* note 75, at 7 (suggesting text of 3(a)(1) regarding national identity should follow rather than precede other clauses in chapter to help address concern of other minorities that their cultural identity is respected alongside questions of national identity); NORTHERN IRELAND HUMAN RIGHTS COMMISSION, SUMMARY OF SUBMISSIONS ON A BILL OF RIGHTS 32 (2003) [hereinafter NIHRC SUMMARY] (stating that 29% of submissions, such as those made by CoSO, Amnesty International, and Equality Commission, endorse notion that Bill has to ensure that rights are guaranteed for all communities, not just two main [Catholic/Nationalist and Protestant/Unionist] communities). CoSO also has expressed disappointment at the lack of recognition of a lesbian, gay, and bisexual identity. *Id.* at 34.

96. Compare NIHRC CONSULTATION, *supra* note 59, at 112, § 3 — for text of Section 3 of draft Bill of Rights, see *supra* note 89 — with *CoSO Bill of Rights Response*, *supra* note 88, at 3-4 (suggesting revisions to Section 3 of draft Bill of Rights). A new clause titled "Right to Self-Define One's Identity" should be inserted and should read: "Individuals born in Northern Ireland have the right to identify themselves in terms of their national, religious, ethnic, linguistic, cultural, political and sexual identities." *Id.*

97. See NIHRC CONSULTATION, *supra* note 59, at 112, § 3. For text of Section 3 of draft Bill of Rights, see *supra* note 89. See also *CoSO Bill of Rights Response*, *supra* note 88, at 4 (arguing for inclusion of "other communities" to § 3(b)). The term "other communities" would allow for a more dynamic interpretation of the clause as perceptions of identity develop in the future making the Bill more comprehensive in protecting all identity groups. *Id.*; *CAJ Bill of Rights Submission*, *supra* note 75, at 7 (suggesting text of 3(b)(2) be changed). The proposed changes, italicized, provide:

Every person belonging to a national, ethnic, religious, linguistic, or *cultural minority* shall have the right *individually and in community* with other members of that *minority* to participate *effectively in the cultural, religious, social, economic, and public life of society*, to enjoy his or her own culture, to profess and practice his or her own religion and to use his or her own language.

Id.

98. See NIHRC CONSULTATION, *supra* note 59, at 113, § 4. For text of Section 4 of draft Bill of Rights, see *supra* note 90.

and indirect (clause 4(6)) forms of discrimination illegal.⁹⁹ CoSO, however, expresses concern over the exception clause that follows because it holds an exception to be justifiable as long as it is "legitimate" and "proportionate".¹⁰⁰ Both the Catholic and Protestant churches are involved in areas, such as education and health care, creating concern that this exception may be used by church-run schools, hospitals, and other social services to keep openly gay, lesbian, and bisexuals from working and participating in such sectors.¹⁰¹ CoSO has requested that the NIHRC change the text from "legitimate" to "necessary", because under indirect discrimination law, it is much more difficult to establish a necessary objective rather than a legitimate one.¹⁰² They argue that by raising the standard to one of necessity, it becomes much more difficult for an individual or organi-

99. See NIHRC CONSULTATION, *supra* note 59, at 113, Secs. 4(4)-4(6). For text of Sections 4(4)-4(6) of draft Bill of Rights, see *supra* note 90. See also *CoSO Bill of Rights Response*, *supra* note 88, at 6-7 (expressing full support for clause on direct discrimination); Cook, *supra* note 63 (praising draft Bill of Rights for including both direct and indirect discrimination).

100. See NIHRC CONSULTATION, *supra* note 59, at 113, § 4(9). For text of Section 4(9) of draft Bill of Rights, see *supra* note 90. See also *CoSO Bill of Rights Response*, *supra* note 88, at 7 (expressing its technical concern regarding use of "legitimate" rather than "necessary" in clause 4(9)).

101. See *CoSO Bill of Rights Response*, *supra* note 88, at 7 (explaining that, for example, educational establishment might argue that sexual orientation of teacher — requiring heterosexuals — is "legitimate" objective and courts would accept this; it would, however, be quite difficult for courts to accept that sexual orientation — heterosexuality — of teacher is necessary objective); see also Beirne, *supra* note 80 (discussing how clause 4(9) may be used to legitimize discrimination against LGB individuals in certain fields). Participants in the workshop discussion also expressed concerns that church-affiliated organizations could discriminate against LGB individuals, since homosexuality is in contradiction with a church's ethos. *Id.*; Fitzpatrick PowerPoint, *supra* note 61 (discussing how homosexuality could be considered to be against churches' beliefs). Churches might argue for exception to Clause 4(4) — prohibiting discrimination based on sexual orientation — using Clause 4(9). *Id.* See also NIHRC SUMMARY, *supra* note 95, at 41 (discussing faith-based organizations support for equality rights for churches to ensure protection for their beliefs and practices). The Irish Council of Churches and the Presbyterian Church in Ireland's Church and Government Committee have requested provisions exempting churches from equality legislation and protecting a faith organization's ethos. *Id.* For a discussion of balancing the human right to freedom from sexual orientation discrimination with the human right to freedom of religion, see Robert Wintemute, Independent Review of the Enforcement of U.K. Anti-Discrimination Legislation — Working Paper No. 7: Inclusion of Sexual Orientation in U.K. Anti-Discrimination Legislation (Centre for Public Law, University of Cambridge 1999) (on file with author) [hereinafter Wintemute Working Paper].

102. See *CoSO Bill of Rights Response*, *supra* note 88, at 7-8 (claiming that there exists significant legal distinction between "legitimate" aim or objective and "necessary" one).

zation to justify their discriminatory practices.¹⁰³

Section 9 outlines rights in regards to family and private life as well as marriage, expanding upon the European Convention on Human Rights by adding provisions concerning protection of personal data (Clause 9(a)(3)) and individuals' right to access data concerning them (Clause 9(a)(4)).¹⁰⁴ CoSO praises these provisions for further protecting the private lives of LGB people in regards to investigations into and monitoring of their sexuality as well as actions taken on the basis of their sexual orientation, such as dismissal from employment.¹⁰⁵ Chapter 9(b), dealing with the right to marry, includes the recognition of domestic partnerships, which CoSO supports.¹⁰⁶ It, nevertheless, argues for the removal of the descriptor "long-term," maintaining that length alone should not determine the commitment of a relationship.¹⁰⁷ Overall, CoSO argues that Section 9 of the drafted Bill of Rights marks a major advance in LGB rights as it ad-

103. *Id.* (explaining that it is accepted law that more powerful test within indirect discrimination for justifications of discrimination requires necessary objectives, for it is much easier to establish legitimate ones). It is essential that those organizations, which are reluctant to pursue equality are subject to robust definitions of discrimination and clear exceptions clauses. *Id.* See also NIHRC SUMMARY, *supra* note 95, at 41 (summarizing CoSO's concerns with exception clause). CoSO argues that a necessary objective discrimination clause would make it harder to prove that indirect discrimination was legal. *Id.*

104. Compare NIHRC CONSULTATION, *supra* note 59, at 121, § 9(a) (including protection of personal data and individual's right to access such data in provisions on privacy) with European Convention on Human Rights, *supra* note 18, art. VIII (protecting privacy only in regards to one's family life, home, and correspondence).

105. See *CoSO Bill of Rights Response*, *supra* note 88, at 15 (noting positive approach of ECHR towards protection of private lives of LGB people and applauding proposed extensions to scope of privacy protection offered through clauses 9(a)(3) and (4) in draft Bill of Rights).

106. See NIHRC CONSULTATION, *supra* note 59, at 121, § 9(b). For text of Section 9(b) of draft Bill of Rights, see *supra* note 91. See also *CoSO Bill of Rights Response*, *supra* note 88, at 16 (applauding clause 9(b)(2), providing for right to recognition of domestic partnerships); see also NIHRC SUMMARY, *supra* note 95, at 68 (stating that four percent of submissions to NIHRC's consultation document approve of equal rights for those living in domestic partnerships). Eight percent of submissions do not believe that same-sex relationships should have the same protection as marriage in a Bill of Rights. *Id.* Catholic and Protestant organizations asked the NIHRC to be mindful of Northern Ireland's conservative ethos and the religious beliefs of many Northern Irish people, and to recognize a right not to have beliefs imposed by a Bill of Rights that are contrary to an individual's religious doctrine. *Id.*

107. See *CoSO Bill of Rights Response*, *supra* note 88, at 16 (arguing that partners are the ones who should define level of commitment within relationship); see also NIHRC SUMMARY, *supra* note 95, at 68 (discussing how CoSO and other groups prefer that relationships are not qualified by their length).

dresses two major concerns of the LGB community in Northern Ireland – the right of privacy for those who wish to maintain confidentiality about their sexuality and their personal relationships and the right to recognition of same-sex partnerships.¹⁰⁸

CoSO criticizes the draft Bill of Rights for lacking provisions ensuring individuals' access to justice.¹⁰⁹ Section 18 dealing with enforcement¹¹⁰ lacks provisions ensuring an individual's right to information, advocacy, and representation, which CoSO argues are essential to one actualizing the rights and protections the Bill of Rights grants them.¹¹¹ CoSO has proposed the inclusion of an additional chapter to secure a right to information, advocacy, and representation, thus ensuring that even the most socially disadvantaged people in society may exercise their

108. See *CoSO Bill of Rights Response*, *supra* note 88, at 16 (claiming that Section 9 reflects two vital considerations for LGB people in Northern Ireland: one being right to privacy of those who wish to maintain confidentiality around their personal relationships and other being right to recognition of those who live in same-sex partnerships). Clause 9(b)(2) is fully consistent with NIHRC's prior research and work on LGB rights in Northern Ireland. *Id.* Furthermore, it aids public authorities in satisfying their statutory duty by providing for appropriate services and benefits to same-sex partnerships. *Id.*

109. See *CoSO Bill of Rights Response*, *supra* note 88, at 28-29 (criticizing draft Bill of Rights for lacking appropriate enforcement measures); see also *CAJ Bill of Rights Submission*, *supra* note 75, at 20-21 (arguing that Northern Ireland needs text that is accessible and rights that are enforceable). This concern about accessibility and enforceability was repeatedly raised during the NIHRC's public consultation. *Id.*

110. See NIHRC CONSULTATION, *supra* note 59 at 133, § 18. Section 18 — Enforcement reads:

1. Courts shall grant to any person or body whose rights and freedoms under this Bill of Rights have been or may be violated an effective remedy and for this purpose may grant such relief or remedy, including compensation, or make such order, as they consider just and appropriate.
2. Any person or body who has a legitimate interest in the matter may bring proceedings concerning the alleged breach of any provision in this Bill of Rights.
3. Proposed legislation may be referred to the courts for a decision as to whether it is at that time compatible with the Bill of Rights for Northern Ireland.

Id.

111. See *CoSO Bill of Rights Response*, *supra* note 88, at 28 (arguing that inclusion of rights to information, advocacy and representation, which are not included in draft Bill of Rights, are needed to support and represent people facing homophobia in their day-to-day lives). The social exclusion experienced by LGB individuals can be addressed by educating people about their rights. *Id.* If individuals cannot be supported by organizations in their complaints of discrimination or have such complaints addressed by the Courts or Government, then the provisions of the draft Bill of Rights will not be worth the paper they are written on. *Id.*

rights.¹¹²

C. A Single Equality Bill

The purpose of the Single Equality Bill (“SEB”) is to harmonize existing equality and anti-discrimination legislation, as well as incorporate Northern Ireland’s regional (European Community) obligations regarding such matters.¹¹³ A main objective of the SEB is to overcome problems with existing equality legislative acts by uniting them under a single piece of legislation.¹¹⁴

112. *See id.*, at 28-29 (proposing inclusion of additional clause on right to information, advocacy and representation). The proposed clause reads:

A person’s right to information, support, advocacy and representation underpin the application of each and every one of their civil, political, economic and social rights. Without these rights the most socially disadvantaged people in society cannot actualise the rights given to them by a Bill of Rights.

- 1) Every person has the right to independent, impartial and confidential information, support, and advice.
- 2) Every person has the right to advocacy and representation.
- 3) Government has a duty to provide resources to support access to information, support, advocacy and representation services for every citizen.

Id. *See also CAJ Bill of Rights Submission*, *supra* note 75, at 21 (discussing how clause on legal aid, accessibility provision and generous interpretation of standing should be included in Section on enforcement). Such provisions are vital to protecting those who most need protection. *Id.* If the most vulnerable and most marginalized in society are to benefit from the passage of a Bill of Rights, then enforcement measures must grant them access to justice. *Id.*

113. *See OFMDFM INITIAL CONSULTATION*, *supra* note 67, at 5 (claiming that SEB is designed to build on existing equality legislation in preventing discrimination and promoting equality, as well as enable Northern Ireland to implement European Directives on equality). The SEB will enable Northern Ireland’s anti-discrimination legislation to be harmonized as far as practicable and will allow for the consideration of extending protection to new categories. *Id.* The SEB will not involve a reduction in protection offered by current laws. *Id.* The current equality and anti-discrimination legislation and applications are: Sex Discrimination (Northern Ireland) Order 1976 applicable to sex, married persons, and gender reassignment; Equal Pay Act (Northern Ireland) 1970 applicable to contract terms; Disability Discrimination Act 1995 applicable to disability; Race Relations (Northern Ireland) Order 1997 applicable to color, race, nationality, ethnic origin, and Irish Traveler; and Fair Employment and Treatment (Northern Ireland) Order 1998 applicable to religious belief and political opinion. *Id.* at 12. *See also CAJ SEB Submission*, *supra* note 9, at 1 (discussing how Single Equality Bill will apply regional requirements regarding employment discrimination against LGB individuals as well as harmonize and simplify existing anti-discrimination legislation); OFMDFM, *Promoting Equality of Opportunity: Implementing EU Equality Obligations in Northern Ireland: Summary Document 1-3* (Jan. 2003), available at <http://www.ofmdfmi.gov.uk/equalityofopportunity/index.htm> (outlining OFMDFM’s obligations under European Union’s Framework Employment Directive (2000) to implement anti-discrimination legislation on grounds of sexual orientation).

114. *See* Equality Commission, PowerPoint Presentation, Proposed Single Equality Bill — Hearing Your Views, 2 (Nov./Dec. 2001) (on file with author) [hereinafter

The SEB, furthermore, incorporates Northern Ireland's regional obligations — the European Union's Race Directive¹¹⁵ and Framework Employment Directive ("Framework Directive" or "Directive")¹¹⁶ — thus broadening the scope of protection to include groups such as age and sexual orientation.¹¹⁷ Many commentators have praised the OFMDFM's plan for a Single Equality Bill, believing that such legislation will be an improvement to Northern Ireland's equality regime.¹¹⁸

Equality Commission PowerPoint] (arguing that current legislation is unsuccessful in eliminating discrimination, is based on outdated approach, focuses on avoiding discrimination rather than promoting equality, is complicated, places heavy burden on complainants to redress inequality, offers conflicting levels of protection, and creates hierarchy of discrimination); *see also ECNI SEB Paper, supra* note 29, at 1 (expressing Equality Commission's support for Single Equality Bill for Northern Ireland). The existence of a number of pieces of equality legislation does not gel with the existence of a single Equality Commission to enforce such legislation. *Id.* at 5. A move to a single legislative framework would greatly assist the Equality Commission in eliminating unlawful discrimination and promoting equality of opportunity for all. *Id.*; *CAJ SEB Submission, supra* note 9, at 3 (claiming that current anti-discrimination models focusing on equality of opportunity have failed to gain measurable results for marginalized groups and arguing that equality should be measured by equality of outcome, rather than equality of opportunity); NIHRC REPORT, *supra* note 7, at 8 (stating that SEB is aimed at harmonizing existing anti-discrimination legislation); UK EQUALITY REPORT, *supra* note 59, at 23 (arguing positives of harmonizing equality legislation under single statute includes: recognizing indivisibility of concept of equality; encouraging links among groups facing discrimination; focusing attention of employers and service providers on need for inclusive approach; making it easier to deal with cases of multiple discrimination).

115. *See* Council Directive No. 00/43, O.J.L 180 (2000) (implementing principle of equal treatment between persons irrespective of racial or ethnic origin).

116. *See* Council Directive No. 00/78, O.J.L 303/16 (2000) [hereinafter Framework Directive] (establishing general framework for equal treatment in employment and occupation).

117. *See* NIHRC REPORT, *supra* note 7, at 8 (mentioning that SEB broadens scope of protection against discrimination to new categories, including sexual orientation); *see also ECNI SEB Paper, supra* note 29, at 5 (stating that Framework Directive adds age and sexual orientation to list of categories to which equality must be guaranteed); *E-ILGA Policy Paper, supra* note 59, at 1 (explaining that Framework Directive forbids discrimination in employment on grounds of religion or belief, age, disability or sexual orientation). It represents a first and important step for the European Union in combating discrimination against LGB people. *Id.*

118. *See ECNI SEB Paper, supra* note 29, at 1 (stating that by unifying equality rights in one Bill, OFMDFM will affirm that equality is fundamental principle of universal relevance); *see also* Equality Commission, *Position Paper: Update on the Single Equality Act 1* (2002) [hereinafter *ECNI SEB Update*] (reiterating its stance that SEB will sustain equality as deep-seated principle); *CAJ SEB Submission, supra* note 9, at 1-2 (explaining that SEB will provide much needed harmonizing and simplifying of existing anti-discrimination legislation).

1. Framework Directive: Regional Prohibition on Discrimination Based on Sexual Orientation

In November 2000, the European Union adopted the Framework Directive on Equal Treatment in Employment, which prohibits discrimination in employment on the grounds of religion or belief, age, disability, and sexual orientation.¹¹⁹ The Framework Directive's main purpose is to compel Member States to enforce the principle of equal treatment, defined as the prohibition of both direct and indirect discrimination.¹²⁰ The Framework Directive also includes harassment and instruction to discriminate as forms of prohibited discrimination.¹²¹ Article III

119. See Framework Directive, *supra* note 116, at 18, art. I. Article I — Purpose provides:

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Id. See also GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* 1369 (2d ed. 2002) [hereinafter *EU LAW CASEBOOK*] (discussing how Framework Directive addresses discrimination on grounds of religion or belief, disability, age or sexual orientation); *E-ILGA Policy Paper*, *supra* note 59, at 5 (stating that Framework Directive implements right to non-discrimination in area of employment).

120. See Framework Directive, *supra* note 116, at 18, art. II. Article II states, in relevant part:

- (1) For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
- (2) For the purposes of paragraph 1:
 - (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
 - (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
 - (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. . .

Id.; see also *EU LAW CASEBOOK*, *supra* note 119, at 1370 (noting that Framework Directive outlaws both direct and indirect discrimination).

121. See Framework Directive, *supra* note 116, at 19, art. II. Article II provides in relevant part:

- (1) For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

...

outlines the scope of the Directive as applying to both the public and private sectors in access to employment and vocational training, as well as in employment and working conditions and membership in employment organizations.¹²² The Directive provides a number of exceptions to its prohibition on discrimination, including "genuine and determining occupational" requirements, an organization's religious ethos, and positive (affirmative) action, which can be used to justify discrimination in certain circumstances.¹²³ Article VIII of the Framework Directive makes it

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- (3) Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. . .
 - (4) An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.

Id.; see also EU LAW CASEBOOK, *supra* note 119, at 1370 (discussing that Framework Directive's prohibition on harassment is first time in European Community law that harassment is expressly forbidden).

122. See Framework Directive, *supra* note 116, at 18, art. III, ¶ 1. Article III, ¶ 1 states:

Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals and pay;
- (d) membership of, and involvement in, and organisation of workers or employees, or any organisation whose members carry on particular profession, including the benefits provided for by such organisations.

Id.; see also EU LAW CASEBOOK, *supra* note 119, at 1370 (describing how Framework Directive covers not only employment and working conditions, including dismissals and pay, but also extends to recruitment, promotion, access to employment, and vocational training).

123. See Framework Directive, *supra* note 116, at 18, arts. IV, VII. Article IV reads:

- (1) Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

clear that the provisions of the Directive are only minimum requirements, thus Member States may go further in providing protection of the principle of equal treatment.¹²⁴ Article VIII also expressly forbids the use of the Directive by a Member State to minimize existing anti-discrimination legislation — also known as the principle of non-regression.¹²⁵ Article IX addresses enforcement of the rights provided for in the Directive,

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- (2) . . . in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. The difference of treatment . . . should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall not thus prejudice the right of churches and other public and private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

Id. Article VII, Paragraph 1, Positive Action provides: "With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1." *Id.* at 19-20. *See also* EU LAW CASEBOOK, *supra* note 119, at 1370 (describing wording of general occupational requirement as more restrictive than that contained in previous equality directives). The requirement obliges Member States to show that any difference in treatment is the result of a "genuine and determining occupational requirement" made pursuant to a legitimate policy objective and proportionate to that objective. *Id.*

124. *See* Framework Directive, *supra* note 116, at 20, art. VIII, ¶ 1. Article VIII, Paragraph 1 states: "Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive." *Id.*; *see also* EU LAW CASEBOOK, *supra* note 119, at 1370-71 (noting how Framework Directive only lays down minimum rights leaving Member States free to introduce or maintain provisions, which are more favorable to equal treatment than those contained in the directive).

125. *See* Framework Directive, *supra* note 116, at 20, art. VIII, ¶ 2. Article VIII, Paragraph 2 maintains: "The implementation of this Directive shall under no circumstances constitute grounds for reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive." *Id.* *See also* Equality Commission, *Briefing Paper on the Implementation of EU Equality Obligations in Northern Ireland* 5 (Mar. 2003) available at <http://www.equalityni.org/publications/rec entpub.cfm> [hereinafter *ECNI SEB Briefing*] (stating that EU Directives contain specific non-regression clauses, prohibiting Directives from being used to weaken current protections); Right to Water, Introduction to Human Rights, available at http://www.righttowater.org.uk/code/introduction_4.asp (defining principle of non-regression as state practice requiring that norms already adopted should not be undone at later date — in other words, there should not be a reversal in standards of protection of individual).

allowing for organizations, with an interest in ensuring compliance with the Framework Directive, to participate in judicial procedures on behalf of a complainant.¹²⁶ The Framework Directive also contains particular provisions to Northern Ireland in recognition of the need to promote peace and reconciliation between the major communities in the region.¹²⁷ The Directive further requires regular reporting by the Member States to the European Commission on their implementation of the Directive.¹²⁸ Lastly, Article 18 obliges Member States to implement national legislation in compliance with the Directive by December 2003.¹²⁹

2. Drafting A Single Equality Bill

The Office of First Minister and Deputy First Minister

126. See Framework Directive, *supra* note 116, at 20, art. IX, ¶ 2. Article IX, Paragraph 2 reads:

Member States shall ensure that associations, organizations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

Id.

127. See Framework Directive, *supra* note 116, at 21, art. XIV (providing that in Northern Ireland differences in treatment regarding recruitment of police and teachers shall not constitute discrimination in order to tackle under-representation and maintain balance).

128. See Framework Directive, *supra* note 116, at 22, art. IXX. Article IXX — Report provides:

- (1) Member States shall communicate to the Commission, by 2 December 2005 at the latest and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.
- (2) The Commission's report shall take into account, as appropriate, the viewpoints of the social partners and relevant non-governmental organisations. In accordance with the principle of gender mainstreaming, this report shall, *inter alia*, provide an assessment of the impact of the measures taken on women and men. In light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.

Id.

129. See Framework Directive, *supra* note 116, at 21, art. XVIII (requiring Member States to adopt laws, regulations, and administrative provisions necessary to comply with the Directive by December 2, 2003 for categories of religion and belief and sexual orientation and by December 2006 for age and disability); see also EU LAW CASEBOOK, *supra* note 119, at 1371 (noting that Member States are required to implement provisions concerning sexual orientation on or before December 2, 2003).

(“OFMDFM”) is responsible for drafting and implementing the Single Equality Bill (“SEB”) for Northern Ireland.¹³⁰ In May 2001, the OFMDFM released an initial consultation packet¹³¹ to over 500 organizations in order to gain feedback on the scope and content of the proposed SEB, to stimulate debate, and to help inform the decision-making process.¹³² The initial consultation ended in August 2001 and the OFMDFM published a report based on its findings and provided that further consultation would take place before a final bill would be debated and passed into law in Spring 2003.¹³³ The timetable, however, had to be revised, to provide more time for further consultation, leaving the OFMDFM unable to draft and pass the SEB by the December deadline imposed by the Framework Directive.¹³⁴ This

130. See OFMDFM, Functions, *supra* note 43 (stating that OFMDFM’s Equality Unit, which works towards implementing EU equality obligations in Northern Ireland, is charged with responsibility of creating Single Equality Bill); see also *EU Obligations Summary Document*, *supra* note 43, at 1-3 (discussing OFMDFM’s obligations to implement anti-discrimination legislation on grounds of sexual orientation as required by Framework Directive).

131. See OFMDFM, OFMDFM INITIAL CONSULTATION, *supra* note 67.

132. See OFMDFM, *Report on the Consultation Exercise on the Single Equality Bill 1.1* (n.d.) available at www.ofmdfmi.gov.uk/equality/consultation.pdf (describing background to initial SEB consultation with public). Over 500 organizations representing religious organizations, businesses, public sector, voluntary sector, public authorities, solicitors, universities, and a number of other groups and interests were contacted. *Id.* Workshops were arranged throughout the province, and formal and informal briefings were held. In total, ninety-one responses were received. *Id.*

133. See OFMDFM INITIAL CONSULTATION, *supra* note 67, at 6 (describing purpose of initial consultation is to seek public’s views on scope and content of SEB and stating that second consultation, addressing OFMDFM’s proposals for details of SEB itself, would follow); see generally Equality Commission PowerPoint, *supra* note 114 (outlining stages of Single Equality Bill). The stages are:

- initial consultation by OFMDFM (May-August 2001)
- policy paper to Minister/Executive (early 2002)
- published draft Bill (April-June 2002)
- debated in Assembly (September 2002)
- becomes law (before May 2003).

Id.

134. See discussion of implementation deadline for Framework Directive, *supra* note 129; see also Noel McAdam, *New Laws on Equality Facing Two-Year Delay*, BELFAST TELEGRAPH, Jan. 31, 2002 (reporting on delay, for perhaps several years, of new Single Equality Bill); Barry Fitzpatrick, PowerPoint Presentation, Harmonisation and Effectiveness: The Challenge of the Single Equality Bill (May 2002) (on file with author) (summarizing revised timetable). The revised timetable includes:

- White Paper instead of draft Bill by end of 2002
- Affirmative Resolution regulations by mid 2003 to satisfy EU obligations
- Single Equality Bill in 2004 and Single Equality Act in 2005).

Id.; ECNI SEB Briefing, *supra* note 125, at 12 (stating that unavoidable change to timeta-

prompted the OFMDFM to rely on the "affirmative resolution regulation" provisions of the European Communities Act 1972 ("ECA 1972") to meet its Community obligations.¹³⁵ In January 2003, the OFMDFM issued Draft Regulations,¹³⁶ for the various groups covered by the Framework Directive, accompanied by explanatory notes and supplementary questions to encourage comments on the proposals.¹³⁷ Despite their reservations over the use of regulations rather than primary legislation, the Equality Commission, as well as local NGOs, participated throughout the consultation process on both the SEB and the Draft Regulations, releasing a number of reaction and briefing papers.¹³⁸ On De-

ble for Single Equality Act took place); Equality Commission, *Response to Promoting Equality of Opportunity: Implementing EU Equality Obligations in Northern Ireland 2* (Apr. 2003), available at <http://www.equalityni.org/publications/recentpub.cfm> [hereinafter *ECNI Response*] (discussing factors that made timetable unrealistic, including need for more detailed information and further debate on issues); Equality Commission, Press Release, *The Equality Commission and Sexual Orientation: Changes Due in the Law in December (2003)*, available at <http://www.equalityni.org/publications/recentpub.cfm> (mentioning that Northern Ireland government decided to use Regulations to meet requirements of Framework Directive by December deadline).

135. See European Communities Act 1972 ("ECA 1972") (c. 68) Section 2(2) (providing United Kingdom Parliament with ability to incorporate European Community law into domestic legal order); see also *ECNI SEB Briefing*, *supra* note 125, at 2 (stating that with timetable for SEB extended, OFMDFM moved to implement Framework Directive through Regulations under ECA 1972); Equality Commission, *Equality Legislative Reform: Implementation of European Union Directives 2-3* (July 2002), available at <http://www.equalityni.org/publications/recentpub.cfm> [hereinafter *ECNI Implementation*] (discussing OFMDFM's use of regulations versus primary legislation to meet Framework Directive's deadline); CoSO, *Response to the Consultation by the OFMDFM on Regulations to Implement EU Equality Obligations in Northern Ireland 5* (Apr. 2003), available at <http://www.coso.org.uk/publications.php> [hereinafter *CoSO EU Obligations Response*] (noting use of regulations rather than primary legislation to meet regional obligations).

136. See OFMDFM, *Draft Regulations on Sexual Orientation*, available at <http://www.ofmdfmi.gov.uk/equalityofopportunity/index.htm> [hereinafter *Draft Regulations*].

137. See OFMDFM, *Equality of Opportunity*, available at <http://www.ofmdfmi.gov.uk/equalityofopportunity/index.htm> (posting Draft regulations necessary to implement Directive and questionnaire for comments on proposals and setting deadline of April 4 2003 for questionnaires to be handed in); see also OFMDFM, *Promoting Equality of Opportunity: Implementing EU Equality Obligations in Northern Ireland: Summary Document 2* (Jan. 2003), available at <http://www.ofmdfmi.gov.uk/equalityofopportunity/index.htm> (stating draft regulations had been published for consultation purposes); OFMDFM, *Explanatory Notes and Supplementary Questions*, ¶ 1, available at <http://www.ofmdfmi.gov.uk/equalityofopportunity/index.htm> [hereinafter *Notes and Questions*] (stating that explanatory notes relate to, but do not form part of, draft regulations and they have been prepared to assist reader in understanding and commenting on regulations).

138. See *ECNI SEB Paper*, *supra* note 29, at 2 (discussing disadvantages to using

ember 2, 2003 the Draft Regulations were enacted into law as the Employment Equality (Sexual Orientation) Regulations (Northern Ireland).¹³⁹

3. Effectiveness of Employment Equality Regulations Based on Sexual Orientation

The Employment Equality (Sexual Orientation) Regulations (Northern Ireland) ("Regulations") begin by defining sexual orientation as covering, both gay men, lesbians, and bisexuals, as well as heterosexuals.¹⁴⁰ The Regulations also describe the proscribed forms of discrimination as direct discrimination,¹⁴¹ indirect discrimination,¹⁴² victimization,¹⁴³ and harass-

regulations). One is that some argue that ECA regulations can only be used to implement the minimum obligations of directives, thus the Equality Commission fears that is what will occur. *Id.* Another disadvantage is that the draft regulations will not be subject to any committee stage in Northern Ireland's Assembly nor given the opportunity for legislative amendments. *Id.* See also *ECNI SEB Update*, *supra* note 118, at 2 (arguing that use of regulations will inevitably limit opportunities for debate and amendment which would have been possible had primary legislation been proposed). It is important that draft regulations do not pre-empt a full and far-ranging debate on the SEB. *Id.* The use of regulations should not take away from the ultimate need to achieve a harmonized best practice approach to the SEB. *Id.* at 12.; *CoSO EU Obligations Response*, *supra* note 135, at 5 (agreeing with Equality Commission in discussing disadvantages of using regulations in place of primary legislation).

139. See Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003, available at <http://www.ofmdfmi.gov.uk/equality/index.htm> [hereinafter Regulations]; see also Framework Directive, *supra* note 116, at 21, art. XVIII (requiring Member States to adopt necessary measures to comply with the Directive by December 2, 2003 for category of sexual orientation); OFMDFM, News Release, New Law to Prevent Discrimination on Grounds of Sexual Orientation (Dec. 2, 2003), available at www.nics.gov.uk/press/ofmdfm/o31202h-ofmdfm.htm (discussing how OFMDFM's Draft Regulations had become law in Northern Ireland on December 2, 2003); EU LAW CASEBOOK, *supra* note 119, at 1371 (noting that Framework Directive requires Member States to implement provisions concerning sexual orientation on or before December 2, 2003); Notes and Questions, *supra* note 137, at ¶ 4 (explaining that sexual orientation aspects of Framework Directive must be implemented by Member States by December 2, 2003).

140. See Regulations, *supra* note 139, § 2(2). Section 2(2) defines "sexual orientation" as an orientation towards:

- (a) persons of the same sex;
- (b) persons of the opposite sex; or
- (c) persons of the same sex and of the opposite sex.

Id. See also Notes and Questions, *supra* note 137, at ¶ 8 (explaining that "sexual orientation" covers gay men and lesbians, straight men and women, and bisexual men and women).

141. See Regulations, *supra* note 139, at § 3(1). Section 3(1) provides: "For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if — (a) on grounds of sexual orientation, A treats B less favourably than he treats

ment.¹⁴⁴ Commentators criticize the Regulations definition of

or would treat other persons." *Id.* See also Notes and Questions, *supra* note 137, at ¶¶ 12-13 (labeling discrimination described in Section 3(a) as "direct discrimination"). Direct discrimination includes discrimination based on A's perception of B's sexual orientation, whether that perception is right or wrong. *Id.* It also includes discrimination against a person by reason of sexual orientation of another — i.e., discriminating against an individual because they associate with LGB persons or because they refuse to follow instructions to discriminate against LGB persons. *Id.*

142. See Regulations, *supra* note 139, at § 3(1). Section 3(1) reads, in relevant part:

For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if —

- (b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same sexual orientation as B, but—
 - i. which puts or would put persons of the same sexual orientation as B at a particular disadvantage when compared with other persons,
 - ii. which puts B at that disadvantage, and
 - iii. which A cannot show to be a proportionate means of achieving a legitimate aim. . .

Id. See also Notes and Questions, *supra* note 137, at ¶ 14 (labeling discrimination described in Section 3(b) as indirect discrimination).

143. See Regulations, *supra* note 139, at § 4. Section 4 states:

- (1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if he treats B less favourably than he treats or would treat other persons in the same circumstances, and does so by reason that B has—
 - (a) brought proceedings against A or any other person under these regulations,
 - (b) given evidence or information in connection with proceedings brought by any person against A or any other person under these Regulations,
 - (c) otherwise done anything under or by reference to these Regulations in relation to A or any other person, or
 - (d) alleged that A or any other person has committed an act which (whether or not the regulation so states) would amount to a contravention of these Regulations.

Or by reason that A knows that B intends to do any of those things, or suspects that B has done or intends to do any of them.

- (2) Paragraph (1) does not apply to treatment of B by reason of any allegation made by him, or evidence or information given by him, of the allegation, evidence or information was false and not made (or, as the case may be, given) in good faith.

Id.

144. *Id.*, at § 5. Section 5 provides:

- (1) For the purposes of these Regulations, a person ("A") subjects another person ("B") to harassment where, on the grounds of sexual orientation, A engages in unwanted conduct which has the purpose or effect of —
 - (a) violating B's dignity, or
 - (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) Conduct shall be regarded as having the effect specified in paragraph

direct discrimination for taking a comparative approach, arguing that discrimination should instead be based on a finding of disadvantage on the grounds of one's membership of a designated group.¹⁴⁵ There is also criticism of the Regulations test for indirect discrimination (i.e., proportionate means of achieving a legitimate aim) for not adhering to the test laid down by the Framework Directive (i.e., objectively justified by a legitimate aim and the means of achieving such aim were appropriate and necessary).¹⁴⁶ Commentators, though, have characterized the Regulation's provisions on both harassment and victimization in a more favorable light.¹⁴⁷

(1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.

Id. See also Notes and Questions, *supra* note 137, at ¶ 17 (adding that over-sensitive complainant who takes offense unreasonably at perfectly innocent comment would probably not be considered as having been harassed).

145. See *ECNI SEB Briefing*, *supra* note 125, at 5 (claiming that comparison is evidence of inequality and not essence of inequality). The definition of direct discrimination should be based on a finding of disadvantage on the grounds of a prohibited criterion. *Id.*; see also *ECNI Response*, *supra* note 134, at 6 (noting that drafted Bill of Rights takes non-comparative approach in its definition of direct discrimination). The Equality Commission is unconvinced that a comparator is necessary in order to establish discrimination. *Id.* Rather, it advocates the adoption of a disadvantage approach, so the focus is on the reason for the discrimination rather than an arid quest for real or hypothetical comparisons. *Id.* at 8; *CAJ SEB Submission*, *supra* note 9, at 11 (arguing that need for comparator makes discrimination more difficult to prove and works contrary to principle of equality by setting up currently privileged groups as norm); *CoSO Response to the Single Equality Bill Consultation Document 8* (Aug. 2001) [hereinafter *CoSO 2001 SEB Response*] (stating their belief that in order to establish *prima facie* case of discrimination, in terms of disadvantage suffered, applicant need not locate comparator).

146. See *ECNI SEB Briefing*, *supra* note 125, at 5-6 (criticizing Draft Regulations because test of appropriate and necessary means for objective justification has been implemented through a proportionate means test, which is significantly weaker); see also *ECNI Response*, *supra* note 134, at 7 (stating that Equality Commission does not believe that Draft Regulations' test for indirect discrimination satisfies Framework Directive's requirement for appropriate and necessary means test). The Draft Regulations' proportionate means test is a diminution of the indirect discrimination principle. *Id.*; *CoSO 2001 SEB Response*, *supra* note 145, at 9 (claiming that definition of indirect discrimination based around necessity test for objective justification will provide best protection); *ECNI SEB Paper*, *supra* note 29, at 32 (stating that indirect discrimination is important tool in challenging systematic and institutionalized discrimination).

147. See *ECNI SEB Briefing*, *supra* note 125, at 6 (praising Regulations for taking a disjunctive approach to harassment, rather than using more stringent test offered by Directive). The Directive states that harassment occurs when there is a violation of a person's dignity and an intimidating environment is created. *Id.* Meanwhile, the Regulations define harassment as being either the violation of a person's dignity or the crea-

In Part II, the Regulations describe the contexts in which discrimination based on sexual orientation is prohibited, including the express prohibition of discrimination based on sexual orientation in institutions of further and higher education.¹⁴⁸ Part II of the Regulations also outlines the "genuine occupational requirement" exception to the prohibitions on discrimination, which allows employers to discriminate against applicants if they do not possess the particular sexual orientation necessary for the job.¹⁴⁹ This exception has evoked some concern among

tion of an intimidating environment [emphasis added]. *Id.*; see also *ECNI Response*, *supra* note 134, at 17 (stating that Regulations provide sensible basis upon which victimization cases can be addressed); Equality Commission, *Response to Equality and Diversity — The Way Ahead* 7 (Jan. 2003) (welcoming disjunctive approach taken in Regulations towards harassment as being either violation of person's dignity or creation of intimidating environment). The definition of harassment in Framework Directive would have led to regression in current protection and such would have been contrary to the non-regression clause in Art. XVIII of the Framework Directive. *Id.*; *CoSO EU Obligations Response*, *supra* note 135, at 6 (noting that definition of harassment in Regulations is more subjective than originally proposed).

148. See Regulations, *supra* note 139, at § 6(1) (making it unlawful for employer to discriminate against person in arrangements made for purposes of offering employment, terms on which employment is offered, and by deliberately refusing to offer employment). Section 6(2) makes it unlawful for an employer to discriminate against an employee in terms of employment, in opportunities offered such as promotion, transfer, training and other benefits, by deliberately refusing an employee opportunities and by dismissing an employee or subjecting them to other detriment. *Id.* Section 6(3) prohibits an employer from subjecting an employee or potential employee to harassment. *Id.* Section 7 prohibits one who is empowered to select a person for employment for a third party to discriminate against or harass that person. *Id.* Section 19 makes it unlawful for a provider of vocational training to discriminate or harass one seeking or undergoing training. *Id.* Section 20 prohibits an employment agency from discriminating against persons, or subjecting them to harassment, in terms of its services, including career guidance. *Id.* Section 22 makes discrimination based on an individual's sexual orientation unlawful in educational spheres. *Id.*

149. See Regulations, *supra* note 139, at § 8—Exception for Genuine Occupational Requirement. Section 8(2) reads:

This paragraph applies where, having regard to the nature of the employment of the context in which it is carried out—

- (a) Being of a particular sexual orientation is a genuine and determining occupational requirement;
- (b) It is proportionate to apply that in the particular case; and
- (c) Either—
 - i. the person to whom that requirement is applied does not meet it, or
 - ii. the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it, and this paragraph applies whether or not the employment is for purposes of an organised religion.

Id.; see also Notes and Questions, *supra* note 137, at ¶¶ 20-21 (explaining that Section 8

groups that it may be abused, in particular through the religious ethos exemption,¹⁵⁰ to unjustly discriminate against LGB persons.¹⁵¹ Part IV of the Regulations outlines some additional general exceptions, among them positive (affirmative) actions taken

allows employer, when recruiting for post, to treat job applicants differently on grounds of sexual orientation if possessing particular sexual orientation is genuine occupational requirement). The genuine occupational requirement exception also applies to promotion, transfer, and training of persons. *Id.*

150. See Regulations, *supra* note 139, § 8 — Exception for Genuine Occupational Requirement. Section 8(3) reads:

This paragraph applies where—

- (a) the employment is for purposes of an organised religion;
- (b) the employer applies a requirement related to sexual orientation—
 - i. so as to comply with the doctrines of religion, or
 - ii. because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with strongly held religious convictions of a significant number of the religion's followers; and
- (c) either—
 - i. the person to whom that requirement is applied does not meet it, or
 - ii. the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.

Id.

151. See *CAJ SEB Submission*, *supra* note 9, at 8 (mentioning that some sectors within Northern Ireland have alluded to possibility of using religious ethos exception to discriminate on grounds of sexual orientation); see also *ECNI SEB Briefing*, *supra* note 125, at 9 (noting that religious ethos exceptions only apply questions of discrimination on grounds of religion or belief and, according to Framework Directive, should not justify discrimination on any other ground); *ECNI Response*, *supra* note 134, at 12 (stating concern regarding potential use of genuine occupational requirements in context of sexual orientation and religious ethos of organizations); *CoSO EU Obligations Response*, *supra* note 135, at 7 (arguing that, where genuine occupational requirement is necessary, it should apply only to position and not to organization as whole). For example, a worker in a religious school should not be discriminated against on the basis of their sexual orientation, because of the ethos of the organization. *Id.* The religious ethos should only be upheld for a teacher who teaches religious education and not for those who teach math, geography, sports, etc. *Id.* If there is a genuine occupational requirement that an employee in a specific job must be of a particular sexual orientation, then it is lawful to discriminate. *Id.* To help avoid this, CoSO would like to see a condition that the requirement be justified and legitimately imposed. *Id.*; Wintemute Working Paper, *supra* note 101, at ¶ 3.2 (arguing that scope of any exceptions allowing religious institutions to discriminate based on sexual orientation must be narrow and limited). The exception should only apply where a person's job requires them to conduct religious services, teach religious doctrine or perform other duties of a religious nature. *Id.* The exception should not extend to covering all employees of religious institutions, such as secretaries, teachers, nurses, caretakers, and doctors in religiously-run schools and hospitals. *Id.* To allow otherwise would create a gaping hole in the legislation's protection. *Id.*

by employers.¹⁵² Commentators stress the importance of positive action in addressing disadvantages, making it central to an equality framework.¹⁵³

Part V outlines the functions of the Equality Commission, which include working towards the elimination of discrimination, promoting equality of opportunity, keeping the effectiveness of the Regulations under review, and issuing a code of practice to provide practical guidance.¹⁵⁴ The Regulations, however, fail to give the Equality Commission the same powers as it has in regards to assisting other identity groups, outraging local non-governmental organizations (NGOs), as well as the Equality Commission itself.¹⁵⁵ The enforcement of the Regulations is

152. See Regulations, *supra* note 139, at § 26 (providing that no act will be considered unlawful discrimination if done for purposes of national security or public safety or public order). Section 28 excludes benefits based upon marital status from the prohibition on discrimination based on sexual orientation. *Id.* Section 30 exempts actions taken based on a person's particular sexual orientation, to help them overcome disadvantages linked to their sexual orientation, from prohibitions on discrimination. *Id.* See also Notes and Questions, *supra* note 137, at ¶ 59 (providing example for positive action exception to Regulation — if survivor benefits in occupational pension scheme are only available to widow(er) of deceased employee, this will not be discrimination on grounds of sexual orientation). Positive action does not require evidence, demonstrating under-representation, because of the difficulties in collecting statistics on sexual orientation. Disadvantage based on sexual orientation includes under-representation, harassment or homophobic attitudes. *Id.* at ¶ 60.

153. See CAJ SEB Submission, *supra* note 9, at 15 (discussing advantages of positive actions). Positive action affords a mean of understanding institutional structures and existing practices. *Id.* It enables society to address the power structures that perpetuate disadvantage. *Id.* Positive action, however, must go beyond numbers and percentiles; it should emphasize mechanisms for attaining and ensuring fair participation and equality of outcome. *Id.* See also CoSO 2001 SEB Response, *supra* note 145, at 7 (arguing that positive action should be framed as equality measures rather than permitted forms of discrimination because it does not advance aim of equality to refer to positive measures in negative language of exemptions); ECNI Response, *supra* note 134, at 12 (stating that provisions on positive measures in Draft Regulations on sexual orientation go further than for other groups, which should be rectified in interest of harmonization and clarity).

154. See Regulations, *supra* note 139, at § 30. Section 30 states:

It shall be the duty of the Commission –

- (a) to work towards the elimination of discrimination;
- (b) to promote equality of opportunity;
- (c) to keep under review the working of these Regulations and, when it so required by the Department or otherwise thinks its necessary, draw up and submit to the Department proposals for amending these Regulations.

Id.

155. See ECNI SEB Briefing, *supra* note 125, at 10 (stating concern that two vital functions — legal assistance in support of complainants and power to undertake formal

placed within the jurisdiction of industrial tribunals, for claims of discrimination by an employer, or county courts, for claims of discrimination in an educational context.¹⁵⁶ The Regulations further set time limits for bringing a complaint of discrimination based on sexual orientation — within three months of an alleged act for a complaint to a tribunal and within six months for an action before the county court.¹⁵⁷

investigations — have not been included among Equality Commission's functions in Draft Regulations on Sexual Orientation). The Equality Commission is disappointed that it is not given "parallel powers" in relation to sexual orientation discrimination. *Id.* at 13. *See also ECNI Response, supra* note 134, at 4 (stating that Equality Commission is gravely concerned that it is not being given functions in relation to legal assistance for complainants, right to bring cases on behalf of complainants, power to conduct formal investigations of acts of alleged discrimination and functions in relation to discriminatory job adverts). The Equality Commission recommends that the Draft Regulations grant it the full range of functions in relation to sexual orientation discrimination, which it already enjoins under other groups, such as disability, race, and religion/national belief. *Id.* at 32. The principle of effective judicial protection is a well-established principle of European Union law. *Id.* The Equality Commission believes that functions, including legal assistance, formal investigations, and monitoring discriminatory advertising, are governed by this principle of effective judicial protection. *Id.* It is also well established that implementation of Community law in the national legal system must be no less favorable than the enforcement of comparable national law and should not make it impossible or excessively difficult to enforce Community rights. *Id.* at 31. The Equality Commission further argues that it should be given powers to act on behalf or in support of complainants because prohibitions on discrimination based on sexual orientation is a new area of law, making it difficult for individuals to take cases without the Commission's assistance. *Id.* Gays and lesbians make up a particularly vulnerable group in society and may be deterred from litigating at all on grounds of confidentiality. *Id.* The Equality Commission's inability to litigate on behalf individuals facing sexual orientation discrimination, while retaining such capacity for discrimination on other grounds, implies a hierarchy of rights. *Id.* at 32; *CoSO EU Obligations Response, supra* note 135, at 12-13 (welcoming functions regarding sexual orientation discrimination granted to Equality Commission, then arguing that it is simply not enough). Although sexual orientation is included in the Draft Regulations, there is no legal backing enabling victims of sexual orientation discrimination to have their cases represented. *Id.* The power to assist individuals is essential in a new area of law to be enforced by vulnerable individuals. If the Commission lacks such powers, employers and others may be able to continue to discriminate. *Id.* at 12. CoSO recommends that sexual orientation be given the same resources and priority within the Equality Commission, legislation, public authorities, and employment as groups, such as race and disability, have. *Id.* at 15.

156. *See* Regulations, *supra* note 139, at § 34(1) (allowing for complaints of discrimination in employment to be brought before industrial tribunals). Section 37(4) allocates jurisdiction over claims of harassment in education to county courts. Sections 35 and 38 outline the burden of proof. Once a complainant has made out prima facie case, it is for respondent to prove that act of discrimination or harassment was not committed. *Id.*

157. *See* Regulations, *supra* note 139, at § 41. Section 41 provides, in relevant part:

III. A MODEL APPROACH: CREATING AN ETHOS OF EQUALITY

The situation of Northern Ireland's LGB community has undoubtedly improved, since the formation of the province's first LGB organization in the 1970s.¹⁵⁸ Through the peace process and the Belfast Agreement, human rights for LGB individuals has become a part of the debate, albeit a small one, surrounding Northern Ireland's future.¹⁵⁹ Both policy-based legislation, provided by the Northern Ireland Act's Section 75 statutory duty, and rights-based legislation, proposed in the draft Bill of Rights and the Single Equality Bill hold great potential in improving the lives of Northern Ireland's LGB citizens.

The Section 75 statutory duty on public authorities mainstreams sexual equality into public policy formulations.¹⁶⁰ By placing a duty on public authorities to consider any adverse impact their policies may have on LGB individuals and to consult representative groups in the process, it creates a dialogue on LGB rights and encourages active participation by this marginalized group in formulating government policies that affect their lives.¹⁶¹ The statutory duty, though, being policy-based, offers no legal claim for LGB persons who experience unequal treat-

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- (1) An industrial tribunal shall not consider a complaint. . . unless it is presented to the tribunal before the end of —
 - (a) the period of three months beginning when the act complained of was done. . .
 - (2) A county court shall not consider a claim . . . unless proceedings in respect of such claim are instituted before the end of the period of six months beginning when the act complained of was done.
 - (3) A court or tribunal may nevertheless consider any such complaint or claim, which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

Id.

158. Compare *supra* note 17 and accompanying text (discussing laws criminalizing homosexuality and harassment of early gay activists by police) with *supra* note 27 and accompanying text (describing much more visible and active LGB community in Northern Ireland during 1990s).

159. See *supra* notes 35-36 and accompanying text (describing how Belfast Agreement included sexual orientation, among the groups to which the Agreement's equality of opportunity provision applied).

160. See *supra* note 59 and accompanying text (defining mainstreaming and discussing this process makes equality issues central to policy-making process).

161. See *supra* notes 45, 49, 61 and accompanying text (describing statutory duty and how Schedule 9 process gives minority groups ability to participate in policy-making).

ment based on their sexual orientation.¹⁶² The draft Bill of Rights and the Single Equality Bill succeed where the statutory duty fails by explicitly offering sexual minorities legal protections.

The draft Bill of Rights creates legal rights for sexual minorities, by unequivocally prohibiting discrimination based on sexual orientation.¹⁶³ It also contains provisions on the right to identity, the rights of members of communities, and the right to privacy and family life that could potentially be viewed as further assurances of equal treatment and protection for LGB individuals.¹⁶⁴ The draft Bill of Rights, however, is in reality only a draft and thus its strength has yet to be tested in court.¹⁶⁵ The proposed Single Equality Bill is in a similar legal conundrum, and the interim legislation — Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 (the “Regulations”) — does not offer adequate protections for LGB persons.¹⁶⁶ In particular, the Regulations fail to provide victims of discrimination with assistance in achieving a legal remedy, making their effectiveness as rights-based legislation questionable.¹⁶⁷ Most discouraging is that the Bill of Rights and the Single Equality Bill, which would offer LGB individuals rights and protections under the law, have yet to become law.¹⁶⁸ Despite Northern Ireland’s commitment to promoting and protecting the rights of a number of identity groups, in reality the focus remains on politi-

162. *See supra* note 62 and accompanying text (noting how statutory duty creates no legal rights and thus provides no claim in court).

163. *See supra* notes 88, 98 and accompanying text (discussing how Bill of Rights will provide LGB persons with substantive rights and legal protections, specifically by prohibiting discrimination based on sexual orientation).

164. *See supra* notes 93-97, 104-08 and accompanying text (describing how Sections 3 and 9 provide further protections for LGB community).

165. *See supra* note 80 and accompanying text (discussing NIHRC’s release of draft Bill of Rights as part of its public consultation process). *See also supra* note 87 (suggesting Bill of Rights might not be passed by Westminster because of its sweeping provisions).

166. *See supra* notes 146-147 and accompanying text (criticizing Regulations definition of discrimination and expressing concern over religious ethos exemption included in Regulations).

167. *See supra* note 155 and accompanying text (describing how Regulations fail to provide sexual minorities with necessary assistance to form a legal claim in court).

168. *See supra* notes 80, 133, 134 and accompanying text (discussing consultation process on Bill of Rights as ongoing and describing delay in passage of Single Equality Bill).

cal and religious divisions.¹⁶⁹ Given Northern Ireland's history, this is understandable. A commitment, nevertheless, has been made to all the people of the troubled Province, specifically the nine categories listed in the Belfast Agreement, that they would be provided with legal protections to ensure equality and combat discrimination.¹⁷⁰ The government and leadership of Northern Ireland must meet this commitment.

CONCLUSION

Both legislation resulting from the Belfast Agreement and European Community obligations hold much promise for LGB individuals in Northern Ireland. The potential of such legislation, however, will ultimately be hindered, unless the Province begins to think less in terms of two divided communities and more in terms of a society with a plethora of communities, all of whom deserve equality of rights, respect of diversity, and protection from discrimination.

169. *See supra* note 9 and accompanying text (describing how Unionist/Protestant and Nationalist/Catholic cleavage dominates society and politics in Northern Ireland).

170. *See supra* notes 35, 36 and accompanying text (noting Belfast Agreement's intent of promoting equality of opportunity among number of groups, including sexual orientation).

