



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

**Response to The Executive Office's Consultation  
on the Review of the Race Relations (NI) Order  
1997**

**12 June 2023**

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## Summary of Recommendations

- 2.3** The NIHRC recommends that, to ensure a human rights-based approach to racial equality, the Executive Office undertakes meaningful engagement with individuals affected and their representative organisations at every stage of the process. This should extend beyond this public consultation, to include planning, design, implementation and evaluation.
- 3.8** The NIHRC advises that, to ensure compliance with Windsor Framework Article 2, any changes to the Race Relations (NI) Order 1997, or equivalent, are compatible with the EU Race Equality Directive and relevant CJEU jurisprudence.
- 3.9** The NIHRC recommends that the Executive Office closely monitor the ongoing review of the EU Race Equality Directive, and ensure that any enhancements in protections are reflected in NI legislation and policy.
- 4.7** The NIHRC recommends that the Executive Office ensures intersectional multiple discrimination claims in NI are effectively addressed, including by the provision of intersectionality within equality legislation, including the Race Relations (NI) Order 1997, or equivalent.
- 4.10** The NIHRC welcomes the Executive Office's proposal to ensure reference to the grounds for racial discrimination is consistent throughout the Race Relations (NI) Order 1997, or equivalent.
- 4.14** The NIHRC welcomes the Executive Office's proposal to expressly include human rights principles, such as 'proportionality' and 'legitimate aim', where relevant within the Race Relations (NI) Order 1997, or equivalent.
- 4.15** The NIHRC recommends that the Executive Office ensures that guidance is within or supplementary to the revised Race Relations (NI) Order 1997, or equivalent, as to what a legitimate aim is within different contexts.
- 4.20** The NIHRC welcomes the Executive Office's proposals to extend

**the definition of discrimination by way of victimisation. The NIHRC advises that the ECHR's definition of a victim may offer some guidance in this regard.**

- 4.21 The NIHRC advises the Executive Office to consider a broad definition of victimisation to ensure access to effective remedy in line with the EU Race Equality Directive and Article 47 of the EU Charter.**
- 4.22 The NIHRC welcomes the Executive Office's proposals to amend Article 54(5) of the Race Relations (NI) Order 1997, or equivalent, and remove the two-month notice period to the Department of Education before a claim of discrimination can be made.**
- 4.25 The NIHRC welcomes the Executive Office's proposal to extend Article 18 of the Race Relations (NI) Order 1997, or equivalent, to include reference to the 'responsibility body' on the basis that a duty holder must adhere to their delegated responsibilities and are held accountable for any violations.**
- 4.28 The NIHRC suggests that the Executive Office reconsiders this proposal. At least, the Executive Office must establish the intended circumstances in which acts are rendered lawful under Article 41 of the Race Relations (NI) Order 1997, or equivalent.**
- 5.7 The NIHRC, in principle, welcomes the proposals to amend Articles 18(1)(a), 18(1)(b) and 18(1)(c) of the Race Relations (NI) Order 1997, or equivalent, to ensure no educational application process or other arrangement discriminates on grounds related to race. The NIHRC recommends that the resulting amendments are informed by human rights standards and considered for compatibility with Windsor Framework Article 2.**
- 6.5 The NIHRC welcomes the Executive Office's proposals to enhance employment protections and ensure non-discrimination and equality for all workers within the Race Relations (NI) Order 1997, or equivalent.**
- 6.6 The NIHRC recommends that the Executive Office includes sufficient flexibility within the Race Relations (NI) Order 1997, or**

**equivalent, to ensure the full range of protections in place extend to new means of employment as they develop.**

- 6.13 The NIHRC recommends that the Executive Office ensures that, before any amendment is introduced, such as the proposals regarding Article 32 of the Race Relations (NI) Order 1997, further consideration is given to the policy and legal intent of the amendment with a particular focus on safeguards against exploitation for employees.**
- 6.16 The NIHRC recommends that the Executive Office amends Article 40 of the Race Relations (NI) Order 1997, or equivalent, to remove restrictions based on nationality or immigration status on persons being employed in the service of the Crown or certain public bodies.**
- 7.10 The NIHRC welcomes the Executive Office's proposed amendment to Article 20(A)(1) of the Race Relations (NI) Order 1997, or equivalent. The NIHRC recommends that the Executive Office works with the Department for Communities and Department of Health to ensure that the resulting legislation ensures equal access to healthcare, social security, social protection and social advantage without discrimination in law and practice.**
- 7.14 The NIHRC recommends that the Executive Office ensures that the language used in the revised Race Relations (NI) Order 1997, or equivalent, does not stereotype or stigmatise people, but promotes tolerance and understanding.**
- 8.4 The NIHRC recommends that the Executive Office ensures the necessary amendments are made to the Race Relations (NI) Order 1997, or equivalent, to ensure that the Equality Commission for NI can fulfil its mandate in full and has the necessary resources to do so effectively on a long-term basis.**
- 8.5 The NIHRC recommends that the Executive Office commits to ensuring that to the extent that the EU directives on standards for equality bodies, if introduced, amend or replace the EU Race Equality Directive, the law in NI is amended to keep pace, as required, with that change.**

- 9.5** The NIHRC recommends to the Executive Office that any reform of the Race Relations (NI) Order 1997, or equivalent, provides clarity to victims regarding their right to judicial protection in addition to any such settlements and to clarify that jurisdiction cannot be excluded by private agreement.
- 9.6** The NIHRC recommends that the Executive Office should clarify more precisely that remedies under the Race Relations (NI) Order 1997, or equivalent, must result in real and effective judicial protection of the rights derived from the EU Race Equality Directive and Article 47 of the EU Charter.
- 9.10** The NIHRC recommends that the Executive Office considers including within the proposed amendments to Articles 52 and 53 of the Race Relations (NI) Order 1997, or equivalent, that a tribunal has the power to recommend 'reasonable' training.
- 10.4** The NIHRC welcomes the commitment within the proposals to ensure that the Race Relations (NI) Order 1997, or equivalent, imposes a duty on specified public authorities to collect data on racial equality and set racial equality objectives. The NIHRC stresses that this commitment should be delivered as quickly as possible in its entirety.
- 11.5** The NIHRC recommends that the Executive Office utilises meaningful engagement with individuals that will be affected and their representatives beyond this public consultation to determine whether both descent and caste are directly referenced within the Race Relations (NI) Order 1997, or equivalent. The decision should also be guided by the principle that the resulting legislation should be effective in law and practice.

## 1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (NIHRC), pursuant to section 69(1) of the Northern Ireland (NI) Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in NI. The NIHRC is also required, under section 78A(1), to monitor the implementation of Article 2(1) of the Windsor Framework,<sup>1</sup> to ensure there is no diminution of those rights protected in the 'Rights, Safeguards and Equality of Opportunity' chapter of the Belfast (Good Friday) Agreement 1998 as a result of the UK's withdrawal from the EU. In accordance with these functions, the following evidence is submitted to the Executive Office in response to its consultation on the review of the Race Relations (NI) Order 1997.
- 1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN). The relevant regional and international treaties in this context include:
- CoE European Convention on Human Rights 1950 (ECHR);<sup>2</sup>
  - CoE European Social Charter 1961;<sup>3</sup>
  - UN Convention on the Elimination of All Forms of Racial Discrimination 1965 (UN CERD);<sup>4</sup>
  - UN International Covenant on Civil and Political Rights 1966 (UN ICCPR);<sup>5</sup>
  - UN International Covenant on Economic, Social and Cultural Rights 1966 (UN ICESCR);<sup>6</sup>
  - UN Convention on the Elimination of All Forms of Discrimination Against Women 1981 (UN CEDAW);<sup>7</sup>
  - UN Convention on the Rights of the Child 1989 (UN CRC);<sup>8</sup>

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<sup>1</sup> The Protocol on Ireland / Northern Ireland was renamed by Decision No 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework.

<sup>2</sup> UK ratification 1951 and given further domestic effect by the Human Rights Act 1998.

<sup>3</sup> UK ratification 1962. The UK has signed, but not ratified, the CoE Revised European Social Charter 1991.

<sup>4</sup> UK ratification 1969.

<sup>5</sup> UK ratification 1976.

<sup>6</sup> UK ratification 1976.

<sup>7</sup> UK ratification 1986.

<sup>8</sup> UK ratification 1991.

- UN Convention on the Rights of Persons with Disabilities 2006 (UN CRPD).<sup>9</sup>

1.3 In addition to these treaty standards, the following declarations and principles provide further guidance, and are often used as an aid to interpretation, in respect of specific areas:

- UN Committee on the Elimination of All Forms of Discrimination Against Women (UN CEDAW Committee) General Recommendation No 6;<sup>10</sup>
- UN Committee on Economic, Social and Cultural Rights (UN ICESCR Committee) General Comment No 13;<sup>11</sup>
- UN ICESCR Committee General Comment No 1;<sup>12</sup>
- UN ICESCR Committee General Comment No 3;<sup>13</sup>
- UN ICESCR Committee General Comment No 14;<sup>14</sup>
- UN Committee on the Elimination of All Forms of Racial Discrimination (UN CERD Committee) General Recommendation No 29;<sup>15</sup>
- UN Committee on the Rights of the Child (UN CRC Committee) General Comment No 5;<sup>16</sup>
- UN ICESCR Committee General Comment No 19;<sup>17</sup>
- UN ICESCR Committee General Comment No 20;<sup>18</sup>
- UN ICESCR Committee General Comment No 23;<sup>19</sup>
- UN CRC Committee Concluding Observations on the UK 2016;<sup>20</sup>
- UN ICESCR Committee Concluding Observations on the UK 2016;<sup>21</sup>

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<sup>9</sup> UK ratification 2009.

<sup>10</sup> 'UN CEDAW Committee General Recommendation No 6: Effective National Machinery and Publicity', 1988.

<sup>11</sup> E/C.12/1999/10, 'UN ICESCR Committee General Comment No 13: Right to Education', 8 December 1999.

<sup>12</sup> CRC/GC/2001/1, 'UN CRC Committee General Comment No 1: Aims of Education', 17 April 2001.

<sup>13</sup> E/1991/23, 'UN ICESCR Committee General Comment No 3: The Nature of States Parties' Obligations', 14 December 1990.

<sup>14</sup> E/C.12/2000/4, 'UN ICESCR Committee General Comment No 14: Right to the Highest Attainable Standard of Health', 11 August 2000.

<sup>15</sup> 'UN CERD Committee General Recommendation No 29: Descent', August 2002.

<sup>16</sup> CRC/GC/2003/5, 'UN CRC Committee General Comment No 5: General Measures of Implementation of the UN CRC', 27 November 2003.

<sup>17</sup> E/C.12/GC/19, 'UN ICESCR Committee General Comment No 19: Right to Social Security', 4 February 2008.

<sup>18</sup> E/C.12/GC/20, 'UN ICESCR Committee General Comment No 20: Non Discrimination in Economic, Social and Cultural Rights', 2 July 2009.

<sup>19</sup> E/C.12/GC/23, 'UN ICESCR Committee General Comment No 23: Right To Just and Favourable Conditions of Work', 27 April 2016.

<sup>20</sup> CRC/C/GBR/CO/5, 'UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016.

<sup>21</sup> E/C.12/GBR/CO/6, 'UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 14 July 2016.



- UN CERD Committee Concluding Observations on the UK 2016;<sup>22</sup>
- UN Committee on the Rights of Persons with Disabilities (UN CRPD Committee) Concluding Observations on the UK 2017;<sup>23</sup>
- UN CEDAW Committee Concluding Observations on the UK 2019;<sup>24</sup> and
- Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, E Tendayi Achiume, on the UK 2019.<sup>25</sup>

1.4 The NIHRC must also advise on the UK Government's commitment (in Windsor Framework Article 2) to ensure there is no diminution of rights, safeguards and equality of opportunity in the relevant section of the Belfast (Good Friday) Agreement as a result of the UK's withdrawal from the EU. This is given effect in UK law by section 7A of the EU (Withdrawal) Act 2018. In addition, section 6 of the NI Act 1998 prohibits the NI Assembly from making any law which is incompatible with Windsor Framework Article 2. Section 24 of the 1998 Act also requires all acts of NI Ministers and NI Departments to be compatible with Windsor Framework Article 2. The relevant EU measures in this context include:

- The EU Race Equality Directive;<sup>26</sup>
- The EU Framework Equality Directive;<sup>27</sup>
- The EU Gender Equality Directive;<sup>28</sup> and
- The Charter of Fundamental Rights of the European Union.<sup>29</sup>

1.5 This NIHRC welcomes the opportunity to respond to the Executive Office's consultation on its review of the Race Relations (NI) Order 1997. This

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<sup>22</sup> CERD/C/GBR/CO/21-23, 'UN CERD Committee Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of UK', 26 August 2016.

<sup>23</sup> CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding observations on the Initial Report of the UK of Great Britain and NI', 3 October 2017.

<sup>24</sup> CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019.

<sup>25</sup> A/HRC/41/54/Add.2, 'Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance: Visit to the UK of Great Britain and NI', 27 May 2019.

<sup>26</sup> Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000.

<sup>27</sup> Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000.

<sup>28</sup> Directive 2006/54/EC, 'EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation', 5 July 2006.

<sup>29</sup> Entry into force in 2009.

advice is given on the proposals of the consultation document, with a focus on human rights standards.

## 2.0 Race Equality Bill

- 2.1 There is some confusion as to whether the consultation contemplates a new Bill or is limited to amendment of the current legislation. For example, the consultation document commits that responses will “be analysed and directly inform the legislative process to bring forward a new Racial Equality Bill to replace the [Race Relations (NI)] Order”.<sup>30</sup> Thereafter, there are only discreet references to ‘the new Bill’. The consultation is focused on proposed amendments to the Race Relations (NI) Order 1997. This should be clarified. The Executive Office must make clear its intentions for reform of the law relating to race relations. That said, the NIHRC provides the following by way of advice in recognition that further consultation and engagement by the Executive Office will be necessary.
- 2.2 It is beyond doubt that a human rights-based approach will only be achieved in practice by effective participation.<sup>31</sup> The need for fundamental reform, for example by a wholly new Racial Equality Bill, better meets the evidence of civil society organisations and experts in NI.<sup>32</sup> The consultation and implementation proposals, however, will need to go further and ensure meaningful engagement with the individuals affected and their representative organisations at every stage of the process – planning, design, implementation and evaluation.
- 2.3 **The NIHRC recommends that, to ensure a human rights-based approach to racial equality, the Executive Office undertakes meaningful engagement with individuals affected and their representative organisations at every stage of the process. This should extend beyond this public consultation, to include planning, design, implementation and evaluation.**

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<sup>30</sup> The Executive Office, ‘Review of the Race Relations (NI) Order 1997: Consultation Document’ (TEO, 2023), at 8.

<sup>31</sup> European Network of National Human Rights Institutions, ‘Human Rights Based Approach’. Available at: <https://ennhri.org/about-nhris/human-rights-based-approach/>

<sup>32</sup> Email correspondence from NI Council for Racial Equality to NI Human Rights Commission, 10 May 2023; Brice Dickson, ‘Race Equality Law Reform: Strengthening Protection’ (ECNI, 2021), at para vii(6).

## 3.0 Windsor Framework Article 2

- 3.1 Article 2 of the Windsor Framework requires the UK Government and NI Executive to ensure that there is no diminution of rights, safeguards and equality of opportunity as set out in the relevant chapter of the Belfast (Good Friday) Agreement 1998, as a result of the UK's withdrawal from the EU.
- 3.2 In the rights, safeguards and equality of opportunity chapter of the Belfast (Good Friday) Agreement, the parties affirmed their commitment to "the mutual respect, the civil rights and religious liberties of everyone in the community", including the right to equality of opportunity in all social and economic activity regardless of ethnicity.<sup>33</sup>
- 3.3 This commitment to ensure 'no diminution' is measured by and against the relevant EU standards on 31 December 2020. As such, the UK Government has committed to ensuring that there will be no diminution of protections as were contained in relevant underpinning EU law on this date.<sup>34</sup>
- 3.4 Article 13(3) of the Windsor Framework provides that "where this Protocol makes reference to a Union act, that reference shall be read as referring to that Union act as amended or replaced". Windsor Framework Article 2 therefore entails a commitment by the UK Government that NI equality law will dynamically align or "keep pace" with any EU law developments falling within the six EU Equality Directives<sup>35</sup> listed in Annex 1 to the Windsor Framework after 1 January 2021, which includes the EU Race Equality Directive.<sup>36</sup> This "keep pace" obligation means that if the minimum

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<sup>33</sup> Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights.

<sup>34</sup> UK Government, 'UK Government commitment to no-diminution of rights, safeguards and equality of opportunity in Northern Ireland', (NIO, 2020), at para 13.

<sup>35</sup> Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000; Directive 2000/78/EC, 'EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000; Directive 2004/113/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and Services', 13 December 2004; Directive 2006/54/EC, 'EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation', 5 July 2006; Directive 2010/41/EU, 'EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity', 7 July 2010; Directive 79/7/EEC, 'EU Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security', 19 December 1978.

<sup>36</sup> Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000.

standards in the Annex 1 Directives are amended or replaced by the EU, the UK Government must ensure that domestic legislation in Northern Ireland reflects any enhancements in relevant protections.

- 3.5 The UK Government has confirmed its commitment to dynamically align with the Annex 1 equality directives to “provide a reassurance that, at the very least, the minimum standard of rights protection required by the listed directives will continue to be relevant in NI” and this will “ensure NI will not fall behind minimum European standards in anti-discrimination law”.<sup>37</sup>
- 3.6 In line with Article 13(2) of the Windsor Framework, “the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union (CJEU)”. Therefore, the Annex 1 equality directives will continue to be informed by future CJEU rulings and, to the extent that such rulings evolve general principles of EU law, the EU Charter of Fundamental Rights and the relevant EU Treaty provisions, these will continue to have relevance in NI.<sup>38</sup>
- 3.7 The EU Commission is currently reviewing the EU Race Equality Directive and have indicated that, following a consultation period, it may take steps to address the main gaps. The NIHRC responded to this consultation in April 2022, making recommendations relating to potential gaps in protections under the EU Directive which align with our views on the Race Relations Order.<sup>39</sup> The NIHRC also recommended that the EU Commission include a specific acknowledgement of the significance of Windsor Framework Article 2 and the keep pace obligations for racial equality in NI.<sup>40</sup> Should standards in the EU Race Equality Directive be strengthened at EU level, that must be reflected in NI legislation. Additionally, the EU Directive provides the minimum requirements for provision of equal treatment irrespective of racial or ethnic origin, but States can introduce

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<sup>37</sup> NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 12.

<sup>38</sup> Article 13(2) and 13(3), Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement; Re Allister [2021] NIQB 64, para 234.

<sup>39</sup> NI Human Rights Commission, ‘Response to the European Commission Consultation on the Race Equality Directive (Directive 2000/43/EC)’, (NIHRC, 2022).

<sup>40</sup> Ibid.

measures that go beyond these standards and provide more favourable protections.<sup>41</sup> The EU Directive also states that the implementation of the Directive does not constitute grounds for a reduction in standards of protection already afforded by Member States.<sup>42</sup>

- 3.8 The NIHRC advises that, to ensure compliance with Windsor Framework Article 2, any changes to the Race Relations (NI) Order 1997, or equivalent, are compatible with the EU Race Equality Directive and relevant CJEU jurisprudence.**
- 3.9 The NIHRC recommends that the Executive Office closely monitor the ongoing review of the EU Race Equality Directive, and ensure that any enhancements in protections are reflected in NI legislation and policy.**

## 4.0 Changes Affecting Multiple Provisions

### Intersectional multiple discrimination

- 4.1 The consultation document does not consider the issue of intersectional multiple discrimination.<sup>43</sup> In the view of the NIHRC, that is an oversight.
- 4.2 In 2017, the UN CRPD Committee recommended that the UK Government and NI Executive:

explicitly incorporate in its national legislation protection from, in particular multiple and intersectional discrimination on the basis of gender, age, race, disability, migrant, refugee and/or other status, and provide appropriate compensation, and redress for victims, and sanctions proportional with the severity of the violation.<sup>44</sup>

- 4.3 In 2019, the UN CEDAW Committee recommended that the NI Executive “revise its legislation in NI to ensure that it affords protection to women on

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<sup>41</sup> Article 6(1), Directive 2000/43/EC, ‘EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin’, 29 June 2000.

<sup>42</sup> Ibid.

<sup>43</sup> The Executive Office, ‘Review of the Race Relations (NI) Order 1997: Consultation Document’ (TEO, 2023).

<sup>44</sup> CRPD/C/GBR/CO/1, ‘UN CRPD Committee Concluding observations on the Initial Report of the UK of Great Britain and NI’, 3 October 2017, at para 19.

an equal footing with women in other administrations of the State party". It also recommended reconsideration of the public sector equality duty "to address situations of intersectional forms of discrimination, such as discrimination faced by 'Black, Asian and Minority Ethnic' women, older women, women with disabilities, asylum-seeking and refugee women, and lesbian, bisexual, transgender women and intersex persons."<sup>45</sup>

- 4.4 The EU Race Equality Directive highlights that in the implementation of the Directive, Member States should aim to eliminate inequalities and in particular notes that women are often the victims of multiple discrimination.<sup>46</sup> The CJEU has stopped short of recognising intersectional discrimination, in and of itself, as a protected category, however, in the case of *CHEZ*, the court demonstrated the intersectional potential of the EU Race Equality Directive, where it found discrimination on the basis of ethnic origin, socio-economic disadvantage, and location.<sup>47</sup> In another, the case of *Heiko Jonny Maniero*, the CJEU affirmed that:

in the light of the objective of Directive 2000/43 and the nature of the rights which it seeks to safeguard, and in view of the fact that that directive is merely an expression, within the area under consideration, of the principle of equality, which is one of the general principles of EU law, as recognised in Article 21 of the Charter of Fundamental Rights of the European Union, the scope of that directive cannot be defined restrictively<sup>48</sup>

Both cases demonstrate that, in line with Article 13(2) of the Windsor Framework, there is a need to keep a watching brief on relevant CJEU jurisprudence.

- 4.5 In response to the EU Commission's review of the EU Race Equality Directive, the NIHRC recommended to the EU Commission that there is a need to strengthen the requirement to recognise and address intersectional multiple discrimination within the Directive.<sup>49</sup>

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<sup>45</sup> CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019, at para 15(a) and (c).

<sup>46</sup> Recital 14, Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000.

<sup>47</sup> *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, C-83/14, 16 July 2015.

<sup>48</sup> *Heiko Jonny Maniero*, C-457/17, 15 November 2018, at para 36.

<sup>49</sup> NI Human Rights Commission, 'Response to the European Commission Consultation on the Race Equality Directive (Directive 2000/43/EC)', (NIHRC, 2022), at 13.

- 4.6 The Executive Office will be aware that a commitment was made to include intersectional multiple discrimination in a review of the Race Relations (NI) Order 1997.<sup>50</sup> The NIHRC views the inclusion of intersectional multiple discrimination as a key amendment to the Race Relations (NI) Order 1997, or equivalent, and is disappointed to not see concrete proposals within the consultation document for addressing this. In the absence of this, it is also disappointing for there to be no reference within the consultation document as to what the plan is for addressing this issue outside of this consultation process or, if there is no plan, to confirm that this is the case.
- 4.7 **The NIHRC recommends that the Executive Office ensures intersectional multiple discrimination claims in NI are effectively addressed, including by the provision of intersectionality within equality legislation, including the Race Relations (NI) Order 1997, or equivalent.**

### **Clarifying definitions**

- 4.8 The consultation document includes proposals to change some of the definitions contained within the Race Relations (NI) Order 1997 to “widen the scope that the new Bill will cover, to provide better overall protection”.<sup>51</sup> This includes ensuring consistent reference to the grounds for racial discrimination throughout the Race Relations (NI) Order 1997, or equivalent.<sup>52</sup>
- 4.9 Legislation should be effective in law and practice.<sup>53</sup> The first practical step in guaranteeing this is to ensure that the law is consistent throughout.
- 4.10 **The NIHRC welcomes the Executive Office’s proposal to ensure reference to the grounds for racial discrimination is consistent throughout the Race Relations (NI) Order 1997, or equivalent.**

### **Reference to human rights principles**

- 4.11 The consultation document includes proposals that any new provisions on

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<sup>50</sup> Eoin Mullan, Sinead Brown and Paul Roddy, 'Racial Equality Legislation Review' (TEO, 2018).

<sup>51</sup> The Executive Office, 'Review of the Race Relations (NI) Order 1997: Consultation Document' (TEO, 2023), at 12.

<sup>52</sup> Ibid.

<sup>53</sup> See for example, *Orhan v Turkey* (2002) ECHR 497, at para 383; *Cam v Turkey* (2016) ECHR 206, at para 64.

justifying discriminatory practices introduced due to legislative reform should include reference to the principles of proportionality and legitimate aim.<sup>54</sup> For example, this would apply to amendments to Articles 7A and 41 of the Race Relations (NI) Order.

- 4.12 In human rights terms, establishing whether a violation of a qualified right<sup>55</sup> has occurred is guided by whether the interference is proportionate in pursuit of a legitimate aim.<sup>56</sup> Expressly referring to such principles within the Race Relations (NI) Order 1997, or equivalent, will provide clarity and assist with ensuring the resulting legislation is effective in law and practice.
- 4.13 Within human rights law, some clarity is provided as to what a legitimate aim is within different contexts.<sup>57</sup> It would be useful to consider whether a similar approach within the text of the revised legislation is required, or if sufficient guidance is provided elsewhere.
- 4.14 **The NIHRC welcomes the Executive Office’s proposal to expressly include human rights principles, such as ‘proportionality’ and ‘legitimate aim’, where relevant within the Race Relations (NI) Order 1997, or equivalent.**
- 4.15 **The NIHRC recommends that the Executive Office ensures that guidance is within or supplementary to the revised Race Relations (NI) Order 1997, or equivalent, as to what a legitimate aim is within different contexts.**

### **Victim centred approach**

- 4.16 The consultation document includes proposals that the definition of discrimination by way of victimisation in Article 4 of the Race Relations (NI) Order 1997 is extended.<sup>58</sup> It also proposes that the two-month notice period to the Department of Education before a claim of discrimination can be made, as currently set out in Article 54(5) of the Race Relations (NI)

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<sup>54</sup> The Executive Office, ‘Review of the Race Relations (NI) Order 1997: Consultation Document’ (TEO, 2023), at 12 and 13.

<sup>55</sup> A qualified right can be interfered with when such interference can be justified, i.e. it is prescribed by law, proportionate and satisfies a legitimate aim. For example, Articles 8-11 of the ECHR.

<sup>56</sup> *Dudgeon v UK* (1981) ECHR 5, at paras 51-53.

<sup>57</sup> Articles 8(2), 9(2), 10(2) and 11(2), European Convention on Human Rights 1950.

<sup>58</sup> The Executive Office, ‘Review of the Race Relations (NI) Order 1997: Consultation Document’ (TEO, 2023), at 12.



Order 1997, is removed.<sup>59</sup>

- 4.17 Removal of procedural obstacles such as those suggested would help to ensure the right to an effective remedy and assist in achieving the broader requirement that legislation is effective in law and practice.<sup>60</sup>
- 4.18 In terms of defining victimisation, the ECHR's definition of a victim offers some guidance. For example, the ECtHR has accepted married partners,<sup>61</sup> unmarried partners,<sup>62</sup> parents,<sup>63</sup> siblings,<sup>64</sup> children,<sup>65</sup> and nephews as indirect victims.<sup>66</sup> The ECtHR has also indicated that nieces, aunts, uncles and grandparents could be categorised as an indirect victim.<sup>67</sup>
- 4.19 Protection from victimisation is provided for in Article 9 of the EU Race Equality Directive and also in other Annex 1 Equality Directives, such as the EU Gender Equality Directive.<sup>68</sup> Recital 20 of the EU Race Equality Directive states "the effective implementation of the principle of equality requires adequate judicial protection against victimisation".<sup>69</sup> In relation to protection from victimisation in Article 24 of the EU Gender Equality Directive, the CJEU has held that an essential part of effective judicial control to protect the principle of equal treatment, is ensuring victimisation is not interpreted restrictively.<sup>70</sup> In *Hakelbracht*, the CJEU found that the principle of effective judicial protection is reaffirmed in Article 47 of the EU Charter. The CJEU noted that the category of employees who are entitled to the protection provided by Article 24 of the EU Gender Equality Directive "must be interpreted broadly and include all employees who may be subject to retaliatory measures taken by an employer in response to a

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<sup>59</sup> *Ibid*, at 16.

<sup>60</sup> See for example, *Orhan v Turkey* (2002) ECHR 497, at para 383; *Cam v Turkey* (2016) ECHR 206, at para 64.

<sup>61</sup> *McCann v UK* (1995) 21 EHRR 97; *Salman v Turkey* (2000) ECHR 357.

<sup>62</sup> *Velikova v Bulgaria* (2000) ECHR 198.

<sup>63</sup> *Ramsahai and Others v the Netherlands* (2007) ECHR 393; *Giuliani and Gaggio v Italy* (2011) ECHR 513.

<sup>64</sup> *Andronicou and Constantinou v Cyprus*, Application No 86-1996-705-897, Judgment of 9 October 1997.

<sup>65</sup> *McKerr v UK* (2001) ECHR 329.

<sup>66</sup> *Yasa v Turkey* (1998) ECHR 83.

<sup>67</sup> *Velikova v Bulgaria* (2000) ECHR 198; *Ramsahai and Others v the Netherlands* (2007) ECHR 393; *Giuliani and Gaggio v Italy* (2011) ECHR 513; *Andronicou and Constantinou v Cyprus*, Application No 86-1996-705-897, Judgment of 9 October 1997; *McKerr v UK* (2001) ECHR 329; *Yasa v Turkey* (1998) ECHR 83.

<sup>68</sup> Article 9, Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000; Article 24, Directive 2006/54/EC, 'EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation', 5 July 2006.

<sup>69</sup> Recital 20, Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000.

<sup>70</sup> *Hakelbracht* C-404/18, 28 May 2018, at paras 33-34

complaint of discrimination”, including employees who act as witnesses.<sup>71</sup> The CJEU noted that, if these employees were not protected under Article 24 of the EU Gender Equality Directive, it may deter victims from seeking effective legal remedy.<sup>72</sup>

- 4.20 **The NIHRC welcomes the Executive Office’s proposals to extend the definition of discrimination by way of victimisation. The NIHRC advises that the ECHR’s definition of a victim may offer some guidance in this regard.**
- 4.21 **The NIHRC advises the Executive Office to consider a broad definition of victimisation to ensure access to effective remedy in line with the EU Race Equality Directive and Article 47 of the EU Charter.**
- 4.22 **The NIHRC welcomes the Executive Office’s proposals to amend Article 54(5) of the Race Relations (NI) Order 1997, or equivalent, and remove the two-month notice period to the Department of Education before a claim of discrimination can be made.**

### **Accountability**

- 4.23 The consultation document includes a proposal to extend Article 18 of the Race Relations (NI) Order 1997 to include reference to the ‘responsible body’.<sup>73</sup>
- 4.24 The ECtHR recognises that “structural deficiencies call for the implementation of positive measures in order, inter alia, to assist with... any difficulties... encountered”.<sup>74</sup> The ECtHR has specifically stated that “these obligations are particularly stringent where there is an actual history of direct discrimination. Therefore, some additional steps are needed in order to address these problems...”.<sup>75</sup> Thus follows a positive obligation on the NI Executive to prevent, stop or punish discrimination.
- 4.25 **The NIHRC welcomes the Executive Office’s proposal to extend**

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<sup>71</sup> Ibid, at paras 27-28.

<sup>72</sup> Ibid, 28 May 2018, at paras 33.

<sup>73</sup> The Executive Office, ‘Review of the Race Relations (NI) Order 1997: Consultation Document’ (TEO, 2023), at 14.

<sup>74</sup> *Horváth and Kiss v Hungary* (2013) ECHR 92, at para 104.

<sup>75</sup> *Horváth and Kiss v Hungary* (2013) ECHR 92, at para 104.

**Article 18 of the Race Relations (NI) Order 1997, or equivalent, to include reference to the 'responsibility body' on the basis that a duty holder must adhere to their delegated responsibilities and are held accountable for any violations.**

## **National security**

- 4.26 Article 41 of the Race Relations (NI) Order 1997 provides that “nothing in Parts II to IV shall render unlawful an act done for the purpose of safeguarding national security or of protecting public safety or public order”. The consultation document includes proposals to remove “protecting public safety or public order” from Article 41.<sup>76</sup>
- 4.27 The consultation document suggests that the terms protecting public safety or public order and ‘national security’ are the same. The NIHRC disagrees strongly. As is clear from the relevant human rights treaties, domestic legislation and resulting case-law there are real and substantive distinctions.<sup>77</sup> For example, Articles 8(2), 10(2) and 11(2) of the ECHR and Article 21 of the UN ICCPR list ‘national security’ and ‘public safety or public order’ as separate circumstances under which a right may be interfered with, subject to certain conditions. ‘National security’ however captures situations affecting NI or the UK as a whole (e.g. acts of terrorism) and ‘public safety or public order’ applies in more localised contexts (e.g. localised riots). Given the potential significance of the proposed amendment, further clarification is required. In the meantime, however, the following might be helpful.
- 4.28 **The NIHRC suggests that the Executive Office reconsiders this proposal. At least, the Executive Office must establish the intended circumstances in which acts are rendered lawful under Article 41 of the Race Relations (NI) Order 1997, or equivalent.**

## **5.0 Education**

- 5.1 The consultation document includes proposals to amend Articles 18(1)(a), 18(1)(b) and 18(1)(c) of the Race Relations (NI) Order 1997, or

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<sup>76</sup> The Executive Office, ‘Review of the Race Relations (NI) Order 1997: Consultation Document’ (TEO, 2023), at 13-14.

<sup>77</sup> See for example, Articles 8(2), 10(2), 11(2) European Convention on Human Rights 1950; Article 21, UN International Covenant on Civil and Political Rights 1966.

equivalent, to ensure no educational application process or arrangements across the workings of educational establishments discriminate on grounds related to race.<sup>78</sup>

5.2 The ECtHR has restated many times that the protection of rights must be “practical and effective and not theoretical and illusory”. Moreover, that means in the context of education a right to inclusive education.<sup>79</sup> The ECtHR observed that:

the importance of the fundamental principles of universality and non-discrimination in the exercise of the right to education are enshrined in many international texts and that the international instruments also recognised inclusive education as the most appropriate means of guaranteeing those fundamental principles.<sup>80</sup>

5.3 The ECtHR held that:

Article 14 of the... [ECHR] does not prohibit a Member State from treating groups differently in order to correct ‘factual inequalities’ between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of... [Article 14].<sup>81</sup>

5.4 The ECtHR clarified that “the Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment”.<sup>82</sup> However, the ECtHR continued that:

Article 14 of the... [ECHR] must be read in light of the requirements of those texts regarding reasonable accommodation – understood as ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case’... Such reasonable

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<sup>78</sup> The Executive Office, ‘Review of the Race Relations (NI) Order 1997: Consultation Document’ (TEO, 2023), at 15-16.

<sup>79</sup> *Cam v Turkey* (2016) ECHR 206, at para 64.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*, at para 54.

<sup>82</sup> *Ibid.*

accommodation helps to correct factual inequalities which are unjustified and therefore amount to discrimination.<sup>83</sup>

5.5 Similarly, the UN ICESCR Committee has noted that education “shall ‘enable all persons to participate effectively in a free society’, and it shall promote understanding among all ‘ethnic’ groups, as well as nations and racial and religious groups”.<sup>84</sup> The UN ICESCR Committee has confirmed that right to education requires “accessibility”.<sup>85</sup> This means that “educational institutions and programmes have to be accessible to everyone, without discrimination”. Accessible to everyone includes “the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds”.<sup>86</sup> The UN CRC Committee has also stressed that:

discrimination on the basis of any of the grounds listed in Article 2 of the... [UN CRC] whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities.<sup>87</sup>

5.6 The EU Race Equality Directive prohibits direct and indirect discrimination, harassment and an instruction to discriminate and applies to all persons in both the public and private sectors, including in relation to education.<sup>88</sup> The CJEU has affirmed that the EU Directive cannot be interpreted restrictively in light of its objective of promoting equality in respect to racial and ethnic origin, including in respect to education.<sup>89</sup> For example, the CJEU found that access to education should be considered an essential aspect of education and that “costs related to the participation in a research project or in an educational programme must be considered to be part of the components of access to education”.<sup>90</sup>

### 5.7 **The NIHRC, in principle, welcomes the proposals to amend Articles 18(1)(a), 18(1)(b) and 18(1)(c) of the Race Relations (NI) Order**

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<sup>83</sup> Ibid, at para 65.

<sup>84</sup> E/C.12/1999/10, ‘UN ICESCR Committee General Comment No 13: Right to Education’, 8 December 1999, at para 4.

<sup>85</sup> Ibid, at para 6(b).

<sup>86</sup> Ibid, at para 6(b).

<sup>87</sup> CRC/GC/2001/1, ‘UN CRC Committee General Comment No 1: Aims of Education’, 17 April 2001, at para 10.

<sup>88</sup> Article 3(1)(g), Directive 2000/43/EC, ‘EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin’, 29 June 2000.

<sup>89</sup> *Heiko Jonny Maniero*, C-457/17, 15 November 2018, at para 36.

<sup>90</sup> Ibid, at paras 37-38.

**1997, or equivalent, to ensure no educational application process or other arrangement discriminates on grounds related to race. The NIHRC recommends that the resulting amendments are informed by human rights standards and considered for compatibility with Windsor Framework Article 2.**

## 6.0 Employment

### Different forms of employment

- 6.1 The consultation document makes several proposals for amendments to the Race Relations (NI) Order 1997 for the purpose of enhancing employment protections.<sup>91</sup> For example, the Executive Office proposes to amend Article 6 of the Race Relations (NI) Order 1997 to ensure that it includes all forms of employees and employment.
- 6.2 Under human rights law, workers have the right to just and favourable conditions of work.<sup>92</sup> The UN ICESCR Committee has clarified that this:

is a right of everyone, without distinction of any kind. The reference to 'everyone' highlights the fact that the right applies to all workers in all settings, regardless of gender, as well as young and older workers, workers with disabilities, workers in the informal sector, migrant workers, workers from ethnic and other minorities, domestic workers, self-employed workers, agricultural workers, refugee workers and unpaid workers. The reference to 'everyone' reinforces the general prohibition on discrimination... the equality provision... and is supplemented by the various references to equality and freedom from distinctions of any kind.<sup>93</sup>

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<sup>91</sup> The Executive Office, 'Review of the Race Relations (NI) Order 1997: Consultation Document' (TEO, 2023), at 17-23.

<sup>92</sup> E/C.12/GC/23, 'UN ICESCR Committee General Comment No 23: Right To Just and Favourable Conditions of Work', 27 April 2016, at para 5; CoE European Social Charter 1961; Article 5(e)(i), UN Convention on the Elimination of All Forms of Racial Discrimination 1965; Articles 6 and 7, UN Covenant on Economic, Social and Cultural Rights 1966; Article 11, UN Convention on the Elimination of All Forms of Discrimination Against Women 1981; Article 32, UN Convention on the Rights of the Child 1989; Article 27, UN Convention on the Rights of Persons with Disabilities 2006; Article 3(1)(b)(c), Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000, the EU Directive applies to all persons, in both private and public sectors, in relation to employment and working conditions, including dismissal and pay and access to all types of vocational guidance, training and retraining, including practical work experience.

<sup>93</sup> E/C.12/GC/23, 'UN ICESCR Committee General Comment No 23 :Right To Just and Favourable Conditions of Work', 27 April 2016, at para 5.

- 6.3 The EU Race Equality Directive includes access to employment, self-employment, occupation and to working conditions, including dismissal and pay within its scope. The EU Directive subsequently extends its scope to vocational training and retraining, including practical work experience.<sup>94</sup> The prohibition of discrimination in the EU Directive covers direct and indirect discrimination, harassment, instruction to discriminate and victimisation in relation to employment and other areas falling within scope of the EU Directive.
- 6.4 The NIHRC supports enhancing employment protections and ensuring non-discrimination and equality for all workers. In the current fast-developing climate, there are additional considerations that are required to ensure that the resulting legislation remains relevant. As technology develops, particularly with the increased use of artificial intelligence, the employment landscape is likely to change. Therefore, it would be beneficial to work in some form of flexibility to ensure the Race Relations (NI) Order 1997, or equivalent, extends to new means of employment as they inevitably develop.
- 6.5 **The NIHRC welcomes the Executive Office’s proposals to enhance employment protections and ensure non-discrimination and equality for all workers within the Race Relations (NI) Order 1997, or equivalent.**
- 6.6 **The NIHRC recommends that the Executive Office includes sufficient flexibility within the Race Relations (NI) Order 1997, or equivalent, to ensure the full range of protections in place extend to new means of employment as they develop.**

### **Liability of employees**

- 6.7 The consultation document includes proposals that Article 32 of the Race Relations (NI) Order 1997 is amended so that an employee takes “responsibility if they did something wrong, unless it was their boss who told them to do it”.<sup>95</sup> This is a complex and multi-layered issue which, in the view of the NIHRC, requires caution and further consideration.

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<sup>94</sup> Article 3(1)(a)(b)and(c), Directive 2000/43/EC, ‘EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin’, 29 June 2000.

<sup>95</sup> The Executive Office, ‘Review of the Race Relations (NI) Order 1997: Consultation Document’ (TEO, 2023), at 21.

6.8 The right to just and favourable working conditions requires that sufficient safeguards are in place to ensure that an employee is not exploited.<sup>96</sup> The UN ICESCR Committee has stated that:

violations of the right to just and favourable conditions of work can occur through acts of commission, which means direct actions of States Parties. Adoption of labour migration policies that increase the vulnerability of migrant workers to exploitation, failure to prevent unfair dismissal from work of pregnant workers to exploitation, failure to prevent unfair dismissal from work of pregnant workers in public service, and introduction of deliberately retrogressive measures that are incompatible with core obligations are all examples of such violations.<sup>97</sup>

6.9 The UN ICESCR Committee has clarified that:

violations can also occur through acts of omission, which means the failure by a State Party to take reasonable steps to fully realise the right for everyone, for example by failing to enforce relevant laws and implement adequate policies, or to regulate activities of individuals and groups to prevent them from violating the right.<sup>98</sup>

6.10 The UN ICESCR Committee has also noted that migrant workers, domestic workers and refugee workers are at increased risk of exploitation.<sup>99</sup>

6.11 To reverse the burden and place it on the employee, rather than the employer, has the potential to further undermine vulnerable employees.

6.12 The guidance offered by the UN ICESCR Committee makes it clear that steps are required to ensure any amendment to the Race Relations (NI) Order 1997, or equivalent, does not introduce a risk of an employee being exploited by an employer.

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<sup>96</sup> E/C.12/GC/23, 'UN ICESCR Committee General Comment No 23: Right To Just and Favourable Conditions of Work', 27 April 2016, at paras 47(e), 47(f), 47(i) and 78; CoE European Social Charter 1961; Article 5(e)(i), UN Convention on the Elimination of All Forms of Racial Discrimination 1965; Articles 6 and 7, UN Covenant on Economic, Social and Cultural Rights 1966; Article 11, UN Convention on the Elimination of All Forms of Discrimination Against Women 1981; Article 32, UN Convention on the Rights of the Child 1989; Article 27, UN Convention on the Rights of Persons with Disabilities 2006.

<sup>97</sup> E/C.12/GC/23, 'UN ICESCR Committee General Comment No 23: Right To Just and Favourable Conditions of Work', 27 April 2016, at para 78.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid, at paras 47(e), 47(f) and 47(i).



- 6.13 **The NIHRC recommends that the Executive Office ensures that, before any amendment is introduced, such as the proposals regarding Article 32 of the Race Relations (NI) Order 1997, further consideration is given to the policy and legal intent of the amendment with a particular focus on safeguards against exploitation for employees.**

### **Acts done under statutory authority**

- 6.14 The consultation document includes proposals that Article 40 of the Race Relations (NI) Order 1997 is amended to modify or remove restrictions on persons being employed in the service of the Crown or certain public bodies.<sup>100</sup>
- 6.15 The principle of freedom from discrimination, which includes national origin, birth and other status,<sup>101</sup> requires that there are no arbitrary restrictions on employment based on nationality or immigration status.<sup>102</sup> This relates to a wider call by the NIHRC that people seeking asylum or subject to other forms of immigration checks are not arbitrarily prohibited from obtaining employment.<sup>103</sup>
- 6.16 **The NIHRC recommends that the Executive Office amends Article 40 of the Race Relations (NI) Order 1997, or equivalent, to remove restrictions based on nationality or immigration status on persons being employed in the service of the Crown or certain public bodies.**

## **7.0 Provisions of Goods, Facilities, Services and Premises**

### **Healthcare, social security, social protection and social advantage**

- 7.1 The consultation document includes proposals for several amendments to

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<sup>100</sup> The Executive Office, 'Review of the Race Relations (NI) Order 1997: Consultation Document' (TEO, 2023), at 22.

<sup>101</sup> Article 14, European Convention on Human Rights 1950; Article 2(1), UN Convention on the Elimination of All Forms of Racial Discrimination 1965; Article 2(1), UN Covenant on Civil and Political Rights 1966; Article 2(2), UN Covenant on Economic, Social and Cultural Rights 1966; UN Convention on the Elimination of All Forms of Discrimination Against Women 1981; Article 2, UN Convention on the Rights of the Child 1989; Article 4(1), UN Convention on the Rights of Persons with Disabilities 2006.

<sup>102</sup> *Hode and Abdi v UK* (2012) ECHR 1871, at para 47; *Bah v UK* (2011) ECHR 1448, at para 46.

<sup>103</sup> NI Human Rights Commission, 'Annual Statement 2022' (NIHRC, 2022), at 202-204.

improve access to provisions of goods, facilities, services and premises. For example, it is proposed that Article 20(A)(1) of the Race Relations (NI) Order 1997 is amended to remove a restriction that limits protection against racial discrimination and harassment by public bodies regarding social security, healthcare, social protection and social advantage.<sup>104</sup>

- 7.2 Several human rights treaties are clear that services, including healthcare, social security and social protection, should be available and accessible to everyone without discrimination.<sup>105</sup>
- 7.3 Specific to the UK, the UN ICESCR Committee recommended that steps are taken “to ensure that temporary migrants and undocumented migrants, asylum seekers, refused asylum seekers... have access to all necessary health-care services”.<sup>106</sup> The UN CRC Committee also recommended that the UK Government and NI Executive ensure that migrant, refugee and asylum-seeking children are provided with “sufficient support... to access basic services”.<sup>107</sup>
- 7.4 The UN CERD Committee reaffirmed that the UK Government and NI Executive “should take effective measures to ensure the accessibility and availability of quality health-care services to persons belonging to ethnic minorities, through its jurisdiction”.<sup>108</sup>
- 7.5 Additionally, the UN CEDAW Committee highlighted the “obstacles faced by women from marginalised groups... to access healthcare services, including as a result of their inability to provide identity documentation, proof of address or immigration status”.<sup>109</sup> It recommended that the UK

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<sup>104</sup> The Executive Office, ‘Review of the Race Relations (NI) Order 1997: Consultation Document’ (TEO, 2023), at 24.

<sup>105</sup> Articles 11 and 12, CoE European Social Charter 1961; Articles 1 and 5(e)(iv), UN Convention on the Elimination of All Forms of Racial Discrimination 1965; Articles 2(2), 9, 10 and 12, UN International Covenant on Economic, Social and Cultural Rights 1966; Articles 12 and 14(c), UN Convention on the Elimination of All Forms of Discrimination Against Women 1981; Articles 2, 24, 25, 26, UN Convention on the Rights of the Child 1989; Articles 25 and 28, UN Convention on the Rights of Persons with Disabilities 2006; E/C.12/GC/20, ‘UN ICESCR Committee General Comment No 20: Non Discrimination in Economic, Social and Cultural Rights’, 2 July 2009; E/C.12/GC/19, ‘UN ICESCR Committee General Comment No 19: Right to Social Security’, 4 February 2008; E/C.12/2000/4, ‘UN ICESCR Committee General Comment No 14: Right to the Highest Attainable Standard of Health’, 11 August 2000;

<sup>106</sup> E/C.12/GBR/CO/6, ‘UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI’, 14 July 2016.

<sup>107</sup> CRC/C/GBR/CO/5, ‘UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016.

<sup>108</sup> CERD/C/GBR/CO/21-23, ‘UN CERD Committee Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of UK’, 26 August 2016.

<sup>109</sup> CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI’, 14 March 2019.

Government and NI Executive "strengthen the implementation of programmes and policies aimed at providing effective access to healthcare by women from marginalised groups, particularly asylum-seeking and refugee women, migrant women, Gypsy and Traveller women, and victims of trafficking".<sup>110</sup>

- 7.6 The EU Race Equality Directive affirms that, in order to ensure the development of a democratic and tolerant society, which allows the participation of all people irrespective of racial or ethnic origin, specific protections should go beyond employment to include, among others, access to goods and services.<sup>111</sup> Article 3(1) of the EU Race Equality Directive provides for access to goods and services available to the public, including housing.<sup>112</sup> The EU Directive also prohibits discrimination in relation to the provision of social protection, including social security and healthcare, and social advantages.<sup>113</sup> As noted above, the EU Directive explicitly provides for member states to introduce provisions which set out more favourable provisions for the protection of the principle of equal treatment.
- 7.7 The NIHRC is aware of particular issues for migrants accessing healthcare in NI. The House of Commons NI Affairs Committee heard evidence on the lack of healthcare provision for irregular migrants who are traumatised or have complex needs.<sup>114</sup> Delays issuing asylum registration cards and HC2 certificates, which are required to register and receive full support for many health care services, were also reported.<sup>115</sup>
- 7.8 Travelling to healthcare appointments remains difficult for people seeking asylum or those with irregular status. Due to delays in the decision-making process, pregnant migrant women do not receive financial support until late in their pregnancy. Furthermore, there have been reports of a lack of

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<sup>110</sup> Ibid.

<sup>111</sup> Recital 12, Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000.

<sup>112</sup> Article 3(1)(h), Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000.

<sup>113</sup> Article 3(1)(e)and(f), Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000.

<sup>114</sup> House of Commons NI Affairs Committee, 'Inquiry into the Experience of Minority Ethnic and Migrant People in NI - Oral Evidence', 8 September 2021, at Question 19.

<sup>115</sup> CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019, at Question 22.

access to translation and interpretation services.<sup>116</sup>

- 7.9 Registering for and accessing General Practitioner services and National Health Service dental services remains challenging for migrants, with long waiting times for appointments.<sup>117</sup> Concerns have been raised by individuals seeking asylum that are currently in temporary and contingency hotel accommodation about the lack of access to healthcare information, inadequate provision for medical needs and significant delays in health assessments.<sup>118</sup> There are also instances where migrants are being questioned about immigration status at the point of contact with health services, rather than being treated primarily as a patient.<sup>119</sup> Additionally, some migrants with disabilities have reported difficulties in accessing mental health services, which is contributing to declining mental health.<sup>120</sup>
- 7.10 **The NIHRC welcomes the Executive Office’s proposed amendment to Article 20(A)(1) of the Race Relations (NI) Order 1997, or equivalent. The NIHRC recommends that the Executive Office works with the Department for Communities and Department of Health to ensure that the resulting legislation ensures equal access to healthcare, social security, social protection and social advantage without discrimination in law and practice.**

## Language

- 7.11 The consultation document includes proposals to amend Article 23(7) of the Race Relations (NI) Order 1997 so that it covers a wider range of circumstance, including ‘illegitimate’ children.
- 7.12 Following a visit to the UK, the former Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, E Tendayi Achiume, recommended that efforts are stepped up to “eliminate prejudice, negative stereotyping and stigmatisation, in particular by politicians and in the media, and take

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<sup>116</sup> NI Human Rights Commission, 'Submission to the NI Affairs Committee Inquiry into the Experience of Minority Ethnic and Migrant People in NI' (NIHRC, 2021).

<sup>117</sup> Meeting between NI Human Rights Commission and NI Council for Racial Equality, 9 August 2022.

<sup>118</sup> Children’s Law Centre and South Tyrone Empowerment Programme, 'Joint Submission to Framework Convention on the Protection of National Minorities Advisory Committee: Rights of Asylum Seeker Children Living in Contingency Accommodation (Hotel Buildings) in NI, Run by Mears Group PLC' (CLC and STEP, 2022).

<sup>119</sup> Roundtable on Access to Healthcare and Protocol Article 2 hosted by the NI Human Rights Commission, 6 June 2022.

<sup>120</sup> Independent Mechanism in NI Disability Forum Meeting, 2 August 2022.

effective measures aimed at promoting tolerance and understanding”.<sup>121</sup>

- 7.13 This is a point for the resulting legislation more broadly, but using the proposals for Article 23(7) of the Race Relations (NI) Order 1997 as an example, the language used in any amendments should not negatively stereotype or stigmatise. For example, while it may still be a legal term, the NIHRC raises caution against the use of ‘illegitimate’ children. There is an opportunity to set a new precedent that modernises and destigmatises the legal language used for such scenarios without losing any of the precise meaning.
- 7.14 **The NIHRC recommends that the Executive Office ensures that the language used in the revised Race Relations (NI) Order 1997, or equivalent, does not stereotype or stigmatise people, but promotes tolerance and understanding.**

## 8.0 Equality Commission for NI’s Role

- 8.1 The consultation document includes several proposals for amending the Equality Commission NI’s duties.<sup>122</sup>
- 8.2 The EU Race Equality Directive obliges Member States to designate bodies for the promotion of equal treatment of all persons in relation to racial or ethnic origin, becoming the first EU Directive to specifically reference equality bodies.<sup>123</sup> In December 2022, the European Commission published proposals on two Directives on standards for equality bodies, including the EU Race Equality Directive.<sup>124</sup>

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<sup>121</sup> A/HRC/41/54/Add.2, ‘Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, E Tendayi Achiume: Visit to the UK of Great Britain and NI’, 27 May 2019, at para 74(r).

<sup>122</sup> The Executive Office, ‘Review of the Race Relations (NI) Order 1997: Consultation Document’ (TEO, 2023), at 27-32.

<sup>123</sup> Article 13, Directive 2000/43/EC, ‘EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin’, 29 June 2000.

<sup>124</sup> Proposal for a Council Directive on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC. Proposal for a Directive of the European Parliament and of the Council on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU.

- 8.3 The Equality Commission for NI, alongside the NIHRC, consider that the proposed Directives do amend provisions of a number of the Annex 1 equality directives and it is therefore important that NI equality law is amended to keep pace with any changes to these equality directives, if the proposals are introduced.
- 8.4 **The NIHRC recommends that the Executive Office ensures the necessary amendments are made to the Race Relations (NI) Order 1997, or equivalent, to ensure that the Equality Commission for NI can fulfil its mandate in full and has the necessary resources to do so effectively on a long-term basis.**
- 8.5 **The NIHRC recommends that the Executive Office commits to ensuring that to the extent that the EU directives on standards for equality bodies, if introduced, amend or replace the EU Race Equality Directive, the law in NI is amended to keep pace, as required, with that change.**

## 9.0 Enforcement

### Effective remedy

- 9.1 The consultation document includes proposals aimed at improving the enforcement of the Race Relations (NI) Order 1997, or equivalent.<sup>125</sup> This includes considering whether Articles 52 and 53 of the Race Relations (NI) Order should include the power for tribunals to make recommendations that benefit the whole workforce, including workforce-wide training. The Executive Office states that "anecdotal evidence on this matter showed that, in the majority of cases in Great Britain, tribunals most frequently recommended training and that few, even with the power to do so, recommended anything more".<sup>126</sup>
- 9.2 Article 13 of the ECHR and Article 2(3) of the UN ICCPR provide for the right to an effective remedy. The UN ICESCR Committee is clear that discrimination should be effectively addressed.<sup>127</sup> Human rights standards

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<sup>125</sup> The Executive Office, 'Review of the Race Relations (NI) Order 1997: Consultation Document' (TEO, 2023), at 34-36.

<sup>126</sup> Ibid, at 34-36.

<sup>127</sup> E/C.12/GC/20, 'UN ICESCR Committee General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights', 2 July 2009, at para 40.

are not prescriptive on how the right to an effective remedy is guaranteed. However, they are clear that the remedy “must be ‘effective’ in practice as well as in law”.<sup>128</sup> To be effective, the remedy must be accessible, capable of providing redress in respect of the complaint, and offer reasonable prospects of success.<sup>129</sup>

- 9.3 Article 47 of the Charter of Fundamental Rights of the EU provides for the right to an effective remedy against a violation of any right or freedom arising under Union law. The Charter of Fundamental Rights remains relevant for interpreting provisions of the UK/EU Withdrawal Agreement, including the Windsor Framework, and EU law made applicable under its provisions.<sup>130</sup> This includes the EU Race Equality Directive which, when read in conjunction with Article 47 of the EU Charter, an individual is entitled to judicial protection in respect of their rights.<sup>131</sup>
- 9.4 The NIHRC, jointly with Equality Commission for NI and Irish Human Rights and Equality Commission, have published research on the impact of withdrawal from the EU on the Divergence of Rights.<sup>132</sup> The research suggests that, where provisions of the Race Relations Order empower courts and tribunals to determine discrimination complaints and provide compensation, this can arguably make victims more likely to seek out-of-court settlements. In *Braathens*, the CJEU stated that Article 7 of the EU Race Equality Directive, requiring States to ensure that judicial and administrative procedures for the enforcement of obligations under the Directive are available to all persons who feel they have been discriminated against, reaffirms the rights to effective remedy under Article 47 of the EU Charter.<sup>133</sup> The CJEU also drew attention to Article 15 of the EU Directive on sanctions. The court affirmed that Article 15 obliges States to:

introduce into their national legal systems measures which are sufficiently effective to achieve the aim of that directive and to ensure that they may be effectively relied upon before the national courts,

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<sup>128</sup> *Orhan v Turkey* (2002) ECHR 497, at para 383.

<sup>129</sup> *Sejdovic v Italy* (2006) ECHR 181, at para 46; *Pakas v Lithuania* (2011) ECHR 1, at para 75.

<sup>130</sup> Article 4, UK/EU Withdrawal Agreement 2020.

<sup>131</sup> *Braathens Regional Aviation*, C-30/19, 15 April 2021, at para 59.

<sup>132</sup> Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, ‘EU Developments in Equality and Human Rights: the impact of Brexit on the divergence of rights and best practice on the island of Ireland’, (NIHRC, ECNI and IHREC, 2022).

<sup>133</sup> *Braathens Regional Aviation*, C-30/19, 15 April 2021, at para 33.

including by an association, organisation or legal entity... so that judicial protection is real and effective.<sup>134</sup>

- 9.5 **The NIHRC recommends to the Executive Office that any reform of the Race Relations (NI) Order 1997, or equivalent, provides clarity to victims regarding their right to judicial protection in addition to any such settlements and to clarify that jurisdiction cannot be excluded by private agreement.**
- 9.6 **The NIHRC recommends that the Executive Office should clarify more precisely that remedies under the Race Relations (NI) Order 1997, or equivalent, must result in real and effective judicial protection of the rights derived from the EU Race Equality Directive and Article 47 of the EU Charter.**

### **Reasonable training**

- 9.7 In considering whether Articles 52 and 53 of the Race Relations (NI) Order 1997 should include the power for tribunals to make recommendations that benefit the whole workforce, including workforce-wide training, the Executive Office also states that "it was suggested that training can be expensive but ultimately not overly helpful in changing attitudes".<sup>135</sup>
- 9.8 Human rights standards commonly require that the maximum available resources are used to ensure human rights compliance.<sup>136</sup> In simplified terms, this does not seek to place an undue burden on duty-holders, but does require that all that can be done is undertaken within the resources available.
- 9.9 Furthermore, consideration should be given to what reasonable training would entail. For example, this may involve considering where within the workforce direct training would be best utilised, for learning to then filter through the organisation via peer-to-peer education.

### **9.10 The NIHRC recommends that the Executive Office considers**

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<sup>134</sup> Ibid, at para 37.

<sup>135</sup> The Executive Office, 'Review of the Race Relations (NI) Order 1997: Consultation Document' (TEO, 2023), at 33.

<sup>136</sup> Article 2(2), UN International Covenant on Economic, Social and Cultural Rights 1966; Article 4(2), UN Convention on the Rights of Persons with Disabilities 2006; E/1991/23, 'UN ICESCR Committee General Comment No 3: The Nature of States Parties' Obligations', 14 December 1990, at paras 9-10; UN Human Rights Office of the High Commissioner, 'Realising Human Rights Through Government Budget' (OHCHR, 2017).



**including within the proposed amendments to Articles 52 and 53 of the Race Relations (NI) Order 1997, or equivalent, that a tribunal has the power to recommend 'reasonable' training.**

## 10.0 Monitoring

- 10.1 The consultation document includes consideration of the Executive Office's plans to introduce ethnic equality monitoring.<sup>137</sup> The consultation document acknowledges the Racial Equality Strategy's statement that ethnic monitoring is an important tool in tackling inequality and racism and committed to "examine where ethnic monitoring should be introduced and consult on proposals for implementation".<sup>138</sup> It also acknowledged the subsequent study that recommended that the Race Relations (NI) Order 1997 is amended to impose a duty on specified public authorities to collect data on racial equality and set racial equality objectives.<sup>139</sup>
- 10.2 The UN ICESCR Committee has clarified that there is an obligation to "monitor effectively the implementation measures to comply with" the right to non-discrimination and equality.<sup>140</sup> It continued that "monitoring should assess both the steps taken and the results achieved in the elimination of discrimination. National strategies, policies and plans should use appropriate indicators and benchmarks, disaggregated on the basis of the prohibited grounds of discrimination".<sup>141</sup> The UN CEDAW Committee and UN CRC Committee have made similar clarifications.<sup>142</sup>
- 10.3 There is currently no general requirement under the EU Race Equality Directive for Member States to establish robust systems to collect, analyse or monitor disaggregated equality data or to report on these findings.<sup>143</sup> While the EU Directive requires that Member States disseminate relevant

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<sup>137</sup> The Executive Office, 'Review of the Race Relations (NI) Order 1997: Consultation Document' (TEO, 2023), at 36.

<sup>138</sup> The Executive Office, 'Racial Equality Strategy 2015-2025' (TEO, 2015), at 5.

<sup>139</sup> This would be analogous to sections 149 and 153 of the Equality Act 2010, which does not extend to NI.

<sup>140</sup> E/C.12/GC/20, 'UN ICESCR Committee General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights', 2 July 2009, at para 41.

<sup>141</sup> *Ibid.*

<sup>142</sup> 'UN CEDAW Committee General Recommendation No 6: Effective National Machinery and Publicity', 1988, at para 1(b); CRC/GC/2003/5, 'UN CRC Committee General Comment No 5: General Measures of Implementation of the UN CRC', 27 November 2003, at para 45.

<sup>143</sup> While the Directive requires that Member States disseminate relevant information about the Directive to those concerned (Article 10) and communicate information on the application of the Directive to the Commission (Article 17(1)), it currently does not stipulate the level of depth necessary for the report.

information about the Directive to those concerned,<sup>144</sup> and communicate information on the application of the Directive to the EU Commission,<sup>145</sup> it currently does not stipulate the level of depth necessary for a report. The NIHRC raised this as an issue in its submission to the EU Commission's consultation on potential gaps in the EU Race Equality Directive, and recommended the EU Directive be amended to address this.<sup>146</sup>

**10.4 The NIHRC welcomes the commitment within the proposals to ensure that the Race Relations (NI) Order 1997, or equivalent, imposes a duty on specified public authorities to collect data on racial equality and set racial equality objectives. The NIHRC stresses that this commitment should be delivered as quickly as possible in its entirety.**

## 11.0 Descent and Caste

11.1 The consultation document includes proposals to include 'descent' and 'caste' within the definition of racial discrimination within the Race Relations (NI) Order 1997, or equivalent.<sup>147</sup>

11.2 Within Article 1(1) of the UN CERD 'descent' is a recognised term on which racial discrimination can be based.<sup>148</sup> In exploring the meaning of 'descent', the UN CERD Committee stated that "discrimination based on 'descent' includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights".<sup>149</sup> The UN CERD Committee further stated that steps should be taken "to identify those descent-based communities under their jurisdiction who suffer from discrimination, especially on the basis of caste and analogous systems of inherited status".<sup>150</sup>

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<sup>144</sup> Article 10, Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000.

<sup>145</sup> Article 17(1), Directive 2000/43/EC, 'EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000.

<sup>146</sup> NI Human Rights Commission, 'Response to the European Commission Consultation on the Racial Equality Directive (Directive 2000/43/EC)' (NIHRC, 2022).

<sup>147</sup> The Executive Office, 'Review of the Race Relations (NI) Order 1997: Consultation Document' (TEO, 2023), at 37.

<sup>148</sup> Article 1(1), UN Convention on the Elimination of All Forms of Racial Discrimination 1965.

<sup>149</sup> 'UN CERD Committee General Recommendation No 29: Descent', August 2002, at 1.

<sup>150</sup> Ibid, at para 1(a).

11.3 The UN CERD Committee specifically states that State Parties, including the UK, should “review and enact or amend legislation in order to outlaw all forms of discrimination based on descent”.<sup>151</sup> This can include adopting “special measures in favour of descent-based groups and communities in order to ensure their enjoyment of human rights and fundamental freedoms, in particular concerning access to public functions, employment and education”.<sup>152</sup>

11.4 The UN CERD Committee is clear that ‘descent’ includes ‘caste’. Consequently, if the approach to expressly reference both is adopted, consideration should be given to whether this approach leaves other groups that fall under the umbrella term of ‘descent’, such as analogous systems of inherited status, feeling excluded. Or, if the approach of only referring to ‘descent’ is adopted, it should be made clear as to what this term covers.

**11.5 The NIHRC recommends that the Executive Office utilises meaningful engagement with individuals that will be affected and their representatives beyond this public consultation to determine whether both descent and caste are directly referenced within the Race Relations (NI) Order 1997, or equivalent. The decision should also be guided by the principle that the resulting legislation should be effective in law and practice.**

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<sup>151</sup> Ibid, at para 1(c).

<sup>152</sup> Ibid, at para 1(f).

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