



racial
equality

POLICY POSITION

Race Law Reform

Priorities and Recommendations



Equality Commission

FOR NORTHERN IRELAND

TABLE OF CONTENTS

EXECUTIVE SUMMARY	I
PRIORITIES FOR ACTION	II
RECOMMENDATIONS	II
WORKING TO SECURE CHANGE.....	V
1 INTRODUCTION	1
SINGLE EQUALITY LEGISLATION.....	1
PRIORITIES FOR ACTION	2
WIDER CONTEXT	2
WIDER BENEFITS OF REFORM.....	5
2 OVERARCHING	9
<i>Ensure equality law reform reflects best international standards, advances equality of opportunity, prevents discrimination, and clarifies the law</i>	9
<i>Ensure race law reform is in compliance with Article 2 of the Windsor Framework</i>	10
3 FORMS OF DISCRIMINATION	14
HARMONISE AND EXPAND THE SCOPE OF RACIAL GROUNDS	14
<i>Increase protection on grounds of colour and nationality</i>	14
<i>Define ‘racial grounds’ non-exhaustively, and specifically include caste and descent</i>	18
DEFINITIONS	21
<i>Define direct racial discrimination in terms of treatment occurring ‘because of’ racial grounds</i>	21
<i>Remove the comparator requirement in the definition of victimisation and maintain scope of protections</i>	22
<i>Widen the definition of ‘racial harassment’</i>	23
PUBLIC FUNCTIONS.....	26
<i>Increase protection for individuals against racial discrimination and harassment by public bodies when carrying out their public functions</i>	26
COMBINED DISCRIMINATION	30
<i>Introduce protections against combined discrimination</i>	30
PROTECTIONS IN EMPLOYMENT AND ANALOGOUS SITUATIONS	34
<i>Ensure greater protection for employees against third party racial harassment</i>	34
<i>Increase protection for agency and contract workers</i>	38
<i>Clarify protections against victimisation for office-holders</i>	41
<i>Expand protection for law enforcement officers</i>	43
<i>Ensure protection for Councillors against racial discrimination, harassment and victimisation by local councils</i>	44
<i>Enhance protection regarding providers of employment services</i>	45
<i>Provide legal protection for volunteers</i>	46
PROTECTIONS IN SCHOOLS AND TRAINING	48
<i>Increase protection against victimisation for pupils in schools</i>	48
<i>Ensure greater protection in relation to admission to educational establishments</i>	49
<i>Clarify protection in provision of education</i>	50
<i>Extend protection from qualification bodies</i>	51
POSITIVE ACTION.....	52
<i>Expand the scope of positive action to better address disadvantage and disproportionately low participation, and meet differential needs</i>	52
<i>Allow political parties to take positive action measures when selecting candidates</i>	56
INFLUENCING OTHERS AND PREVIOUS RELATIONSHIPS.....	58
<i>Introduce additional preventions against influencing others to discriminate</i>	58
<i>Extend protection after relationships (members of clubs / associations) have come to an end</i>	60

4	EXCEPTIONS.....	61
	<i>Further limit exemptions to race equality law (public order, national security and public safety)</i>	<i>61</i>
	<i>Remove the immigration exception which permits discrimination on the grounds of ethnic or national origins in carrying out immigration functions.....</i>	<i>62</i>
	<i>Narrow the employment exception on foreign nationals in public service</i>	<i>67</i>
	<i>Clarify, and extend the persons covered by, proportionate and legitimate exceptions from occupational requirements</i>	<i>68</i>
	<i>Clarify law regarding competitive activities.</i>	<i>70</i>
5	ENFORCEMENT AND REMEDIES.....	71
	COMMISSION POWERS	71
	<i>Increase powers to issue Race Codes of Practice in a wider range of areas</i>	<i>71</i>
	<i>Strengthen formal investigation powers.....</i>	<i>72</i>
	<i>Ensure provisions in relation to the disclosure of information are appropriate and compliant with data protection.....</i>	<i>75</i>
	<i>Strengthen and harmonise the Commission’s grant-making powers</i>	<i>76</i>
	<i>Maintain powers to undertake research and educational activities.....</i>	<i>77</i>
	<i>Maintain Commission powers to tackle discrimination</i>	<i>78</i>
	<i>Empower the Commission and other representative bodies to bring a claim on behalf of named individuals and in its own name.....</i>	<i>80</i>
	<i>Amend NI race equality law, as appropriate, aligned to EU Directive on standards for equality bodies, if introduced</i>	<i>82</i>
	PROCEDURAL AND REMEDIES.....	86
	<i>Simplify the enforcement mechanism for education complaints against schools</i>	<i>86</i>
	<i>Ensure time limits for assistance by Commission and bringing proceedings are fit for purpose</i>	<i>88</i>
	<i>Clarify rights of individuals to take cases relating to instructions to discriminate.....</i>	<i>89</i>
	<i>Ensure the appropriate parties can be held liable for unlawful acts.....</i>	<i>90</i>
	<i>Increase powers for tribunals.....</i>	<i>91</i>
	<i>Maintain the questionnaire procedure, and allow for tailoring of questions</i>	<i>93</i>
6	ETHNIC EQUALITY MONITORING	96
	<i>Ensure provision for effective ethnic equality monitoring to improve the delivery of public services.....</i>	<i>96</i>
7	CONCLUSION	98

Executive Summary

- i. The Equality Commission for Northern Ireland ('the Equality Commission') is an independent public body established under the Northern Ireland Act 1998, with responsibility for implementing equality legislation across a range of grounds.
- ii. We continue to call for action to deliver harmonised single equality legislation for Northern Ireland. In the absence of this, we consider that urgent changes are required to strengthen the race equality legislation in Northern Ireland.
- iii. Race equality legislation protects individuals in Northern Ireland from being subjected to unlawful discrimination because of their race. Our recommended changes are aimed at strengthening, simplifying and harmonising the race equality legislation.
- iv. Our recommendations relate to a wide range of areas covered by the race equality legislation and therefore strengthen the rights of individuals as employees, customers, pupils in schools, and as students in further and higher education. Many of these recommendations are considered in Professor Brice Dickson's expert paper '[Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#)'.
- v. There are numerous wider benefits of reforming the race law legislation, including to:
 - Address key racial inequalities in Northern Ireland
 - Further the overarching aims and objectives of the Executive's Racial Equality Strategy 2015-2025
 - Harmonise, simplify and clarify the race equality legislation
 - Keep pace with international standards and best practice, taking account of lessons from other jurisdictions
 - Ensure race equality legislation is in line with the UK Government's international obligations

- vi. However, we would underline the Commission’s position that the most effective means of reforming equality law in Northern Ireland remains by introducing comprehensive single equality legislation.

Priorities for Action

- vii. The Commission has highlighted five priority areas for change to the race equality laws:
- Harmonise and expand the scope of racial grounds
 - Increase protection for individuals against racial discrimination and harassment by public bodies when carrying out their public functions
 - Introduce protections against combined discrimination
 - Ensure greater protection for employees against third party racial harassment
 - Expand the scope of positive action

Recommendations

- viii. The Commission has made the following recommendations in relation to racial equality law:

Overarching

- Ensure equality law reform reflects best international standards, advances equality of opportunity, prevents discrimination, and clarifies the law
- Ensure race law reform is in compliance with Article 2 of the Windsor Framework

Forms of Discrimination

Harmonise and Expand the Scope of Racial Grounds

- Increase protection on grounds of colour and nationality
- Define ‘racial grounds’ non-exhaustively, and specifically include caste and descent

Definitions

- Define direct racial discrimination in terms of treatment occurring 'because of' racial grounds
- Remove the comparator requirement in the definition of victimisation and maintain scope of protections
- Widen the definition of 'racial harassment'

Public Functions

- Increase protection for individuals against racial discrimination and harassment by public bodies when carrying out their public functions

Combined Discrimination

- Introduce protections against combined discrimination

Protections in Employment and Analogous Situations

- Ensure greater protection for employees against third party racial harassment
- Increase protection for agency and contract workers
- Clarify protections against victimisation for office-holders
- Expand protection for law enforcement officers
- Ensure protection for Councillors against racial discrimination, harassment, and victimisation by local councils
- Enhance protection regarding providers of employment services
- Provide legal protection for volunteers

Protections in Schools and Training

- Increase protection against victimisation for pupils in schools
- Ensure greater protection in relation to admission to educational establishments
- Clarify protection in provision of education
- Extend protection from qualification bodies

Positive Action

- Expand the scope of positive action to better address disadvantage and disproportionately low participation, and meet differential needs
- Allow political parties to take positive action measures when selecting candidates

Influencing Others and Previous Relationships

- Introduce additional preventions against influencing others to discriminate
- Extend protection after relationships (members of clubs / associations) have come to an end

Exceptions

- Further limit exemptions to race equality law (public order, national security and public safety)
- Remove the immigration exception which permits discrimination on the grounds of ethnic or national origins in carrying out immigration functions
- Narrow the employment exception on foreign nationals in public service
- Clarify, and extend the persons covered by, proportionate and legitimate exceptions from occupational requirements
- Clarify law regarding competitive activities.

Enforcement and Remedies

Commission Powers

- Increase powers to issue Race Codes of Practice in a wider range of areas
- Strengthen formal investigation powers
- Ensure provisions in relation to the disclosure of information are appropriate and compliant with data protection
- Strengthen and harmonise the Commission's grant-making powers

- Maintain powers to undertake research and educational activities
- Maintain Commission powers to tackle discrimination
- Empower the Commission and other representative bodies to bring a claim on behalf of named individuals and in its own name
- Amend NI race equality law, as appropriate, aligned to EU Directive on standards for equality bodies, if introduced

Procedural and Remedies

- Simplify the enforcement mechanism for education complaints against schools
- Ensure time limits for assistance by Commission and bringing proceedings are fit for purpose
- Clarify rights of individuals to take cases relating to instructions to discriminate
- Ensure the appropriate parties can be held liable for unlawful acts
- Increase powers for tribunals
- Maintain the questionnaire procedure, and allow for tailoring of questions

Ethnic Equality Monitoring

- Ensure provision for effective ethnic equality monitoring to improve the delivery of public services

Working to Secure Change

- ix. We have, and will continue to, proactively engage with a wide range of key stakeholders to secure change.
- x. We would welcome any steps you could take to raise awareness of these recommendations and their supporting evidence base.

- xi. We encourage you to engage with elected representatives, key government officials and wider stakeholders to call for the adoption of these proposals.

1 Introduction

- 1.1 The Equality Commission for Northern Ireland ('the Commission') is an independent public body established under the Northern Ireland Act 1998, with responsibility for implementing equality legislation across a range of grounds. It has specific powers regarding Article 2(1) of the Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement; and has also been designated as an 'independent mechanism' under the UN Convention on the Rights of Persons with Disabilities.
- 1.2 The Commission is calling for urgent reform of the race equality legislation in Northern Ireland.
- 1.3 These changes are aimed at strengthening, simplifying and harmonising the race equality legislation so that individuals in Northern Ireland have robust and effective protection against unlawful racial discrimination and harassment.
- 1.4 The changes relate to a wide range of areas covered by the race equality legislation and therefore strengthen the rights of individuals as employees, customers, pupils in schools, tenants, as members of private clubs and as students in further and higher education.

Single Equality Legislation

- 1.5 We continue to call for action to deliver harmonised single equality legislation for Northern Ireland¹.
- 1.6 Single equality legislation is the most effective means of strengthening and maintaining protections against discrimination in Northern Ireland.
- 1.7 Such legislation would also improve consistency, understanding and efficiency - saving time and costs for individuals from across all equality categories, as well as employers, service providers, advisory services, and those interacting with equality legislation more generally.

¹ ECNI (2022) [Single Equality Act](#)

- 1.8 It is fundamentally unfair that different equality groups have different protections without justifiable reason. Such differing protections contribute to a ‘hierarchy of rights’.
- 1.9 We call on decision-makers to take steps to legislate for a single equality act in Northern Ireland.
- 1.10 This legislation should reflect international human rights standards and best practice, and build on equality law in GB. Any legislation should also consider and comply with the Protocol Article 2 commitment and keep pace with all future EU equality laws that enhance protections.
- 1.11 In the absence of progress on harmonised single equality legislation for Northern Ireland, we consider that urgent changes are required to strengthen the race equality legislation in Northern Ireland.

Priorities for Action

- 1.12 The Commission has highlighted five priority areas for change to the race equality laws:
- Harmonise and expand the scope of racial grounds
 - Increase protection for individuals against racial discrimination and harassment by public bodies when carrying out their public functions
 - Introduce protections against combined discrimination
 - Ensure greater protection for employees against third party racial harassment
 - Expand the scope of positive action

Wider Context

- 1.13 Individuals in Northern Ireland currently have protection against unlawful racial discrimination under the Race Relations (NI) Order 1997, as amended (RRO 1997). This legislation prohibits discrimination on racial grounds in employment and vocational training, and when accessing goods, facilities and services. It also gives protection against unlawful racial discrimination when accessing private clubs (such as golf clubs), buying or

renting premises, when in education (including education in schools), and when subject to the functions of public bodies, such as the police.

- 1.14 Whilst the race equality legislation currently provides protections against racial discrimination and harassment, these protections are not comprehensive, with gaps in protection existing and increasing over time.
- 1.15 Pursuant to our duty to keep this legislation under review and to make recommendations for change, over the years we have made a number of recommendations relating to racial equality law.
- 1.16 This has included proactively engaging with the Office of the First and Deputy First Minister (OFMDFM) in 2004 as regards the development of robust and comprehensive single equality legislation. However, despite a commitment in the St Andrews Agreement² in 2006 to ‘work rapidly’ towards the development of single equality legislation, this legislation has not been progressed by the Northern Ireland Executive.
- 1.17 In the absence of progress on single equality legislation, in February 2009, we submitted our Proposals for legislative reform to Junior Ministers in OFMDFM outlining a number of areas in Northern Ireland equality law which required urgent amendment; including the harmonisation and strengthening of the race equality legislation³.
- 1.18 In particular, in our Proposals for Legislative Reform, we made it clear that a priority area for reform of the race equality legislation was increased protection from discrimination and harassment on the grounds of colour and nationality across the scope of the race equality legislation.
- 1.19 In 2014, we published a series of detailed recommendations in relation to racial equality law⁴, following extensive engagement with officials and stakeholders. These recommendations included proposals in relation to increasing protection in relation

² NIO (2006) [The St Andrews Agreement](#), Annex B.

³ ECNI (2009) [Proposals for Legislative Reform](#)

⁴ ECNI (2014) [Strengthening protection against racial discrimination: Recommendations for law reform](#)

to colour and nationality, improved protection against racial harassment, and removing or modifying certain exceptions.

- 1.20 Northern Ireland race equality law, since its introduction in 1997, has in a number of key respects, consistently failed to keep pace with legislation in Great Britain and Ireland, which has strengthened and improved protection against racial discrimination for different racial groups. A significant number of our recommended changes have already been implemented in neighbouring jurisdictions.
- 1.21 In particular, the introduction of the Equality Act 2010 in Great Britain in October 2010 has addressed a number of our recommendations, and, as a result, there is now significantly less protection for individuals against discrimination, harassment and victimisation across all racial grounds and in a wider range of areas in Northern Ireland than in other parts of the United Kingdom.
- 1.22 Calls for the reform of race equality law have received widespread support, including from international mechanisms such as those associated with the UN Convention on the Elimination of All Forms of Racial Discrimination; the European Commission against Racism and Intolerance; and the Framework Convention on the Protection of National Minorities (see next section).
- 1.23 To assist with updating our recommendations, we commissioned an expert paper by Professor Brice Dickson⁵, which, through engagement with stakeholders, was grounded in lived experience⁶.
- 1.24 Whilst a number of our recommendations call for specific changes to the race equality legislation, some of our recommendations apply equally to other equality grounds, for example: protection against combined discrimination; increased protection against discrimination by public bodies when carrying out their public functions; an increase in tribunal powers; and the strengthening of our enforcement powers.

⁵ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#).

⁶ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p.7.

- 1.25 In considering our recommendations on race law reform, there is also the opportunity to advance and harmonise protection against discrimination across a number of equality grounds. We therefore recommend action to address similar legislative gaps that exist under other areas of equality law in order to ensure a consistent and best practice approach is adopted across the equality legislative framework as a whole.

Wider benefits of reform

- 1.26 In relation to each recommendation, we have also set out a specific supporting rationale. However, there are also wider overarching benefits to reforming the racial equality law, as outlined here.

Address key racial inequalities in Northern Ireland

- 1.27 We consider that these changes will help address key racial inequalities in Northern Ireland.
- 1.28 It is clear that there are still unacceptable levels of racial discrimination, harassment and prejudice in Northern Ireland. For example, *A Question of Attitude: Equality Awareness Survey 2016*, commissioned by the Equality Commission has revealed that the five most negatively viewed groups were racial groups, with Travellers and Roma being the most negatively viewed groups⁷. Racist hate crime is now the most common form of hate crime in Northern Ireland and that levels of racist hate crime have been increasing since 2019⁸. In addition, we continue to receive and investigate a substantial number of complaints alleging discrimination on racial grounds⁹.
- 1.29 We recognise that legislative changes by themselves won't address all the issues or barriers facing individuals from ethnic minority communities in Northern Ireland. However, legislation outlines minimum standards and levels of protection in our society. It is therefore important we have robust and comprehensive equality legislation setting out clear standards

⁷ ECNI (2016) [A Question of Attitude: Equality Awareness Survey](#)

⁸ PSNI (2022) [Incidents and Crimes with a Hate Motivation Recorded by the Police in Northern Ireland](#)

⁹ For example, over a twelve month period (1 April 2021 - 31 March 2022) the number of race discrimination enquiries received by the Commission was 196.

which employers, service providers, and others must comply with.

- 1.30 Robust legislation acts as a catalyst for change which encourages good practice, raises standards and enables individuals to obtain redress when standards fall.
- 1.31 It is of note that a report from the Government Equalities Office in Great Britain following the introduction of the Equality Act 2010, has highlighted that pressure on employers to promote equality principally comes from a combination of legislation and the organisation's sense of moral or social responsibility¹⁰. It indicates that the reason why the vast majority of employers adopt a conscious approach to equality and discrimination matters is in order to comply with equality legislation and because they consider it morally important.

Further the aims of the Racial Equality Strategy

- 1.32 We consider that our recommendations are also in line with the aims and objectives of the Executive's current *Racial Equality Strategy 2015-2025* which sets out a strategic framework for tackling racial inequalities in Northern Ireland, as well as eradicating racism and hate crime.
- 1.33 In particular, one of the key aims of the Strategy is to eliminate racism, racial inequality and unlawful racial discrimination and promote equality of opportunity in all aspects of life.
- 1.34 The Strategy includes an action to review racial equality legislation, to ensure that the RRO offers at least the same levels of protection as in Great Britain and Ireland.

Harmonise, simplify and clarify the race equality legislation

- 1.35 Our recommended changes will also help harmonise and simplify the racial equality legislation making it easier for individuals in Northern Ireland to understand what their rights are and for employers, service providers and others to understand what their responsibilities are.
- 1.36 Many of our recommended changes will remove significant unjustifiable anomalies and complexities within the race

¹⁰ GEO (2012) [Evaluation of the Equality Act 2010: Report 1-Organisational Approaches to Equality](#)

equality legislation which have led to difficulties and confusion for those seeking to exercise their rights under the legislation and for those seeking to comply with the law. A number of our recommended changes will ensure greater legal certainty and clarity in areas where the scope of legislation is unclear; for example, the scope of protection against discrimination in the exercise of public functions.

- 1.37 Further, a number of our recommended changes will ensure that the race equality law is consistent with best practice standards that have already been adopted in other areas of equality law in Northern Ireland.
- 1.38 They will therefore help improve consistency between the race equality legislation and other equality legislation in Northern Ireland. For example, a number of the changes we recommend have already been implemented in other areas of Northern Ireland equality law, such as disability equality law. This will assist employers, service providers and others who struggle to understand, and keep pace with, the differences between race equality law and other equality law in Northern Ireland.

Keep pace with international standards and best practice, taking account of lessons from other jurisdictions

- 1.39 Adopting our recommendations will help ensure that Northern Ireland race equality legislation keeps pace with international standards and legislative developments, taking account of lessons from Great Britain, Ireland and other jurisdictions.
- 1.40 While a number of our recommended changes have already been implemented in neighbouring jurisdictions, we consider that simply mirroring those legislative developments would not be sufficient to give effect to best international standards. For example, in Great Britain, while the Equality Act that was granted Royal Assent in 2010 included measures to provide protection against dual discrimination, third-party harassment; and provided powers for tribunals to make recommendations that benefit the whole workforce - these provisions were never enacted, or were subsequently repealed.
- 1.41 In support of ensuring best available protections, a number of our recommendations, if adopted, would in some areas provide protections beyond those currently available via equality

legislation in Great Britain and Ireland, for example in relation to combined discrimination.

Ensure race equality legislation is in line with the UK Government's international obligations

- 1.42 The introduction of many of our recommendations will ensure that Northern Ireland race equality legislation is in line with the UK Government's international obligations relating to the promotion of human rights for racial minorities, and with the recommendations of international human rights monitoring bodies.
- 1.43 In particular, the lack of comprehensive, harmonised race equality legislation in Northern Ireland, and the gap in legal protections between the two jurisdictions, has been criticised by the European Commission on Racism and Intolerance (ECRI)¹¹, the Advisory Committee on the Framework Convention for the Protection of National Minorities¹²¹³ and the UN Committee on the Convention for the Elimination of all forms of Racial Discrimination (UN Committee on CERD)^{14 15}.
- 1.44 Calls for the reform of race equality law have received widespread support, including from international mechanisms who recommended that government should:
- act without further delay to adopt comprehensive legislation prohibiting racial discrimination in accordance with the provisions of the Convention on the Elimination of All Forms of Racial Discrimination¹⁶
 - consolidate equality legislation into a single, comprehensive equality act, taking inspiration from the Equality Act 2010, and taking account of the

¹¹ ECRI (2019) [Conclusions on the implementation of the recommendations in respect of the UK subject to interim follow up](#).

¹² Advisory Committee on the Framework Convention for the Protection of National Minorities (2023) [Fifth Opinion on the United Kingdom](#), para 65.

¹³ Advisory Committee on the Framework Convention for the Protection of National Minorities (2016) [Fourth Opinion on the United Kingdom](#)

¹⁴ CERD (2011) [Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK \(2011\)](#) CERD/C/GBR/CO/18-20.

¹⁵ CERD (2016) [Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK \(2016\)](#) CERD/C/GBR/CO/21-23 para 8(b)

¹⁶ CERD (2016) [Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK \(2016\)](#) CERD/C/GBR/CO/21-23, para 8 (c).

recommendations of the Equality Commission for Northern Ireland¹⁷

- adopt comprehensive equality legislation in Northern Ireland, and harmonise protection across the UK¹⁸.

1.45 Further, as outlined in more detail in the recommendations below, international human rights monitoring bodies have recommended that the UK Government address a number of the specific recommendations for change that we advocate; for example, broader protection against discrimination in the exercise of public functions and increased protection against combined discrimination.

2 Overarching

Ensure equality law reform reflects best international standards, advances equality of opportunity, prevents discrimination, and clarifies the law

- 2.1 Equality law in Northern Ireland should reflect best international standards, taking account of best practice and lessons from Great Britain, Ireland and wider jurisdictions.
- 2.2 Equality law reform should further advance equality of opportunity and prevent discrimination. Protections should be applied widely, and law reform should occur to close inconsistencies or loop-holes which mean some categories of people unjustifiably do not benefit from protection.
- 2.3 Furthermore, law reform should serve to make equality law as clear and easily understandable as possible.

¹⁷ ECRI (2016) [ECRI Report On The United Kingdom \(fifth monitoring cycle\)](#) para 22.

¹⁸ Advisory Committee on the Framework Convention for the Protection of National Minorities (2023) [Fifth Opinion on the United Kingdom](#), para 65.

Supporting rationale

- 2.4 In general, we welcome taking steps to ensure gaps in legislation are addressed, if in doing so, there is better protection against discrimination, harassment and victimisation. We also welcome any approach that assists understanding of the law.
- 2.5 While lessons can be learnt from neighbouring jurisdictions, best international practice should lead equality law development in Northern Ireland, rather than simply copying the Equality Act 2010 or legislation from any other jurisdiction.
- 2.6 However, we emphasise that in several areas, such as combined discrimination, equality legislation in the UK and Ireland does not meet best international standards, and is not in compliance with recommendations made by UN treaty monitoring bodies¹⁹.
- 2.7 Likewise, we welcome reform which addresses any potential confusion in the law, whilst ensuring protections are maintained and enhanced, such as removing anomalies in the relation to reversing the burden of proof. Clearer legislation will assist individuals in understanding their rights; employers and service providers in understanding and effectively implementing their duties; and making it easier for those providing advice or support services to do so. Simplified legislation will also assist those tasked with keeping the legislation under review or updating the legislative framework.

Ensure race law reform is in compliance with Article 2 of the Windsor Framework

- 2.8 The Commission recommends that the Northern Ireland Executive, Assembly and Departments ensure that any legislative developments on race law reform in Northern Ireland are in compliance with Article 2 obligations under the Windsor Framework. Any future new draft legislation should also make

¹⁹ ECNI (2022) [The need for a NI Single Equality Act](#), pp. 6-7.

clear in its Explanatory Memorandum what consideration has been given to Article 2 of the Windsor Framework

- 2.9 The Northern Ireland Executive, Assembly and departments should ensure that any legislative developments on race do not reduce the equality and human rights protected within the scope of Article 2, including those rights within the Race Equality Directive, contrary to the UK Government commitment under Article 2.
- 2.10 In addition, the Northern Ireland Executive, Assembly and departments should ensure Northern Ireland race law keeps pace with any changes by the EU to the Race Equality Directive in Annex 1 Windsor Framework, including ensuring conformity with current and future Court of Justice of the European Union (CJEU) decisions relating to the Directive, that enhance equality protections²⁰.
- 2.11 Regardless of whether or not required to under the ‘keeping pace’ requirement associated with Windsor Framework Article 2, the Commission would encourage steps are taken *voluntarily* to ensure that NI law aligns with changes to EU laws or Directives, where they have the potential to strengthen equality and human rights protections, standards or frameworks.

Supporting rationale

- 2.12 Following the UK’s exit from the EU, the UK Government has committed under Article 2 of the Windsor Framework to ensuring that certain equality and human rights in Northern Ireland will continue to be upheld after Brexit. Since 1 January 2021, the Equality Commission, together with the Northern Ireland Human Rights Commission (NIHRC), has been given additional powers and responsibilities, as the ‘dedicated mechanism’, to ensure that the UK Government’s commitment under Article 2 Windsor Framework is met²¹.

²⁰ The Northern Ireland Office has, in its [2020 Explainer Document](#), stated that when a UK Court is considering the interpretation of any of the directives listed in Annex 1, this will be done in conformity with any relevant case law of the CJEU

²¹ Schedule 3 of the European Union (Withdrawal Agreement) Act 2020 amended the Northern Ireland Act 1998 to confer these additional powers on the Commission – to monitor, advise, report on and enforce the UK’s adherence to its commitment.

- 2.13 Under Article 2(1) the UK Government has committed to ensuring there is no diminution of rights, safeguards and equality of opportunity protections and provisions, including those underpinned by the Race Equality Directive²², as set out in the relevant part of the Belfast (Good Friday) Agreement.
- 2.14 There is also a commitment by the UK Government to ensuring that some of Northern Ireland’s equality laws will keep pace with any changes the EU may make to amend or replace the EU equality Directives, set out in Annex 1 Windsor Framework including the Racial Equality Directive²³²⁴ that enhance protections against discrimination in Northern Ireland.
- 2.15 Significantly, neither the Northern Ireland Assembly, nor the Northern Ireland Executive, can act in a way that is incompatible with the UK Government’s commitment. If they do, those actions can be challenged in courts, by way of judicial review proceedings.
- 2.16 This commitment therefore has significant implications for the work of the Northern Ireland Assembly, Executive Ministers and departments, including as they develop, consult on, and introduce new legislation. They must ensure that this legislation complies with the UK Government’s commitment under the Windsor Framework.
- 2.17 Therefore, as a result of this commitment in the Windsor Framework, it should be noted that any changes by the EU which amend or replace the provisions in the Racial Equality Directive so as to enhance protections, will have implications for race equality rights in Northern Ireland.

²² [Race Equality Directive \(Race\): Directive 2000/43/EC](#) of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

²³ Ireland/Northern Ireland Protocol Annex 1 Directives: [Gender Goods and Services Directive \(Gender\)](#): Directive 2004/113/EC of 13 December 2004, [Recast Directive \(Gender\)](#): Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, [Race Equality Directive \(Race\)](#): Directive 2000/43/EC of 29 June 2000, [Framework Directive \(religion and belief; age; sexual orientation; and disability\)](#): Directive 2000/78/EC of 27 November 2000, [e](#): Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010, [Equal Treatment Directive: Social security \(Gender\)](#): Directive 79/7/EEC of 19 December 1978.

²⁴ In addition, UK courts when considering the interpretation of any of the equality directives listed in Annex 1, including the Race Directive, must do so in conformity with any relevant case law of the Court of Justice of the EU (CJEU). UK Government, [Explainer Document](#): UK Government commitment to “no diminution of rights, safeguards and equality of opportunity” in Northern Ireland, 7 August 2020

- 2.18 In light of the obligations under the Withdrawal Agreement and the Windsor Framework²⁵ in relation to UK courts consideration of the interpretation of the Annex 1 Directives and the ongoing relevance of relevant CJEU case law, including as regards case law delivered after the end of the Brexit transition period, we draw attention to an EU Commission Report on the Racial Equality Directive and the Employment Equality (Framework) Directive (2021)²⁶ that highlights recent legal and other developments in these areas. These developments, particularly as regards the Race Equality Directive, are of particular significance in relation to the ongoing review of the Race Relations (NI) Order 1997.
- 2.19 The European Commission's January 2022 public consultation, to pinpoint potential gaps in the Racial Equality Directive and identify measures to address these gaps²⁷ should be monitored in relation to implications for the ongoing review of the Race Relations (NI) Order 1997.
- 2.20 It is also important to note that in 2023, the Commission, along with the NIHRC and Irish Human Rights and Equality Commission (IHREC) published a research report on the impact of Brexit on the divergence of rights and best practice on the island of Ireland.²⁸ Further, the Commissions have, as a result of the findings of the research, developed a number of key policy recommendations.²⁹
- 2.21 Of particular note is our recommendation in relation to migrants' rights that the Northern Ireland Executive and UK Government review recent CJEU case law on the Citizens' Rights Directive and its enduring relevance in Northern Ireland and consider

²⁵ See Article 4 of the Withdrawal Agreement and Art 13(2) of the Protocol. 'Notwithstanding Article 4(4) and (5) of the Withdrawal Agreement, 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'.

²⁶ EU Commission Report to the EU Parliament and Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive') - COM/2021/139, (EU Commission, 2021).

²⁷ EU Commission, 'Addressing possible gaps in the Racial Equality Directive – Public Consultation', (EU, 2022).

²⁸ Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, [European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland](#), 2022

²⁹ ECNI, NIHRC, IHREC, [Policy Recommendations: European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland, Policy Recommendations](#), 2023.

what legal and policy changes might be made as required and as a matter of best practice.³⁰

- 2.22 Also of note is our recommendation related to ensuring effective judicial protection. In particular, our recommendation that the NI Assembly, the NI Executive, and the UK Government review recent CJEU case law relating to access to court and effective remedies to ensure that their policies/legislation in this area reflect these developments as required and as a matter of best practice.³¹

3 Forms of discrimination

Harmonise and expand the scope of racial grounds

Increase protection on grounds of colour and nationality

- 3.1 We recommend increased protection from discrimination and harassment on the grounds of colour and nationality across the scope of the race equality legislation, including consideration of the removal or modification of exceptions that apply only on grounds of colour and/ or nationality, unless there are justifiable reasons for doing so, or statutory exception to protection.
- 3.1 Protections should be harmonised upwards to the highest standards. Any regressions in relation to race or ethnic or national origins may be a potential breach under Article 2 of the Windsor Framework³².

³⁰ Ibid page 43.

³¹ Ibid page 45.

³² In February 2023, the UK and European Commission published a joint Political Declaration announcing a political agreement on the Protocol. The parties agreed that the amended Protocol should be renamed the Windsor Framework. See [Political Declaration](#) by the European Commission and the Government of the United Kingdom of 27 February 2023

Supporting rationale

- 3.2 This change will help to clarify, strengthen, harmonise and simplify the legislation.
- 3.3 Currently there are ‘two tier’ levels of protection against discrimination and harassment within the race equality legislation. In particular, there is less protection against discrimination and harassment on the grounds of colour and nationality than on the other racial grounds protected under the legislation; namely race, ethnic or national origins.
- 3.4 This ‘two tier’ level of protection came about following the introduction in Northern Ireland of legislation to implement the EU Race Directive³³ in 2003³⁴. As the Race Directive only applied to the grounds of race, ethnic and national origin, the Regulations introduced in Northern Ireland at that time, in order to give effect to the Race Directive, did not go as far as to also amend provisions in the Race Relations (NI) Order 1997 as regards the grounds of colour and nationality.
- 3.5 The main impacts of this ‘two tier’ level of protection are summarised below:
- The statutory definition of harassment which applies to the grounds of race, ethnic or national origins, in a wide range of areas (including employment and the provision of goods and services), does not extend to the grounds of colour and nationality. As a result, it is more difficult for individuals to bring complaints if they are subjected to offensive or degrading comments on the grounds of their colour or nationality.
 - Whilst the race legislation prohibits public bodies from discriminating on the grounds of race, ethnic or national origins when exercising some of their public functions³⁵, this prohibition does not extend to the \
 - Although the race legislation prohibits discrimination against office holders, such as chairpersons or board members of non-departmental public bodies, this

³³ Race Directive, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

³⁴ Namely, the [Race Relations Order \(Amendment\) Regulations \(NI\) 2003](#)

³⁵ See recommendation below on public functions - Increased protection for individuals against racial discrimination and harassment by public bodies when carrying out their public functions

prohibition does not exist on the grounds of colour and nationality.

- A more restrictive definition of indirect discrimination applies to the grounds of colour and nationality than on the other racial grounds. This means it is more difficult for claimants alleging unlawful discrimination on the grounds of colour and nationality to successfully prove their case. Effective protection against indirect discrimination is particularly important in challenging systemic or institutional racism; where policies and practices of an employer, service provider or public authority may, without justification, have a particular adverse impact on individuals from minority ethnic communities.
- There are also differences in relation to the exceptions under the race equality legislation, depending on the racial ground in question. Exceptions that do not apply for the grounds of race, ethnic or national origins, do apply for discrimination based on colour or nationality. Such exemptions which apply only to colour or nationality should be considered for removal or modification, unless there is a justifiable reason to retain them. For example, exceptions relating to partnerships of fewer than six people³⁶, premises³⁷ and employment for the purposes of a private household apply to the grounds of colour and nationality and not the grounds of race, ethnic or national origins. Exemptions relating to discriminatory acts done under statutory authority regarding colour and nationality should be considered for modification^{38 39}.
- There are differences in relation to the reversal of the burden of proof regarding discrimination, which applies to provisions relating to discrimination based on race or

³⁶ Article 12 of the [RRO 1997](#).

³⁷Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp.66-68.

³⁸ See also our recommendation on Narrowing of employment exception on foreign nationals in public service

³⁹Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp. 48-52. We also note that Professor Dickson recommends that paragraphs (c) and (d) of article 40(2) of the RRO should either be deleted or made conditional upon there being statutory support for the ministerial or departmental actions concerned, which would go further than the Equality Act 2010, but may increase symmetry with other Northern Irish equality laws. He also recommends that 'colour' be inserted into article 40(1A).

ethnic or national origins, but does not apply to the same provisions in relation to colour and nationality.

- 3.6 These anomalies have led to difficulties and confusion for those seeking to understand their responsibilities and to exercise their rights under the legislation, as well as resulting in reduced protection on the grounds of colour and nationality.
- 3.7 Further, removing the two-tier level of protection is in line with changes already implemented in other parts of the United Kingdom, as well as the recommendations of international human rights monitoring bodies. In particular, changes to address this gap in protection have been implemented in Great Britain under the Equality Act 2010. The Republic of Ireland's legislation⁴⁰ likewise defines the 'ground of race' as 'race, colour, nationality or ethnic or national origins'.
- 3.8 It is of note that, in the case of *Abbey National PLC v Chagger*, the Employment Appeal Tribunal in Great Britain was of the view that the Race Directive was intended to apply to discrimination on the ground of colour, as such discrimination is in practice necessarily an aspect or manifestation of discrimination based on racial or ethnic origins.
- 3.9 Although this is a welcome clarification as regards protection on the ground of colour, there is still a need to amend the race equality legislation in order to ensure equal levels of protection against discrimination and harassment across all racial grounds. Following *Abbey National PLC v Chagger*, the legislation in Great Britain was changed to clarify the law in this area.
- 3.10 Further, our recommendation is in line with the recommendation of the UN Committee on the Elimination of Racial Discrimination. In particular, in 2003, it recommended that the UK Government extend the amending Regulations that implemented the Race Directive to cover discrimination on the grounds of colour and nationality. It was concerned that a failure to do so would result in inconsistencies in discrimination laws and differential levels of protection and create difficulties for the general public as well as law enforcement agencies.

⁴⁰ [Equal Status Act](#), 2000 3(2)(h).

3.11 Finally, this legislative gap and the need for action to address this, has already been recognised by TEO, and its predecessor, OFMDFM. In particular, in its consultation on single equality legislation in 2004, OFMDFM indicated that it ‘intended to rectify this gap’ in the race equality legislation. Likewise, the Racial Equality Strategy 2015-25, commits the Executive to review the law’s protection against colour and nationality discrimination⁴¹.

Define ‘racial grounds’ non-exhaustively, and specifically include caste and descent

3.12 The definitions of ‘race’ and ‘racial ground’ should be expanded to specifically include caste and descent, and be non-exhaustive.

3.13 This should be clear in statute and reflect best international practice, in accordance with human rights standards.

Supporting rationale

3.14 Currently, NI equality law defines racial grounds as ‘colour, race, nationality or ethnic or national origins’⁴². However, the legislation in Great Britain defines race as *including* colour; nationality; ethnic or national origins⁴³.

3.15 Research⁴⁴ commissioned by the Equality and Human Rights Commission (EHRC) states that ‘[c]aste is a form of identity that is used as a basis for social differentiation and usually involves inequality. It is generally accepted that caste is acquired by birth and sustained by endogamy, in which marriage is restricted to individuals of the same caste. Caste has considerable fluidity and also a global reach’.

3.16 In *Mandla v Dowell Lee*, Lord Fraser set out a wide range of shared characteristics which may suggest a distinct community

⁴¹ OFMDFM (2015) [Racial Equality Strategy 2015-2025](#), para 5.13

⁴² Article 5 of the [RRO 1997](#).

⁴³ Section 9(1) of the [Equality Act 2010](#).

⁴⁴ Dhanda, M. et al (2014) [Caste in Britain: Socio-legal Review](#), EHRC Research Report 91, p. iii.

and ethnic group⁴⁵. More recently, the case of *Chandhok v Tirkey* suggested that many of the facts relevant in considering caste might be capable of constituting ‘ethnic origin’ in Great Britain⁴⁶. Therefore, claims based on descent or caste might already fall within the protected characteristic of ‘ethnic origin’⁴⁷. However, it would be helpful for this to be confirmed in statute.

- 3.17 The Equality Act 2010, as amended⁴⁸ allows for ‘caste’ to be a protected characteristic in England, Wales and Scotland. However, following consultation, the UK Government⁴⁹ announced it believed the best way to provide protection against caste-based discrimination was to rely on emerging case law, citing *Tirkey v Chandhok*, as well as raising concerns around low case numbers and difficulty defining caste.
- 3.18 This decision was controversial⁵⁰, and it was criticised by the EHRC who stated ‘The government has missed a crucial opportunity to improve legal clarity...[t]his is inconsistent with the UK’s international obligations to provide for separate and distinct protection for caste in our legislation’⁵¹.
- 3.19 Further, in its Concluding Observations on the UK in both 2011⁵² and 2016⁵³, CERD recommended that the UK act to ensure that caste-based discrimination is explicitly prohibited.
- 3.20 Likewise, in 2016 the Advisory Committee on the Framework Convention for the Protection of National Minorities called upon

⁴⁵ *Mandla v Dowell Lee* [1983] 2 AC 548, 562, also available at <https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKHL/1982/7.html>. Lord Fraser argued it was essential for ethnic groups to have a long shared history and own cultural tradition. Other relevant characteristics may include common geographical origin or descent from small number of common ancestors; common language; common literature; common religion; and being a minority, oppressed or dominant group.

⁴⁶ *Chandhok v Tirkey* [2015] ICR 527, also available at https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKCAT/2014/0190_14_1912.html.

⁴⁷ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 24.

⁴⁸ Section 9 (5)(a) of the [Equality Act 2010](#).

⁴⁹ Government Equalities Office (2018) [Caste in Great Britain and equality law: a public consultation Government consultation response](#), p. 14.

⁵⁰ Law Commission (2021) [Hate Crime Laws: Final Report](#), paras 4.56-4.66.

⁵¹ EHRC (2018) [Caste consultation: our response to the government statement](#).

⁵² CERD (2011) [Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK \(2011\)](#) CERD/C/GBR/CO/18-20, para 30.

⁵³ CERD (2016) [Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK \(2016\)](#) CERD/C/GBR/CO/21-23, para 8(a).

the UK to amend its statutes so as to include caste as a ground of discrimination under the definition of race⁵⁴.

- 3.21 Confirming that the equality legislation in Northern Ireland protects against discrimination related to caste in statute will simplify the process of dealing with relevant cases by reducing costs and providing certainty⁵⁵.
- 3.22 The legislation should recognise discrimination based on descent, in line with Article 1 of the UN Convention on the Elimination of All Forms of Racial Discrimination⁵⁶. CERD has indicated that they understand that discrimination based on 'descent' includes 'discrimination against members of communities based on forms of social stratification such as caste'⁵⁷.
- 3.23 Professor Dickson argues⁵⁸ that broadening the definition of racial discrimination will help ensure such discrimination is not disguised as descent or caste discrimination in an attempt to avoid liability.
- 3.24 The definition of racial grounds should be phrased in a non-exhaustive way⁵⁹. Professor Dickson⁶⁰ recommends that other aspects of race (such as physical features, hairstyle, cultural practices, food choices or language usage) be considered as part of the definition in particular instances even though those aspects are not explicitly mentioned in the legislation. Recent case law suggests language can be treated as an indicator of race⁶¹, but a statutory change would aid clarity in the law.

⁵⁴ Advisory Committee of the Framework Convention (2016) [Fourth Opinion on the United Kingdom](#), para 32.

⁵⁵ Dhanda, M. et al (2014) [Caste in Britain: Socio-legal Review](#), EHRC Research Report 91, p. 26.

⁵⁶ UN (1965) [International Convention on the Elimination of All Forms of Racial Discrimination](#), Art. 1.

⁵⁷ CERD (2002) [General Recommendation 29](#).

⁵⁸ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 23

⁵⁹ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp. 23-26.

⁶⁰ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 23.

⁶¹ An example of 'language' being treated as an indicator of race is the recent decision by a court in England that prohibiting the use of Irish words on a gravestone amounted to racial discrimination. *In the matter of an Application for a Faculty for a memorial in the Churchyard of St Giles, Exhall, Diocese of Coventry* [2021] EACC 1, a decision of the Arches Court of Canterbury, 18 June 2021, also available at <https://lawandreligionuk.com/wp-content/uploads/2021/06/Re-St.-Giles-Exhall-2021-EACC-1-with-reasons.pdf>

Definitions

Define direct racial discrimination in terms of treatment occurring 'because of' racial grounds

- 3.25 Race equality legislation should be amended to define direct racial discrimination in terms of treatment occurring 'because of' racial grounds including race, colour, nationality, ethnic or national origin, descent or caste.

Supporting rationale

- 3.26 Current legislation⁶² states that a person discriminates against another if '*on racial grounds*' he or she treats that other less favourably than he or she treats or would treat other persons.
- 3.27 Professor Dickson however argues that '*because of*' includes more behaviour than '*on grounds of*' and would include factors beyond motivation⁶³.
- 3.28 As discrimination law aims to protect people from being the victim of discrimination, it usually disregards the motive behind a person's actions and focuses instead on the effect of the action on the alleged victim of those actions.
- 3.29 It therefore makes sense to define direct discrimination as occurring '*because of*' certain treatment rather than '*on grounds of*' certain treatment.
- 3.30 This recommendation would be in line with changes made in Great Britain⁶⁴.

⁶² Article 3(1)(a) of [RRO 1997](#).

⁶³ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 35-36.

⁶⁴ Section 13 (1) of the [Equality Act 2010](#).

Remove the comparator requirement in the definition of victimisation and maintain scope of protections

- 3.31 We recommend that there is no longer a requirement for those alleging victimisation to compare his or her treatment with that of a person who has not made a complaint of discrimination or supported a complaint under the race equality legislation.
- 3.32 Non-individuals, such as limited companies, should continue to be protected from victimisation, in line with their protections against discrimination.

Supporting rationale

- 3.33 The victimisation provision protects the right of a victim of unlawful discrimination to complain about it without being subjected to retaliation for doing so.
- 3.34 Removing the comparator requirement will make it easier for claimants to show subsection to victimisation.
- 3.35 For example, victimisation would include a situation where an employee from a minority ethnic community makes a race discrimination complaint against his employer and as a result is denied promotion. This change to the race equality law will mean that the employee, when bringing a complaint of victimisation, would not have to compare his treatment with that of another employee who did not make a race discrimination complaint against his employer.
- 3.36 Professor Dickson argued⁶⁵ that the current requirement for a comparison to be made is unjustifiable, as what matters is only whether the complainant suffered a disadvantage because of their original complaint.
- 3.37 Under the Equality Act 2010 in Great Britain, there is no longer a need to compare the treatment of an alleged victim with that of a person who has not or made or supported a complaint.

⁶⁵Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp. 44-45.

- 3.38 As this legislative gap exists under other equality grounds, we recommend changes designed to widen the overall definition of ‘victimisation’ across all equality grounds, including race.
- 3.39 However, the Equality Act 2010⁶⁶ restricts the victimisation provision only to individuals. This is inconsistent with the approach to other aspects of equality law in both Northern Ireland and GB, as case law in both jurisdictions has confirmed that incorporated bodies can complain of direct discrimination⁶⁷.
- 3.40 Although it is likely to be less common than victimisation against individuals, a limited company may be subject to victimisation, particularly in relation to goods and services. For instance, a limited company which has brought proceedings alleging racial discrimination against one supplier, could potentially face less favourable treatment from other suppliers because it has made a complaint. In this circumstance, the company should be protected against victimisation.

Widen the definition of ‘racial harassment’

- 3.41 We recommend that the definition of racial harassment under the race equality legislation is amended to prohibit unwanted conduct ‘related to’ racial grounds which has the purpose or effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.
- 3.42 We also recommend that this definition of harassment applies to all existing racial grounds; namely, race, ethnic or national origins, colour and nationality, as well as any new racial grounds, such as caste and descent.

Supporting rationale

- 3.43 Currently, harassment under the race equality legislation is defined as unwanted conduct ‘on the grounds of’ race or ethnic or national origins which has the purpose or effect of violating a

⁶⁶ Section 27(4) of the [Equality Act 2010](#).

⁶⁷ Relevant case law includes [Race Relations Board –v- Applin \[1974\] UKHL 3](#) and [Re Northern Ireland Electricity Service’s Application \[1987\] QBD](#).

person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment⁶⁸.

- 3.44 This recommendation would enhance the protection of people who are being harassed, since proving that harassment was 'related to' race can be easier to do than proving that it was 'on grounds of' race⁶⁹.
- 3.45 Our recommendation is in line with the definition of harassment under the EU Race Directive⁷⁰ which refers to an unwanted conduct "related to" racial or ethnic origin.
- 3.46 Following Brexit, EU law is still relevant in this regard as the UK Government has committed to ensuring that certain equality and human rights in Northern Ireland will continue to be upheld after Brexit, including those underpinned by the Race Equality Directive⁷¹. There is also a commitment to ensuring that some of Northern Ireland's equality laws will keep pace with any changes the EU may make to amend or replace the EU equality laws, which include the Race Equality Directive, set out in Annex 1 to the Windsor Framework,^{72 73} which enhance protections, including the Race Equality Directive.
- 3.47 It is of note that in the sex discrimination case of *R (Equal Opportunities Commission) v Secretary of State for Trade and Industry*⁷⁴, the court held that the definition of harassment under the sex equality legislation, which defined harassment as unwanted conduct 'on grounds of' a woman's sex, did not

⁶⁸ See Article 4A of the [RRO 1997](#).

⁶⁹ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 38.

⁷⁰ See Article 2 of [Race Directive](#)

⁷¹ [Race Equality Directive \(Race\): Directive 2000/43/EC](#) of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

⁷² Ireland/Northern Ireland Protocol Annex 1 Directives: [Gender Goods and Services Directive \(Gender\)](#): Directive 2004/113/EC of 13 December 2004, [Recast Directive \(Gender\)](#): Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, [Race Equality Directive \(Race\)](#): Directive 2000/43/EC of 29 June 2000, [Framework Directive \(religion and belief; age; sexual orientation; and disability\)](#): Directive 2000/78/EC of 27 November 2000, [Equal Treatment Directive: Self-employment \(Gender\)](#): Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010, [Equal Treatment Directive: Social security \(Gender\)](#): Directive 79/7/EEC of 19 December 1978.

⁷³ In addition, UK courts when considering the interpretation of any of the equality directives listed in Annex 1, including the Race Directive, must do so in conformity with any relevant case law of the Court of Justice of the EU (CJEU). UK Government, [Explainer Document](#): UK Government commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland, 7 August 2020

⁷⁴ [\[2007\] ICR 1234](#)

accord with the requirements of the amended Equal Treatment Directive⁷⁵.

- 3.48 The amended Equal Treatment Directive defines harassment as unwanted conduct 'related to the sex of a person'. It will be noted that the Race Directive prohibits racial harassment in substantially the same terms as the amended Equal Treatment Directive.
- 3.49 Importantly, the court was of the view that the effect of the wording of the definition of harassment within the amended Equal Treatment Directive meant that an employer could be held liable on appropriate facts for the conduct of third parties, for example, suppliers or customers. In particular, it considered that an employer could be held liable for failing to take action where there is a continuing course of offensive conduct, which the employer knows of but does nothing to safeguard against.
- 3.50 As a result of this decision, the definition of harassment under the sex equality legislation in Northern Ireland was amended to prohibit unwanted conduct that is 'related to' a woman's sex or that of another person.
- 3.51 Further, our recommendation is in line with the definition of harassment under the sex equality legislation in Northern Ireland, as well as those changes implemented in Great Britain under the Equality Act 2010.
- 3.52 Finally, we continue to recommend⁷⁶ that this revised definition applies to all racial grounds, so that it applies not just to race, ethnic or national origins, but also on the grounds of colour and nationality, as the statutory definition of harassment does not apply to these grounds. The revised definition should also apply to any new racial grounds, such as caste and descent.

⁷⁵ [EU Directive \(2002/73/EC\)](#) which amended the original Equal Treatment Directive (76/2007/EEC

⁷⁶ ECNI (2014) [Strengthening protection against racial discrimination: Recommendations for law reform](#)

Public functions

Increase protection for individuals against racial discrimination and harassment by public bodies when carrying out their public functions

- 3.53 We recommend that public bodies be prohibited from racial discrimination or harassment as regards all public functions, except in some narrowly defined limited areas where they can be objectively justified⁷⁷.
- 3.54 This prohibition should apply to all racial grounds. Currently protection only exists on the grounds of race, ethnic or national origins and not on the grounds of colour or nationality.

Supporting rationale

- 3.55 Currently, protection in Northern Ireland against racial discrimination by public authorities when exercising public functions is limited to four areas namely, social security, health care, social protection or social advantage.
- 3.56 When being updated in 2003, the legislation was limited to these four areas to reflect the scope of the Race Directive⁷⁸ which prohibited discrimination by public bodies in the areas of social protection, including social security and healthcare, and social advantage. This means that individuals who consider that they have been subjected to less favourable treatment, including harassment, on racial grounds by a public body carrying out public functions, do not have protection under the race equality legislation if the public function in question falls outside one of these four areas.
- 3.57 'Public functions' cover a wide range of functions including arrests, detention and restraint by the police, the charging and

⁷⁷ The exceptions in Section 21C of the [Disability Discrimination Act 1995](#) may be useful to consider. These include some limited exceptions relating to judicial acts and the making, confirming or approving of legislation.

⁷⁸ [Race Directive](#) Council Directive 2000/43/EC of 29 June 2000.

prosecution of alleged offenders, the regulatory and law enforcement functions of bodies such as HM Revenue and Customs, the formulating or carrying out of public policy (such as devising policies and priorities in health, education or transport), planning control, licensing and investigation of complaints⁷⁹.

- 3.58 In terms of what constitutes a public function, it is important to note that public functions are not only carried out by public bodies but may also be carried out by private or voluntary organisations, for example, a private company managing a prison or a voluntary organisation taking on responsibilities for child protection.
- 3.59 Many activities carried out by public bodies will amount to the provision of goods, facilities and services to the public, for example, the provision of library or leisure services.
- 3.60 In those circumstances, the provisions under the race equality legislation relating to the provision of goods, facilities and services⁸⁰ will apply. Such activities will therefore not be covered by the provisions relating to the exercise of public functions.
- 3.61 In general, the public functions provisions apply in relation to a function of a public nature exercised by a public authority or on behalf of a public authority, and where the function is not covered by the other provisions in the race equality legislation, for example, the provisions relating to accessing goods and services, premises, work or education.
- 3.62 Cases brought before the courts in Great Britain revealed gaps in protection under the equality legislation as well as highlighting that it was not always clear whether an act of a public body was a service to the public or constituted carrying out a public function.
- 3.63 For example, police duties involving the provision of assistance to, or protection of, members of the public were deemed to be providing services to the public, whereas police duties relating to controlling those responsible for crime were considered not

⁷⁹ See for examples EHRC (2011) [EHRC Code of Practice on Services, Public functions and associations](#), para 11.16.

⁸⁰ Article 21 of the [RRO 1997](#).

to be covered by the provisions relating to goods and services under the race equality legislation⁸¹. Further, the application of immigration controls was considered not to be covered by the provisions in the race equality legislation relating to the provision of goods and services⁸².

- 3.64 We are of the view that there is currently the potential for some public functions, such as certain policing and law enforcement functions, including search and arrest functions, to fall outside the existing scope of the racial equality legislation in Northern Ireland. These activities would not be covered by the current provisions relating to goods and services in the race equality legislation.
- 3.65 We consider that the extension of the race legislation to all public functions, unless specifically falling within an exception, will ensure clarity both for those with rights under the legislation and those public bodies with responsibilities under the law.
- 3.66 The potential for legal uncertainty in this area was recognised by OFMDFM in its consultation on a Single Equality Bill for Northern Ireland in 2004. In particular, it indicated that “if the Race Directive approach is taken, there will nevertheless be room for dispute and technical distinctions on the question of whether a function falls within the definition of social security, social protection, social advantage or healthcare”⁸³.
- 3.67 This change will help to clarify, strengthen, harmonise and simplify the legislation. Our recommendation is also largely in line with changes implemented in Great Britain; changes already taken place under the disability equality legislation in Northern Ireland; and with the recommendations of international human rights monitoring bodies.
- 3.68 In particular, a number of steps have been taken in Great Britain as regards the race equality legislation in this area in order to strengthen, harmonise and clarify the legislation, address gaps in protection and ensure legal uncertainty.

⁸¹ See the race discrimination case of *Farah v Commissioner of Police of the Metropolis*, the Court of Appeal in England, [1997] 2 WLR 824.

⁸² See decision of the majority of the House of Lords of landmark case of *R v Entry Clearance Officer, Bombay Ex parte Amin*, [1983] 2 AC 818. It was considered that these provisions did not apply to acts done on behalf of the Crown which were of an entirely different kind of act than could be done by a private person.

⁸³ OFMDFM (2004) [A Single Equality Bill for Northern Ireland: Discussion Paper](#).

- 3.69 For example, in Great Britain the race equality legislation was strengthened and clarified in 2000, following the outcome of the Macpherson report into the police investigation of the murder of Stephen Lawrence⁸⁴. These changes to the law meant that, for the first time, the police and many other public bodies could not discriminate on racial grounds when carrying out their public functions.
- 3.70 In addition, the race and other equality legislation was harmonised and strengthened in this area following the enactment of the Equality Act 2010 in Great Britain. In particular, public bodies were prohibited from discriminating when carrying out public functions across all racial grounds and as regards all functions, except in some limited areas.
- 3.71 However, Professor Dickson has raised concerns that some of the exemptions in the Equality Act 2010 may be unjustifiably broad⁸⁵. He has pointed to exemptions relating to commencing or continuing criminal prosecutions, insurance and other financial services provided by an employer and provision of a content service on television, radio or online broadcasting.
- 3.72 The limitation to four areas does not exist under the disability legislation in Northern Ireland. In particular, public authorities are prohibited from discriminating on the grounds of disability when carrying out public functions across all their functions, except in some clearly defined limited areas⁸⁶.
- 3.73 Any such exemptions in racial equality law in Northern Ireland should be carefully considered to ensure they are narrowly defined and objectively justified.
- 3.74 Our recommendation is in line with the recommendations of the *Advisory Committee on the Framework Convention for the Protection of National Minorities*. In particular, the Committee in its *Second Opinion* on the UK in 2007, urged authorities ‘to introduce a more extensive prohibition of discrimination in

⁸⁴ Changes were introduced via the Race Relations (Amendment) Act 2000 following the [Macpherson report](#) into the murder of Stephen Lawrence.

⁸⁵ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 41.

⁸⁶ There are, for example, some limited exceptions relating to judicial acts, decisions to institute criminal proceedings and the making, confirming or approving of legislation. There are also some public authorities that are excluded, such as the Security Service and Houses of Parliament.

Northern Ireland's race equality legislation in relation to public functions'⁸⁷.

- 3.75 Finally, we continue to recommend that protection against discrimination or harassment by public bodies when exercising their public functions should apply to all racial grounds; currently protection only exists on the grounds of race, ethnic or national origins and not on the grounds of colour or nationality.

Combined discrimination

Introduce protections against combined discrimination

- 3.99 We recommend the introduction of protection against combined discrimination so that there is legal protection for individuals who experience direct or indirect discrimination, victimisation or harassment because of a combination of equality grounds, including racial grounds.
- 3.100 Courts and tribunals should be able to take into account the effect of the combination of racial discrimination with discrimination on other grounds.

Supporting rationale

- 3.101 This change will remove unjustifiable legal barriers that individuals face when trying to prove discrimination on more than one equality ground.
- 3.102 Individuals experiencing intersectional and/ or multiple discrimination face a number of difficulties in seeking legal redress; this is primarily due to the fact that current legal processes solely focus on one prohibited factor at a time and are unable to adequately address in tandem discrimination complaints on more than one ground.

⁸⁷ [Second Opinion on the UK, the Advisory Committee on the Framework Convention for the Protection of National Minorities](#), June 2007

- 3.103 For example, complainants subjected to multiple discrimination may face difficulties in identifying an actual or hypothetical comparator with the same characteristics, as required when proving direct discrimination.
- 3.104 This change to the law, would, for example, allow an older Asian woman, who is not appointed to a job, to seek redress in circumstances where she believes that she has been subjected to discrimination due to a combination of her age and race. In these circumstances, she would be able to allege that a younger Asian woman or an older Asian man was/would have been appointed to the job.
- 3.105 Although case law⁸⁸ in Great Britain suggests judicial interpretation might allow for multiple discrimination cases to be heard, the introduction of express and specific legislative provisions prohibiting intersectional and multiple discrimination would provide clarity and certainty for individuals that this legislative gap had been addressed.
- 3.106 The Fundamental Rights Agency's Handbook on European Non-Discrimination Law⁸⁹ suggests that 'multiple discrimination' should be used to describe discrimination that takes place on the basis of several grounds operating separately, while 'intersectional discrimination' describes a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable and produce specific types of discrimination.
- 3.107 However, finding agreed definitions has proven difficult⁹⁰ and therefore the phrase 'combined discrimination' may be helpful⁹¹. This reflects the Canadian approach, which prohibits discrimination on one or more grounds, and the effect of a combination of grounds⁹². Professor Dickson argues⁹³ that this

⁸⁸ See for example, tribunal decision in *Miriam O'Reilly v BBC*, January 2011, Employment Tribunal Case no.2200423/10; *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] IRLR 870, available at <https://www.bailii.org/uk/cases/UKSC/2012/37.html>.

⁸⁹ FRA (2019) [Handbook on European non-discrimination law](#), p 59.

⁹⁰ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp. 28-29.

⁹¹ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp. 28-29.

⁹² Section 3(1) of the [Canadian Human Rights Act 1985](#) states 'For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds'

⁹³ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 29.

wording ‘leaves open the possibility that in particular circumstances the combination may amount to more than the sum of its distinct parts, without requiring that additional element to be proved in every case’.

- 3.108 Our recommendation also reflects the need for stronger legal protection in light of the clear evidence that individuals experience discrimination because of a combination of equality grounds.
- 3.109 For example, a NICEM research report on the experiences of ethnic minority women in Northern Ireland⁹⁴ has highlighted the particular barriers that minority ethnic women face. It is of note that 10% of respondents who believed that they had been discriminated against in the workplace, considered that it was due to a combination of being an ethnic minority and a woman. Further, 12.3% of respondents who believed that they had been discriminated against when seeking a job, felt that it was due to a combination of being both a woman and an ethnic minority or migrant.
- 3.110 Further, an EU report (2017) on immigrants and ethnic minorities’ experiences found that 16% of respondents had faced discrimination on more than one ground in the last five years⁹⁵.
- 3.111 In addition, statistics collected by the Equality Commission also highlight that in many instances, individuals believe that they are discriminated against on more than one equality ground. For example, over a twelve-month period (1 April 2021 - 31 March 2022), we received 63 hybrid race discrimination enquiries /applications. These represented complaints where individuals were alleging discrimination due to a combination of equality grounds including race⁹⁶.
- 3.112 These concerns have been recognised by the NI Executive; the 2015-2025 Racial Equality Strategy⁹⁷ recognises that some individuals, particularly minority ethnic women, are vulnerable to discrimination on the basis of more than one characteristic.

⁹⁴ NICEM (2013) [Experiences of Ethnic Minority women in Northern Ireland.](#),

⁹⁵ FRA (2017) [Second European Union Minorities and Discrimination Survey: Main results](#), p. 23.

⁹⁶ This represented 28% of the overall number of enquiries/applications on race (namely 406 enquiries).

⁹⁷ OFMDFM (2015) [Racial Equality Strategy 2015 – 2025](#), paras 3.22-3.25

The Strategy commits to exploring ‘how we might provide protection against forms of multiple discrimination’.

- 3.113 Our recommendation is also in line with the recommendations of international human rights monitoring bodies, and the approach embraced by other jurisdictions.
- 3.114 In particular, the need for multiple discrimination provisions to be included in equality legislation has been highlighted by international human rights monitoring bodies. In its latest Concluding Observations, in 2016 and 2020 respectively, on the UK’s and Ireland’s compliance with the UN Convention on the Elimination of All Forms of Racial Discrimination, CERD⁹⁸ recommended that both states should explicitly provide for the prohibition of multiple discrimination.
- 3.115 Furthermore, the Concluding Observations of the Committee on the Elimination of Discrimination Against Women, in 2019, called upon the UK government to bring into force section 14 of the Equality Act 2010⁹⁹.
- 3.116 The extension of protection against multiple and/or combined discrimination on more than two grounds has already been embraced by other jurisdictions, including nine EU Member States¹⁰⁰, Canada¹⁰¹ and South Africa¹⁰².
- 3.117 The Equality Act 2010 originally contained a dual discrimination provision, designed to enable people to bring claims where they have experienced less favourable treatment because of a combination of two protected characteristics. The provisions for dual discrimination in the Equality Act 2010 were limited to claims of direct discrimination only and to a combination of only two relevant protected characteristics. The provisions did not extend to indirect discrimination or harassment, and the

⁹⁸ [CERD/C/GBR/CO/21-23](#) (3 October 2016), para 8(b) for the UK; [CERD/C/IRL/CO/5-9](#) (23 January 2020), para 12(b) for Ireland.

⁹⁹ CEDAW/C/GBR/CO/8 (14 March 2019), para 16(d). The most recent report of the Advisory Committee of the Framework Convention for the Protection of National Minorities, in 2016, did not repeat the recommendation made in 2011.

¹⁰⁰ Fundamental Rights Agency (2017) [Fundamental Rights Report](#), p. 69; Austria, Bulgaria, Croatia, Germany, Greece, Italy, Romania, Slovenia and Sweden.

¹⁰¹ Section 3(1) of the [Canadian Human Rights Act 1985](#).

¹⁰² Section 9 (3) of the [Constitution of the Republic of South Africa, 1996, Chapter 2: Bill of Rights](#).

Commission raised concerns over the approach taken in the Equality Act 2010^{103 104}.

- 3.118 Despite being broadly welcomed, these provisions on dual discrimination did not come in force and in April 2011¹⁰⁵ the UK Government stated that although it had taken action to reduce the disproportionate cost of the regulations for business, there was still more to be done and that it would not bring forward the dual discrimination provisions.
- 3.119 To ensure consistency and harmonisation, legislation should protect against combined direct and indirect discrimination, as well as harassment and victimisation¹⁰⁶.
- 3.120 Finally, as this legislative gap exists across all equality strands, we recommend provisions to prohibit combined discrimination are introduced across all equality grounds, including race.

Protections in employment and analogous situations

Ensure greater protection for employees against third party racial harassment

- 3.121 We recommend that employers are liable if they fail to take reasonably practicable steps to prevent the racial harassment of an employee by a third party.
- 3.122 We recommend that employers are liable in circumstances that they ought to have been reasonably aware of the risk of third party harassment, as this should encourage employers to take steps to reduce harassment from the start of a person's employment. If this is not introduced, employers should be liable when their employee has been subjected to third party harassment on one previous occasion.

¹⁰³ ECNI (2007) [Response to the DLR Consultation on a single equality Bill](#).

¹⁰⁴ ECNI (2009) [Response to the Government Equalities Office consultation on multiple discrimination](#), p. 3.

¹⁰⁵ Government Equalities Office (2013) [Equality Act Guidance](#).

¹⁰⁶ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#).

- 3.123 Employers should also be liable if, after such harassment has occurred, the employee is treated differently because they rejected or accepted the harassment.

Supporting rationale

- 3.124 Our recommendation reflects the need for stronger duties on employers to take action in light of the clear evidence that black and minority ethnic employees are being subjected to racial harassment by customers/clients.
- 3.125 For example, BAYANIHAN! The Filipino Community in Northern Ireland, a report produced by the Northern Ireland Council for Ethnic Minorities (NICEM) in 2012¹⁰⁷, reports that 44.4% of Filipino healthcare workers surveyed had been racially harassed by customers/service users. The research also found that holding certain immigration statuses made it particularly difficult to challenge harassment.
- 3.126 In particular, the report argues that “they cannot move to another firm, nor are they likely to be in a position to take a case against their employer”. This highlights the vulnerability of particular employees of particular ethnicities and the need for the race equality legislation to effectively protect them against harassment.
- 3.127 More recently, a UK-wide TUC survey¹⁰⁸ found that 65% of all ethnic minority survey participants had experienced racial harassment at work in the last five years. Of those who have experienced such harassment, 6% of Black, Asian and Mixed heritage and 23.5% of non-British White workers identified customers, clients and service users as being the main perpetrator(s). It reported participants were faced with a ‘Customer is always right’ attitude when reporting third-party racism to employers.
- 3.128 Whilst we supported the introduction in the sex equality legislation of a clear duty on employers to take reasonably practicable steps to prevent employees being subjected to third party harassment, we do not agree that the employee should

¹⁰⁷ NICEM (2012) [Bayanihan! The Filipino community in NI](#).

¹⁰⁸ Ashe, S. et al (2019) [Racism Ruins Lives: An analysis of the 2016-2017 Trade Union Congress Racism at Work Survey](#), pp. 27-30.

have to wait until the third incident of harassment before an employer is required to take action.

- 3.129 We support the views of the Joint Committee on Human Rights that the threshold requirement, which provides that employer liability only applies where the employer knows that the same employee has been harassed on two prior occasions, “could be seen as permitting employers excessive leeway before they are required to respond to third party harassment”.
- 3.130 In order to encourage the employer to take steps to reduce the risk of the third-party harassment from the start of a person’s employment, this requirement should be replaced across the equality characteristics with a provision that an employer will be liable when they ought to have been reasonably aware of the risk of third party harassment, and, if not, be reduced to one previous incident¹⁰⁹.
- 3.131 The UK Government has repealed this provision in Great Britain. It states that very few cases of third party harassment have been taken to an employment tribunal since the protection was introduced in April 2008 under the sex equality legislation. It contends further there are other means of redress available to employees subjected to third party harassment, such as the ability to bring proceedings against his/her employer for breach of contract, or against the harasser under the Protection from Harassment Act 1997. The UK Government has indicated that the policy objective behind repealing this provision is to reduce any regulatory burden on employers that the third party harassment provisions may impose.
- 3.132 It will be noted that the UN Committee on CERD expressed concern¹¹⁰ about the UK Government’s Red Tape challenge¹¹¹. The Committee indicated that it threatened “to dilute or reverse the State Party’s achievements in the fight against racial discrimination and inequality”. It recommended that the UK Government implemented all of the provisions of the Equality

¹⁰⁹ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp. 71-75.

¹¹⁰ CERD (2011) [Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK \(2011\)](#) CERD/C/GBR/CO/18-20.

¹¹¹ Home Office (2012) [Equalities red tape challenge and reform of the Equality and Human Rights Commission: outcome](#). The Red Tape Challenge included scrutiny of measures envisaged under the Equality Act 2010 designed to prune those legislative provisions deemed as “unnecessary or disproportionate burdens on business

Act and ensure there is no regression from the current levels of protection¹¹².

- 3.133 As set out above, we believe that there is evidence of third party racial harassment of employees. In addition, while the Protection from Harassment Act 1997 enables an employee to bring a claim of harassment against a customer of their employer, the employer is not liable for the harassment under this Act.
- 3.134 Without a change in the law employees are at risk of having no redress against racial harassment by third parties. The decision of the Employment Appeal Tribunal in *Bessong v Pennine Care NHS Trust*¹¹³ illustrates the problem. A black mental health nurse was assaulted and racially abused by a patient. The Hospital Trust recorded the assault but not the racist abuse, which the claimant alleged was typical of the Trust's approach. However, his claims against the Trust for harassment and direct discrimination were unsuccessful. He won only on the grounds of indirect discrimination: the employment tribunal found that the failure to create a culture in which all racist incidents were formally reported contributed to an environment in which racial abuse from patients was more likely to occur. An appeal to the Employment Appeal Tribunal on the harassment claim failed.
- 3.135 It should also be noted that the equality legislation in the Republic of Ireland¹¹⁴ imposes liability on employers for failing to prevent harassment of their employees if reasonable steps to prevent it have not been taken, whether or not there have been any other instances of harassment.
- 3.136 Any post-harassment discriminatory treatment of employees by employers should also be explicitly prohibited, as is the case in the Republic of Ireland¹¹⁵.

¹¹² CERD (2011) [Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK \(2011\)](#) CERD/C/GBR/CO/18-20.

¹¹³ UKEAT/0247/18/JOJ (18 October 2019, Choudhury J), [2020] ICR 849.

¹¹⁴ Section 14A of the [Employment Equality Act](#), 1998.

¹¹⁵ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 74-75.

Increase protection for agency and contract workers

- 3.137 We recommend increased protection against racial discrimination, harassment and victimisation for certain categories of agency workers who currently fall outside the scope of the race equality legislation.
- 3.138 We further recommend that the law be clarified to ensure that contract workers are protected against victimisation.

Supporting rationale

- 3.139 The need for reform in this area has been highlighted by the Northern Ireland case of *Bohill v Police Service of Northern Ireland (PSNI)*¹¹⁶ and the case in Great Britain of *Muschett v-HM Prison Service (HMPS)*¹¹⁷. These gaps in protection have the potential to have a particular impact on migrant workers working in Northern Ireland; many of whom may have entered into arrangements with agencies similar to Mr Bohill or Mr Muschett.
- 3.140 In particular, *Bohill* case, the NI Court of Appeal raised concerns that potential employees who seek work through an agency, due to type of arrangements that they have as an agency, can be deprived of important protections under the equality legislation. Importantly, the NI Court of Appeal also highlighted this was an area of law likely to benefit from law reform.
- 3.141 In that case, Mr Bohill was a former police officer who applied to Grafton Recruitment Services (Grafton) to work as an investigator with the PSNI. Mr Bohill's name was included in lists of potential temporary workers compiled by Grafton and forwarded to the PSNI on some 13 occasions, but upon none of these occasions was Mr Bohill recruited as a temporary worker.
- 3.142 Mr Bohill lodged a discrimination complaint against the PSNI alleging that his failure to secure such employment was as a result of unlawful discrimination on the grounds of religious

¹¹⁶ [2011] NICA 2, <http://www.bailii.org/nie/cases/NICA/2011/2.html>

¹¹⁷ [2010] EWCA Civ 25, <http://www.bailii.org/ew/cases/EWCA/Civ/2010/25.html>

belief/perceived political opinion, contrary to the Fair Employment and Treatment (NI) Order 1998 (FETO 1998). The tribunal was of the view that it did not have the jurisdiction to hear his substantive claim. Mr Bohill appealed this decision to the Court of Appeal in Northern Ireland.

- 3.143 The Court of Appeal confirmed that, in the absence of a contract with either Grafton or the PSNI, the Tribunal did not have the jurisdiction to hear his case. It stated that ‘in our view the inability of the appellant to establish that he is seeking an employment relationship with PSNI or that he is in such a relationship with Grafton and to bring himself within the definition ‘employee’ contained within Article 2 of the 1998 Order is fatal to this appeal’.
- 3.144 The Court of Appeal further stated that “we have arrived at this conclusion with some degree of anxiety since, in doing so, the apprehension expressed by Smith LJ¹¹⁸ that a gap might exist in the remedies available to workers in the appellant’s position would appear to be confirmed”.
- 3.145 Importantly, the Court of Appeal concluded that the case “does seem to illustrate how an agency arrangement may deprive potential employees of important protections against discrimination.”
- 3.146 It also indicated that “Northern Ireland enjoys a well-deserved reputation for the early development and quality of its anti-discrimination laws and this is an area that might well benefit from the attention of the section of the office of OFMDFM concerned with legislative reform.”
- 3.147 It is also of note that the NI Court of Appeal indicated that “there is no doubt that this type of agency arrangement has become much more prevalent over recent years and it would appear that the UK economy uses agency provided workers to a much greater extent than those of most other EU States.”
- 3.148 Importantly, whilst Mr Bohill’s case concerned an allegation of unlawful discrimination on the grounds of religious belief and/or perceived political opinion, such gaps in protection similarly exist in relation to race and other equality grounds.

¹¹⁸ In the case of *Muschett v HM Prison Service*, [2010] EWCA Civ 25

- 3.149 Of further note is the Court of Appeal in Great Britain's decision in the case of *Muschett v HM Prison Service (HMPS)* in 2010¹¹⁹. This case also highlighted a situation where an agency worker, due to the type of arrangements that he had with an agency, was deprived of protection under the equality legislation.
- 3.150 In that case, Mr Muschett had signed a contract with the Brook Street Employment Agency who had placed him as an agency worker with HMPS. Mr Muschett claimed compensation from HMPS for unfair dismissal, wrongful dismissal, as well as sex, racial and religious discrimination.
- 3.151 The Employment Appeal Tribunal (EAT) agreed with the employment judge's finding that he was not a contract worker as he was not employed by the agency and therefore was not covered by the race equality legislation and similar provisions in the other discrimination legislation.
- 3.152 Mr Muschett was not given leave to appeal to the Court of Appeal on the EAT's finding that he was not employed by the agency. He was, however, given leave to appeal to the Court of Appeal on whether a contract of employment could be implied between Mr Muschett and HMPS or whether he was employed under a contract for services with HMPS. The Court of Appeal held that, as he was not an employee under a contract of service nor was he under a contract for services with HMPS, he had no protection under the equality legislation.
- 3.153 In addition, whilst the Muschett case concerned sex, race and religious discrimination, it is clear that, like the *Bohill* case, gaps in legislative protection exist for temporary agency workers alleging discrimination across all equality grounds.
- 3.154 Whilst the Agency Workers Regulations (NI) 2011¹²⁰ have resulted in additional equal treatment protection for agency workers, we are of the view that they do not address the gaps in legislative protection as highlighted in the *Bohill* and *Muschett* cases. Those Regulations protect only persons who have an employment contract with the work agency or another

¹¹⁹ [2010] EWCA Civ 25, <http://www.bailii.org/ew/cases/EWCA/Civ/2010/25.html>

¹²⁰ [Agency Workers Regulations \(NI\)](#) 2011 came into force in Northern Ireland on 5 December 2011.

form of contract under which they undertake to perform work and services personally for the agency¹²¹.

- 3.155 It is important to stress that agency workers who are contract workers and are employed by agencies have protection against racial discrimination and harassment under existing equality legislation¹²². In the particular circumstances of their cases, neither Mr Bohill or Mr Muschett were deemed by the courts to be contract workers and therefore fell outside the scope of the equality legislation.
- 3.156 However, unlike the legislation in Great Britain¹²³, contract workers in Northern Ireland are not explicitly protected against victimisation, which may reduce the likelihood of victims raising concerns¹²⁴. We therefore recommend that racial equality legislation specifies that both contract and agency workers are protected against victimisation.
- 3.157 We also recommend steps are taken to address similar gaps in protection relating to other equality grounds.

Clarify protections against victimisation for office-holders

- 3.158 The current law should be amended to clarify protections against victimisation for office-holders, by making explicit provision in the legislation that all office-holders have the right not to be victimised.
- 3.159 Office holders include offices and posts such as directors, non-executive directors, company secretaries, positions on the board of non-departmental public bodies, some judicial positions and positions held by some ministers of religion¹²⁵.

¹²¹ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 100.

¹²² Article 9 of the [RRO 1997](#).

¹²³ Section 41 of the [Equality Act 2010](#).

¹²⁴ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 99

¹²⁵ EHRC (2011) [Employment Statutory Code of Practice](#), para 11.32.

Supporting rationale

- 3.160 The current law in Northern Ireland concerning discrimination against office-holders is complex and needs to be clarified to ensure protection for all office-holders¹²⁶. It does not include an explicit right for office-holders not to be victimised, unlike the Equality Act¹²⁷.
- 3.161 Office-holders in Northern Ireland who believe they have been victimised may be protected by the general prohibition¹²⁸ against victimisation. However, clarification would be beneficial¹²⁹.
- 3.162 The Equality Act 2010 refers to victimisation at several points, despite also having a general provision outlawing victimisation¹³⁰, and this recommendation would make Northern Irish law consistent with the law in Great Britain in relation to victimisation of office-holders. Likewise, it would make equality legislation in Northern Ireland more in line with the law in the Republic of Ireland¹³¹.
- 3.163 In addition, the RRO 1997 currently affords some greater protections than the Equality Act 2010 to office-holders relating to termination of appointment and harassment; Professor Dickson recommends that these stronger protections should be retained in NI¹³².

¹²⁶ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 76. Article 72 of the 1997 Order protects persons appointed by a Minister of the Crown or a government department, but only if those persons are not already protected as employees or applicants for employment (under article 6) or as other office-holders (under article 72ZA, which was inserted into the 1997 Order in 2003 as a result of the Race Equality Directive 2000). Yet article 72ZA says, in sub-section 8, that it applies, for example, to 'any office or post to which appointments are made by... a Minister of the Crown... or a government department'. It is therefore unclear what role article 72 of the Order continues to play.

¹²⁷ Sections 49(8), 50(9) and 50(10) of the [Equality Act 2010](#).

¹²⁸ Article 4 of the [RRO 1997](#).

¹²⁹ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp. 76-78.

¹³⁰ Section 27 of the [Equality Act 2010](#).

¹³¹ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 77.

¹³² Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp. 76-78.

Expand protection for law enforcement officers

- 3.164 Racial equality legislation should ensure that all law enforcement officers, not just those in the Police Service of Northern Ireland (PSNI), are treated as employees for the purposes of the legislation.
- 3.165 The law should make it clear that police officers from other forces who are in Northern Ireland to give assistance to the PSNI¹³³, as well as those in other law enforcement services, such as the Belfast Harbour Police,¹³⁴ the Belfast International Airport Constabulary¹³⁵ and the National Crime Agency,¹³⁶ are all protected by the race equality laws while serving in Northern Ireland.
- 3.166 Police cadets should be covered too, similar to the status of police trainees.

Supporting rationale

- 3.167 Currently, some law enforcement officers are protected against racial discrimination in Northern Ireland, while others may not be¹³⁷.
- 3.168 Police trainees and police reserve trainees in Northern Ireland are currently protected against discrimination by the Police (NI) Act 2000¹³⁸.
- 3.169 However, if police cadets were to be appointed in Northern Ireland (none have been to date), they would not currently be

¹³³ Such officers are normally considered to be equivalent to PSNI officers in terms of their powers and also with regard to their obligation to abide by the PSNI's Code of Ethics.

¹³⁴ In existence since 1847 under the Harbours, Docks, and Piers Clauses Act of that year.

¹³⁵ Article 19 of the [Airports \(NI\) Order 1994](#).

¹³⁶ Under the National Crime Agency (Limitation of Extension to Northern Ireland) Order 2013 (for excepted and reserved matters) and the Crime and Courts Act 2013 (National Crime Agency and Proceeds of Crime) (NI) Order 2015 (for other matters).

¹³⁷ Article 72B of [RRO 1997](#) may already provide for that, but it is not clear.

¹³⁸ Section 41(2) of the [Police \(NI\) Act 2000](#) provides that '[a]ny statutory provision... which for any purpose treats a police officer as being in the employment of the Chief Constable or the Policing Board shall apply in relation to a police trainee and a police reserve trainee as it applies in relation to a police officer'.

protected against discrimination because there is no provision for them comparable to provision for police trainees.

- 3.170 Professor Dickson has argued¹³⁹ that it ‘is anomalous and unfair that some law enforcement officers are currently protected against racial discrimination in Northern Ireland while others may not be’.

Ensure protection for Councillors against racial discrimination, harassment and victimisation by local councils

- 3.171 Local Councillors should be protected against racial discrimination, harassment and victimisation by their local councils when they are carrying out their Councillor functions.

Supporting rationale

- 3.172 Currently there is no protection for Councillors in local councils against racial harassment or discrimination by local councils. This change to the race equality legislation would mean that it would be unlawful for a local council to harass a Councillor because of his or her race or to discriminate or victimise a Councillor on racial grounds, when carrying out his/her official duties.
- 3.173 It would, for example, enable a Councillor to bring a racial discrimination complaint if they were denied access to facilities or training on racial grounds, or subjected to offensive or degrading racial comments by council staff. This provision would not apply to the election or appointment to posts within the local council.
- 3.174 Professor Dickson argues¹⁴⁰ ‘there can be no justification for continuing to exclude such protection’.

¹³⁹ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 81.

¹⁴⁰ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp 79-80.

- 3.175 Further, our recommendation is in line with changes to the equality legislation that have already been implemented in Great Britain under the Equality Act 2010. This legislation prohibits local councils from subjecting a Councillor, when carrying out his/her official duties, to discrimination or harassment on racial or other equality grounds.
- 3.176 Further, as this legislative gap exists under other equality grounds, we recommend increased protection for Councillors against discrimination and harassment across all equality grounds including race.

Enhance protection regarding providers of employment services

- 3.177 Race equality law in Northern Ireland should widen the definition of ‘providers of employment services’ and extend the type of discrimination by such providers which is made unlawful, to include discrimination in arrangements made for selecting who to provide an employment service; discrimination in the service terms; and discriminating a service user to ‘any other detriment’.

Supporting rationale

- 3.178 Current legislation¹⁴¹ in Northern Ireland provides protection against discrimination by providers of vocational training and employment agencies. However, in Great Britain there is a wider definition of providers of employment services¹⁴², including providers of vocational guidance, and providers of assessments required for particular professions or trades.
- 3.179 Dickson argues¹⁴³ that ‘the services provided by all of these various persons are so similar that it makes no sense to apply the race equality law to only some of them’.

¹⁴¹ Article 15 of the [RRO 1997](#).

¹⁴² Section 56 (2) of the [Equality Act 2010](#).

¹⁴³ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 96.

- 3.180 Under the Equality Act 2010 in Great Britain¹⁴⁴ three further types of discrimination are prohibited:
- discrimination in the arrangements made for selecting persons to whom to provide, or to whom to offer to provide, an employment service,
 - discrimination as to the terms on which such a service is provided and;
 - discrimination in subjecting a person for whom such a service is provided ‘to any other detriment’.
- 3.181 Northern Irish law only contains the ‘any other detriment’ provision in relation to vocational training¹⁴⁵, but not employment agencies¹⁴⁶. There is therefore a gap in protection compared to Great Britain, which should be filled.

Provide legal protection for volunteers

- 3.182 Persons who work as volunteers should be legally protected against racial discrimination, harassment and victimisation by the person or organisation that engages them to the same extent as employees are protected from their employer. Stakeholder engagement should inform how occasional, very short-term volunteers can best be protected.
- 3.183 The inclusion of protections for volunteers will need to be accompanied by appropriate resourcing and guidance to ensure organisations, of all sizes, that use volunteers have support to adhere to any resultant obligations.
- 3.184 A phased approach may be appropriate, where more formal voluntary roles are initially recognised in legislation, with further consideration, informed by significant stakeholder involvement, given to more informal arrangements.

¹⁴⁴ Sections 54(1)(a), 54(2)(a) and 55(2)(d) of the Equality Act 2010.

¹⁴⁵ Article 15 of the [RRO 1997](#).

¹⁴⁶ Article 16 of the [RRO 1997](#).

Supporting rationale

- 3.185 Currently, those who do unpaid voluntary work for an organisation are not usually covered by anti-discrimination law anywhere in the United Kingdom or Ireland¹⁴⁷.
- 3.186 The Commission has previously set out its view that it ‘wishes to see a situation in which citizens can take part in substantial, established voluntary work with the legitimate expectation that they will be protected from discrimination’¹⁴⁸.
- 3.187 Further, we have worked with Volunteer Now, producing a guide on Promoting Equality and Diversity in the Workplace¹⁴⁹. The document recognises a moral responsibility for organisations to protect volunteers from discrimination, even without current legal protections. This moral responsibility should be enforced by statute, where possible.
- 3.188 Concerns have been raised that such protections could expose small, volunteer-led organisations to a disproportionate level of liability¹⁵⁰. The UK Government¹⁵¹, in relation to sexual harassment, was cautious about protecting volunteers, due to worries that such organisations could face difficulties that outweigh the service they provide. This is particularly the case regarding one-off events or occasional volunteers.
- 3.189 However, Professor Dickson argues that this reasoning is hard to substantiate, highlighting that many volunteers perform tasks similar or identical to those performed by employees with whom they work alongside and it is unfair that the latter are protected against discrimination but the former are not¹⁵².
- 3.190 This recommendation would provide greater protections than the Equality Act in Great Britain or Ireland, where people who

¹⁴⁷ Unless they have responded to an offer from the organisation which is providing volunteering ‘services’ to members of the public.

¹⁴⁸ ECNI (2004) [Response to OFMDFM Consultation Paper ‘A Single Equality Bill for Northern Ireland](#), para 4.6.2.

¹⁴⁹ ECNI and Volunteer Now (2019) [Promoting Equality and Diversity in Volunteering: A Guide for Volunteer Involving Organisations](#), p. 7.

¹⁵⁰ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#) pp. 103.

¹⁵¹ UK Government (2021) [Consultation on sexual harassment in the workplace: government response](#), para 4.3.

¹⁵² Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#) p. 103.

do unpaid voluntary work for an organisation are not usually covered by anti-discrimination law¹⁵³.

Protections in schools and training

Increase protection against victimisation for pupils in schools

- 3.191 Race equality legislation should ensure that children in schools are protected from being victimised, including after an allegation of discrimination has been raised by the child's parent or sibling.
- 3.192 In line with provisions in Great Britain, we recommend that where a parent or sibling maliciously makes or supports an untrue complaint, the child is still protected from victimisation, as long as the child has acted in good faith. However, we recommend that where a child has acted in bad faith, he or she is not protected, even where a parent or sibling makes or supports an untrue complaint in good faith.

Supporting rationale

- 3.193 This change will increase protection for pupils in schools from being victimised, for example, by a school, because their parents or siblings have brought a racial discrimination complaint against the school, and clarify the protection available if a child makes the complaint themselves.
- 3.194 The current law does not explicitly prohibit the victimisation of school children following the making of an allegation of discrimination, whether by the child themselves or by the child's parent or sibling¹⁵⁴.
- 3.195 Confirming pupils in schools have protection from being victimised if they make a discrimination or harassment

¹⁵³ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#) p. 103.

¹⁵⁴ The only references to victimisation throughout the whole [RRO 1997](#) are in articles 2(4) and 4. These may be enough to allow a child to claim victimisation, but clarity would be preferable.

complaint, for example, a complaint that they have been racially harassed by a teacher, would clarify the law¹⁵⁵.

- 3.196 This change will also mean, for example, that if a parent complains to the school that their child is suffering racial discrimination or harassment at school, the child is protected from being victimised by the school because of the parent's complaint.
- 3.197 Our recommendation is also in line with changes that have already been implemented in Great Britain, where such conduct has been prohibited across all equality grounds. Under the Equality Act 2010, there are express protections both for victimisation of school children after they themselves have raised an allegation of discrimination¹⁵⁶ and for children who are victimised as a result of a protected act (such as making or supporting a complaint of discrimination) carried out by their parent or sibling¹⁵⁷. This latter protection was introduced in order to prevent parents being discouraged from raising an issue of discrimination within a school, for example, because of a worry that their child may suffer less favourable treatment as a result.
- 3.198 As this legislative gap exists under all other equality grounds, we recommend changes designed to strengthen protection for pupils in schools against victimisation across all equality grounds, including race.

Ensure greater protection in relation to admission to educational establishments

- 3.199 Race equality legislation should clearly prohibit racial discrimination in the arrangements made for deciding who is to be offered admission to educational establishments, such as admissions criteria.
- 3.200 The current protections in Northern Ireland against discrimination by a school, college or university are in the terms

¹⁵⁵ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp. 92-93.

¹⁵⁶Section 85(4)(5) of the [Equality Act 2010](#).

¹⁵⁷ Section 86(2) of the [Equality Act 2010](#).

on which they offer to admit that person to the establishment or by refusing to accept an application for admission from that person should be expanded to also offer protection against discrimination in the arrangements for admissions.

- 3.201 This could help ensure admissions criteria are not racially discriminatory.

Supporting rationale

- 3.202 Currently, a school, college or university in Northern Ireland could potentially avoid liability for racial discrimination by making its admissions criteria discriminatory rather than by making its offer or rejection decisions discriminatory¹⁵⁸.
- 3.203 It is unlawful¹⁵⁹ for those who are running a school, college or university to racially discriminate against a person in the terms on which they offer to admit that person or by refusing to accept an application for admission from that person.
- 3.204 However, the Equality Act 2010¹⁶⁰ also provides protection in Great Britain against discrimination in the arrangements made for deciding who is to be offered admission. The law in Northern Ireland should also ensure protection in this situation¹⁶¹.

Clarify protection in provision of education

- 3.205 The law should explicitly state that racial discrimination in the way an educational establishment provides, or does not provide, education for a student is prohibited.

Supporting rationale

- 3.206 Racial discrimination in the way an educational establishment provides or does not provide education is not currently

¹⁵⁸ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p.94.

¹⁵⁹ Article 18 (1) of the [RRO 1997](#).

¹⁶⁰ Sections 85(1) and 91(1) of the [Equality Act 2010](#).

¹⁶¹ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp. 94-95.

mentioned in the Northern Irish legislation, whereas it is explicitly stated in Great Britain's law¹⁶². It may already be covered by the protection against suffering 'any other detriment'¹⁶³, but specific provision would remove doubt.

3.207 Dickson argues¹⁶⁴ this would 'make it abundantly clear to educational establishments, especially schools, that they cannot use race as a reason for distinguishing between students either in the way that they are taught or in the way that they are excluded from being taught'.

3.208 This recommendation would clarify the law in Northern Ireland. It would also make race equality law in this area consistent with the law in Great Britain.

Extend protection from qualification bodies

3.209 Racial equality law should extend protection against discrimination by qualification bodies in the arrangements they make for deciding upon whom to confer a relevant qualification and when they subject a person who has been conferred with the qualification 'to any other detriment'.

Supporting rationale

3.210 Qualification bodies are bodies which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade.

3.211 Currently, the law in Northern Ireland¹⁶⁵ makes three types of discrimination by such bodies unlawful:

- the terms on which they are prepared to confer the qualification,
- when they refuse to grant an application for the qualification; and

¹⁶² Sections 85 (2) and 91 (2) of the [Equality Act 2010](#).

¹⁶³ Article 18(1)(c) of the [RRO 1997](#).

¹⁶⁴ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 90.

¹⁶⁵ Article 14(1) of the [RRO 1997](#).

- when they withdraw the qualification or vary the terms on which it is held.

3.212 However, the law in Great Britain¹⁶⁶ protects against two further types of unlawful discrimination:

- in the arrangements made for deciding upon whom to confer a relevant qualification; and
- by subjecting to any other detriment a person who has been conferred with the qualification.

3.213 Professor Dickson argues¹⁶⁷ that ‘to avoid a qualification body from slipping through the net it is appropriate to make those two further types of discrimination unlawful in Northern Ireland too’.

Positive Action

Expand the scope of positive action to better address disadvantage and disproportionately low participation, and meet differential needs

3.214 We recommend that the race equality legislation is amended to expand the scope of voluntary positive action that employers, service providers and public bodies can lawfully take in order to promote racial equality, and remove unnecessary barriers relating to collecting statistical information before taking such action.

3.215 Positive action should be permitted where an employer, service provider or public body reasonably thinks that a racial group suffer a related disadvantage, or have different needs, or have a disproportionately low rate of participation in an activity. Any action should be a proportionate means of achieving the aim of enabling other persons who share the racial characteristic to minimise the disadvantage, meet their needs or participate in the activity¹⁶⁸.

¹⁶⁶ Sections 53 (d) and (e) of the [Equality Act 2010](#).

¹⁶⁷ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 94.

¹⁶⁸ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 55.

Supporting rationale

- 3.216 Currently, employers, service providers, and public bodies carrying out public functions in Northern Ireland are allowed, but not required, to take a limited range of special measures, known as ‘positive action’ measures, aimed at alleviating disadvantage experienced minority ethnic groups or individuals.
- 3.217 For employers, this limited action primarily relates to encouraging job applications and providing specific training where individuals from minority ethnic groups are under-represented in the workforce. Service providers are also permitted to take action to meet the special needs of particular racial groups in the areas of education, training or welfare or any ancillary benefits.
- 3.218 This change will mean that employers, service providers and others can take a wider range of voluntary positive action to promote racial equality than currently permitted. It will result in the removal of unnecessary barriers to their taking positive action, and extend what is permissible positive action to the extent allowed by EU law.
- 3.219 Current provisions allowing positive action under the race equality legislation in Northern Ireland are more limited¹⁶⁹ than what is permissible under EU law¹⁷⁰.
- 3.220 Even after Brexit, EU law is still important in this regard because, under the Windsor Framework, the UK Government has committed to ensuring that certain equality and human rights in Northern Ireland will continue to be upheld after Brexit, including those underpinned by the Race Equality Directive. There is also a commitment to ensuring that some of Northern Ireland’s equality laws will keep pace with any changes the EU may make to amend or replace the EU equality laws, set out in

¹⁶⁹ ECNI (2014) [Strengthening Protection Against Racial Discrimination](#), paras 3.125.

¹⁷⁰ Positive action is a central element of EU anti-discrimination law and policy, with EU Equality Directives providing broad permissive provisions to enhance equality of opportunity (see Equinet, [Positive Action Measures: The Experience of Equality Bodies](#), 2014). Article 5 of the EU Race Directive states, “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 racial or ethnic origin.”

Windsor Framework Annex 1, that enhance protections¹⁷¹ which includes the Race Equality Directive¹⁷².

- 3.221 Further, the positive action proposed has to be in relation to ‘particular work’; which does not always accord with employers’ training programmes that are aimed at improving certain skills and competencies rather than a particular type of work.
- 3.222 Section 33 of the Republic of Ireland’s Employment Equality Act 1998, as amended by the Equality Act 2004, allows measures taken which promote integration in the working environment. We note that Professor Dickson¹⁷³ has recommended that promoting integration in the workplace be included as a permitted ground for positive action in an employment context. He suggests that, although there has not been any case law, that measures could be taken, provided they were proportionate, to allow employees from a minority ethnic group the right to take leave on days which are important to them because of their ethnic background.
- 3.223 Our recommendation is also similar to changes already implemented in Great Britain. There is currently a greater scope for employers and service providers in Great Britain to take positive action to promote racial equality than those in Northern Ireland. Professor Dickson has recommended that the change is largely modelled on Section 158 of the Equality Act 2010¹⁷⁴.
- 3.224 In addition, the Equality Act 2010 brought consistency in terms of what positive action could be taken across all equality grounds and extended what was permissible action for employers and others to take, to the extent allowed by EU law.

¹⁷¹ Ireland/Northern Ireland Protocol Annex 1 Directives: [Gender Goods and Services Directive \(Gender\)](#): Directive 2004/113/EC of 13 December 2004, [Recast Directive \(Gender\)](#): Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, [Race Equality Directive \(Race\)](#): Directive 2000/43/EC of 29 June 2000, [Framework Directive \(religion and belief; age; sexual orientation; and disability\)](#): Directive 2000/78/EC of 27 November 2000, [Equal Treatment Directive: Self-employment \(Gender\)](#): Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010, [Equal Treatment Directive: Social security \(Gender\)](#): Directive 79/7/EEC of 19 December 1978.

¹⁷² It will be noted that under Article 2 of the Ireland/Northern Ireland Protocol, the UK Government has committed not to reduce the rights underpinned by the Race Directive and which were in force in Northern Ireland as at the end of the Brexit transition period (31 December 2020), and to ensure NI race equality law keeps pace with any EU changes to the Race Directive made after that date.

¹⁷³ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp. 53-57.

¹⁷⁴ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 55.

- 3.225 International human rights standards allow for positive action that is necessary, proportionate and time limited. These standards were reflected in the Equality Act 2010 which permitted employers, service providers and others to take any proportionate action if it is aimed at; overcoming or minimising a disadvantage; meeting the needs of a particular racial group; or so as enable or encourage members of a particular group to participate in an activity where their participation is proportionally low.
- 3.226 For example, across all equality grounds, employers in Great Britain can take a range of measures; such as targeting training at a specific group, work shadowing, or encouraging applications from an underrepresented group. In addition, across all equality grounds, service providers and others can take positive action measures; such as providing additional or bespoke services, separate facilities, accelerated access to services, targeting resources or induction or training opportunities to benefit a particular disadvantaged group.
- 3.227 With regards to wider barriers, some employers in Northern Ireland may experience difficulties in taking positive action due to the limitations imposed by legislation. For example, before taking positive action, employers must have gathered and assessed statistical information relating to a previous 12 month period which shows the degree to which a particular racial group is undertaking work of a particular nature in Northern Ireland or in an area within Northern Ireland.
- 3.228 In Great Britain, there is no requirement on employers to assess statistical data relating to under-representation of a racial group across a 12 month period¹⁷⁵; nor is positive action limited to ‘particular work’. This contrasts with the requirements placed on employers in Northern Ireland, as highlighted above, under the race equality legislation.
- 3.229 Further, our recommendation is also compatible with the principles underpinning the statutory duties under Section 75, which are aimed at encouraging public bodies to pay due

¹⁷⁵ Although they must ‘reasonably think’ that persons who share a protected characteristic suffer a disadvantage connected to the characteristic, , or participation in an activity by persons who share a protected characteristic is disproportionately low. [Sec 159 of Equality Act 2010](#).

regard to the need to promote equality of opportunity for people of different racial groups.

- 3.230 In making the above recommendations, the Commission is not calling for the ‘tie-break’ provisions included in the Equality Act 2010 to be introduced in Northern Ireland.
- 3.231 Since 2011 in Great Britain¹⁷⁶ an employer can take a protected characteristic into consideration when deciding who to recruit or promote, where people having the protected characteristic are at a disadvantage or under represented; often referred to as a ‘tie-break’ situation. However, this can only be done with candidates who are equally qualified¹⁷⁷, and is considered to be little used in practice¹⁷⁸. Recent case law has suggested it may be difficult for employers to implement and there is a need for sufficient justification for the discriminatory effect of the positive action, although such case law is limited¹⁷⁹.
- 3.232 Given these complexities, we propose that further consideration and guidance would be needed before introducing such measures.

Allow political parties to take positive action measures when selecting candidates

- 3.233 Political parties should be permitted, to take positive action measures when selecting candidates for elections to the UK Parliament, the Northern Ireland Assembly and local Councils, provided that the purpose of the arrangements is to reduce racial inequality in the party's representation in the elected body.
- 3.234 There should be consideration of time-limiting any such measures.

¹⁷⁶Section 159 of the [Equality Act 2010](#).

¹⁷⁷ EHRC (2014) [Supplement to the Employment Statutory Code of Practice](#), p. 8.

¹⁷⁸ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp. 60-61.

¹⁷⁹ See *Furlong v Chief Constable of Cheshire*, available at <https://www.gov.uk/employment-tribunal-decisions/mr-m-furlong-v-the-chief-constable-of-cheshire-police-2405577-2018>. The Employment Tribunal ruled that the police’s resort to section 159 was disproportionate because, amongst other things, they had not first conducted a full analysis of the impact of positive action measures already in place and had set an artificially low threshold for applicants to the service.

3.235 Elections are an excepted matter under the devolution settlement¹⁸⁰. We encourage action to secure progress via Westminster.

Supporting rationale

3.236 The Commission has previously welcomed the legislation permitting temporary special measures (such as all women shortlists) allowed for the purpose of reducing inequality in the numbers of men and women elected¹⁸¹.

3.237 The Equality Act 2010 allows for positive action measures when parties select candidates for election, provided that the purpose is to reduce inequality in the party's representation in the elected body¹⁸² concerned and that they are a proportionate means of achieving that purpose. However, except in the case of sex, this does not include short-listing only people with a particular protected characteristic¹⁸³.

3.238 Professor Dickson argues¹⁸⁴ that 'it is important for the health of democracy that the people who are elected to represent the electorate are as representative as possible of the population. It is good if the electorate can be given a broad range of candidates to choose from and one way of helping to achieve that is to permit political parties to adjust their candidate selection procedures to facilitate people from relatively unrepresented parts of the population to put themselves forward for selection'.

3.239 The Commission has recognised the under-representation of elected representatives from ethnic minority backgrounds as a key inequality^{185 186}.

3.240 The Commission has previously called¹⁸⁷ for positive action measures to continue and extend beyond gender in relation to political representation. The Commission supports the case for

¹⁸⁰ Cabinet Office/ NIO (2019) [Devolution settlement: Northern Ireland](#) [accessed 18/05/23]

¹⁸¹ Section 2 of the [Sex Discrimination \(Election Candidates\) Act 2002](#),

¹⁸² The UK Parliament, the Welsh Senedd, the Scottish Parliament and local government bodies.

¹⁸³ Section 104(6) and (7) of the [Equality Act 2010](#).

¹⁸⁴ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 69.

¹⁸⁵ ECNI (2018) [Statement on Key Inequalities in Participation in Public Life](#), p. 29.

¹⁸⁶ ECNI (2021) [Participation in Public Life: Increasing Diversity in Political Representation](#)

¹⁸⁷ ECNI (2007) [Response to the Proposals for a Single Equality Bill for Great Britain](#), para 54.

representative decision making at all levels, that we support the option of positive action which is necessary and proportionate in political parties and in other spheres

- 3.241 Consideration should be given as to whether these measures should be time-limited. We noted, for example, that the Sex Discrimination (Election Candidates) Act 2002 is due to expire in 2030, and the Equality Act 2010 includes shortlisting as permitted on the grounds of sex only, and this exception will also expire in 2030.
- 3.242 We understand that TEO considers that such positive action measures to be outside the scope of the NI Assembly.

Influencing others and previous relationships

Introduce additional preventions against influencing others to discriminate

- 3.243 Racial equality law should widen the circumstances in which it prohibits a person from influencing another to discriminate against a third person, to ensure that ‘causing or attempting to cause’ discrimination is prohibited, and clarify that indirect influence is expressly prohibited.
- 3.244 Protections should apply where the person giving the instruction is in a relationship with the recipient of the instruction in which discrimination, harassment or victimisation is prohibited. Further, a wider array of fields should be covered when prohibiting influencing discrimination, including relationships that have ended and the aiding of contraventions / unlawful acts.

Supporting rationale

- 3.245 The current legislation in Northern Ireland¹⁸⁸ prohibits instructing, procuring, attempting to procure, inducing or attempting to induce a person to so discriminate. The Equality

¹⁸⁸ Articles 30 and 31 of the [RRO 1997](#).

Act 2010 covers causing or attempting to cause a person so to discriminate, rather than procuring¹⁸⁹.

- 3.246 Dickson argues¹⁹⁰ that the verb ‘procure’ is not defined in the 1997 Order, but it is almost certainly embraced by the verb ‘cause’, which may also include a wider range of situations not currently covered.
- 3.247 Dickson also argues¹⁹¹ the law should reflect the Equality Act 2010 and ensure indirect influence is covered. This would mean, for example, that a situation where a CEO suggests to a hiring manager that engaging a receptionist from a minority ethnic group may reflect poorly on their judgement is likely to amount to indirect causing or attempting to cause the hiring manager to act unlawfully¹⁹².
- 3.248 The law in Great Britain also covers a wider range of relationships between the influencer and the person being influenced. Under the RRO, provision applies only if the influencer is a person who has authority over the person being influenced or is a person in accordance with whose wishes the person being influenced is accustomed to act.
- 3.249 However, under the Equality Act, the only requirement is that the relationship between the person giving the instruction, or causing or inducing the unlawful act, and the recipient must be one in which discrimination, harassment or victimisation is prohibited, including employment relationships, the provision of services and public functions, and other relationships governed by the Act¹⁹³.
- 3.250 Further, the Equality Act 2010 covers a wider array of fields when prohibiting influencing discrimination¹⁹⁴. Among the fields covered by the Equality Act 2010, but not the RRO, are

¹⁸⁹ Section 111 of the [Equality Act 2010](#).

¹⁹⁰Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp. 46-47.

¹⁹¹Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp. 46-47.

¹⁹² EHRC (2011) [Employment Statutory Code of Practice](#), para 9.18.

¹⁹³ EHRC (2011) [Employment Statutory Code of Practice](#), para 9.22.

¹⁹⁴ The Order prohibits the instructing or procuring of any act which is unlawful under Parts II or III of the Order or under article 72ZA. Part II covers discrimination and harassment in the employment field; Part III covers discrimination in other fields; article 72ZA covers the appointment of office holders. The Act, in contrast, prohibits the instructing, causing or inducing of any act which is in contravention of Parts 3, 4, 5, 6 or 7 or sections 108(1) or (2) or 112(1) of the Act..

relationships that have ended and the aiding of contraventions / unlawful acts.

- 3.251 Professor Dickson recommends that these points should also be reflected in the law in Northern Ireland¹⁹⁵.

Extend protection after relationships (members of clubs / associations) have come to an end

- 3.252 Equality law should ensure that former members of associations are able to bring claims for discrimination or harassment because of race.

Supporting rationale

- 3.253 Currently¹⁹⁶ discrimination or harassment following the end of a 'relevant relationship'¹⁹⁷ is prohibited, if the discrimination or harassment 'arises out of and is closely connected to that relationship'. This may include a racially discriminatory reference written by an employer in respect of a former employee.
- 3.254 However, this does not apply to former members of clubs/ associations¹⁹⁸.
- 3.255 There is no justification for denying former members of associations the right to claim discrimination after the relationship has ended, while granting the right to those who

¹⁹⁵Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp. 46-47.

¹⁹⁶ Article 27A of the [RRO 1997](#).

¹⁹⁷ A relationship during the course of which an act of discrimination by one party to the relationship ('the relevant party') against another party to the relationship, on grounds of race, or ethnic or national origins, or harassment of another party to the relationship by the relevant party, is unlawful

¹⁹⁸ Article 27A(1) of [RRO 1997](#) make it clear that the acts of discrimination it covers are only those covered by the provisions mentioned in articles 3(1B) and 4A of the Order. Article 4A deals with harassment but the list of provisions in article 3(1B) does not include discrimination by associations, dealt with by article 25 of the Order.

were formerly in an employment relationship, an educational relationship or a business-customer relationship¹⁹⁹.

- 3.256 This recommendation would be in line with legislation in Great Britain²⁰⁰, where provision dealing with relationships that have ended is more general.

4 Exceptions

Further limit exemptions to race equality law (public order, national security and public safety)

- 4.1 The current exemption in race equality law based on public order should be removed and exemptions based on national security and public safety should be limited.
- 4.2 These limits should require the use of an exemption to be proportionate, with a proportionality test considering issues such as whether actions are justified in terms of the legitimacy of the aim it is pursuing; the necessity for the exemption in a democratic society at the time; and the unavailability of alternative effective measures that could be taken without having resort to the exemption.

Supporting rationale

- 4.3 The law in Northern Ireland is much more permissive of exemptions than the law in England, Wales and Scotland.
- 4.4 At present, race equality law²⁰¹ includes an exemption for the purpose of safeguarding national security or protecting public safety or public order. However, in Great Britain²⁰² there is only an exemption for the purpose of safeguarding national security.

¹⁹⁹ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#) pp. 107-108.

²⁰⁰ Section 108 of the [Equality Act 2010](#).

²⁰¹ Article 41 of the [RRO 1997](#).

²⁰² Section 192 of the [Equality Act 2010](#).

- 4.5 Defining national security, public safety and public order is notoriously difficult²⁰³. Use of the exemption must be justified by showing that it is pursuing a legitimate aim, that it is necessary in a democratic society, that there are no other effective measures that could be taken and that it is proportionate²⁰⁴.
- 4.6 Dickson argues²⁰⁵ that it is especially difficult to envisage a situation where the preservation of public order might be the basis for applying an exemption to race discrimination law, especially as public disorder almost inevitably threatens public safety, so it should be dropped as an exemption.
- 4.7 Using the language of ‘proportionate’, rather than ‘justified’ would helpfully align with other areas of the RRO 1997²⁰⁶, and also with the approach in GB²⁰⁷.
- 4.8 Given recent experience gained from the COVID-19 pandemic it may be reasonable to consider retaining the ‘public safety’ basis, even though it is not contained in the Equality Act 2010²⁰⁸. However, exemptions claimed for on the basis of public safety or national security should be permitted only if they are proportionate.

Remove the immigration exception which permits discrimination on the grounds of ethnic or national origins in carrying out immigration functions

- 4.9 The current exception allowing discrimination on the grounds of ethnic or national origins in the carrying out of immigration functions should be removed.

²⁰³ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp. 109-110

²⁰⁴ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp. 109-110..

²⁰⁵ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 110.

²⁰⁶ see [article 3\(1A\)\(c\)](#), which defines the justification defence for acts of indirect racial discrimination, and [article 7A\(2\)\(b\)](#), which defines the justification defence for using race-based genuine occupational requirements

²⁰⁷ Section 192 of the [Equality Act 2010](#)

²⁰⁸ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 110.

4.10 We encourage action to secure progress via Westminster.

Supporting rationale

- 4.11 This change will result in the removal of an unjustified exception²⁰⁹ which permits immigration practices that can have a discriminatory and disproportionate impact on minority groups.
- 4.12 Current legislation allows discrimination in the carrying out of immigration functions on the grounds of a person's ethnic or national origins. In practice, therefore, immigration officials can carry out their functions by openly discriminating against people on the basis of their general appearance where it might indicate a person's ethnic or national origin²¹⁰.
- 4.13 We recognise that immigration is a reserved matter and remains the responsibility of the Westminster Parliament. However, it is also clear that immigration policies and practices can significantly impact on minority ethnic communities in Northern Ireland.
- 4.14 For example, research commissioned by the Northern Ireland Human Rights Commission (NIHRC) *Our Hidden Borders: The UK Border Agency's Powers of Detention* (2009) raised specific concerns 'particularly around what appeared to be the practice of racial profiling', by the UK Border Agency and recommended that the practice of singling out particular nationalities and people visibly from a minority ethnic background should cease immediately²¹¹.
- 4.15 Further, our recommendation is in line with the recommendations of international human rights monitoring bodies; in particular, the *Advisory Committee on the Framework*

²⁰⁹ See Article 20C of [RRO 1997](#).

²¹⁰ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 84.

²¹¹ NIHRC (2009) [Our Hidden Borders: The UK Border Agency's Powers of Detention](#).

*Convention for the Protection of National Minorities*²¹² and the *Committee on the Elimination of Racial Discrimination*²¹³.

- 4.16 The CERD Committee has expressed “deep concern” that the Equality Act 2010 permitted public officials to discriminate on grounds of nationality, ethnic and national origin, provided it is authorised by a Minister²¹⁴.
- 4.17 It expressed its concern at reports that a ministerial authorisation had come into force on 10 February 2011 which permitted the UK Border Agency to discriminate among nationalities in granting visas and when carrying out checks at airports and ports and points of entry of the State Party.
- 4.18 The CERD Committee recommended that the UK remove the exception based on ethnic and national origin in the exercise of immigration functions, as well as the discretionary powers granted to the UK Border Agency to discriminate at border posts among those entering the territory of the UK.
- 4.19 Further, the Joint Committee on Human Rights in Great Britain has made it clear that it did not consider that the UK Government had established a case for retaining the ethnicity and nationality immigration exception in its current form²¹⁵.
- 4.20 It recognised that discrimination on the basis of nationality is an “unavoidable feature of immigration control”. However, it stated that “the case law of the European Court of Human Rights, the House of Lords and other courts have established that pressing justification must be shown for the use of distinctions based on race, ethnicity or associated concepts such as national origin”.
- 4.21 It highlighted that the provisions of CERD also required States to take steps to avoid the use of race-based distinctions. In

²¹² Advisory Committee on the Framework Convention for the Protection of National Minorities (2011) [Third Opinion on the United Kingdom. The Committee was of the view that racial profiling and “stop and search” measures, including during controls at ports, airports and on the border with Ireland, “have a disproportionate and discriminatory impact on persons belonging to minority ethnic communities.”](#)

²¹³ [Concluding observations of the Committee on the Elimination of Racial Discrimination: United Kingdom, \(2003\).](#)

²¹⁴ It will be noted that the Equality Act 2010 contains an exception allowing public authorities to discriminate in the exercise of their public functions on the grounds of a person’s ethnic or national origins or nationality, in relation to the exercise of immigration functions.

[Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK \(2011\)](#)

²¹⁵ [Joint Committee on Human Rights, Legislative Scrutiny: Equality Bill](#), 26th Report of Session 2008-09, 2009

summary, it was of the view that given the range of immigration powers available and the ability of the government to authorise the use of distinctions based on nationality, it considered that there was insufficient justification for including an exception that permits discrimination based on ethnicity and national origins in the Equality Act 2010.

- 4.22 Equality and human rights stakeholders have raised concerns with the Commission in relation to an increased risk of racial profiling due to the requirements of the proposed Electronic Travel Authorisation (ETA) requirement within the UK Government's Nationality and Borders Act²¹⁶. Similar concerns have also been raised with the Commission about racial profiling in relation to revised Common Travel Area (CTA) Guidance issued by the Home Office²¹⁷. The Commission has previously noted that the ETA requirement means people resident in Ireland who are non-Irish or non-British citizens and regularly travel into NI, fall within the scope of this requirement. The Commission is concerned about the impact of this living on people in border communities, including frontier workers who are not British/Irish citizens and persons with existing UK immigration status.
- 4.23 The Commission has received specific concerns from equality and human rights stakeholders in Northern Ireland about the potential impact of the ETA requirement on certain people resident in border areas and who need to enter Northern Ireland for essential purposes, such as visiting family, attending permitted work engagements, and accessing childcare, services and goods. Concerns have also been raised with us that the enforcement of the ETA could result in an increase of racial profiling / racial discrimination / differential treatment based on race and ethnic origin and we share these concerns.

²¹⁶ Under the Nationality and Borders Act, people resident in Ireland who are non-Irish or non-British citizens will be required to apply for a US-style visa waiver known as an Electronic Travel Authorisation (ETA) before entering the UK, including when crossing the land Border into NI. The requirement will also apply to citizens of the European Economic Area (EEA) living here, which includes people from Norway, Liechtenstein and Iceland. Non-British or non-Irish citizens from other countries, outside the EU/EEA, which previously did not require a visa to enter the UK, will now need an ETA. Clause 71 of the Bill introduced ETA requirements into the UK immigration system. This provides for a pre-entry clearance system, which requires anyone who does not need a visa, entry clearance or other specified immigration status to obtain authorisation before travelling to the UK. This includes on journeys within the CTA, including between Ireland-Northern Ireland.

²¹⁷ UK Home Office, [Common Travel Area Guidance](#), 11 October 2021

- 4.24 The Commission has written to the Secretary of State at the Home Office highlighting our concerns on proposals to introduce an ETA and have recommended that effective steps are taken by the Home Office to ensure that the revised guidance on the CTA and the ETA requirements will not lead to an increase in instances of racial profiling of black and ethnic minority people and migrant people, in the context of cross-border travel. In its response, the Home Office highlighted that it does not operate routine immigration controls on journeys from within the Common Travel Area and that there are no immigration controls whatsoever on the Ireland-Northern Ireland border. In addition, the letter highlighted that the UK and Ireland had agreed to work together to establish whether there is scope for a workable UK/Ireland data-sharing solution to determine whether a person is a lawful resident of Ireland and could therefore be exempt from the ETA requirement for travel to the UK²¹⁸.
- 4.25 The Commission has previously supported a claim of racial discrimination against the Home Office, which concerned racial profiling by UK immigration officers²¹⁹. This resulted in the settlement of the claim of alleged racial discrimination against a black British woman, arising from the actions of an immigration officer at Belfast City Airport.
- 4.26 Where the actions of immigration authorities breach race anti-discrimination law, the Commission will use its enforcement powers, including assisting individual complaints, as necessary.
- 4.27 The Commission, jointly with NIHRC, raised concerns regarding the potential increase in racial profiling as a result of Electronic Travel Authorisations across the island of Ireland and suggested further consideration was required, including specifically Article 2's 'non-diminution' guarantee, which includes the right to 'equal opportunity in all social and economic activity'²²⁰.
- 4.28 In March 2023, the UK Government announced that third country nationals who are resident in Ireland and from a

²¹⁸ Letter from the Home Office to the Equality Commission for NI, 16 May 2022.

²¹⁹ ECNI (2016) [Race case supported by Commission settled with Home Office](#).

²²⁰ The Belfast (Good Friday) Agreement section on Rights, Safeguards and Equality of Opportunity – Human Rights; the Agreement references “the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity”.

nationality that does not usually require a visa to visit the UK, would be exempt from requiring an Electronic Travel Authorisation to enter the UK, which partially addresses the NIHRC's recommendation. However, individuals not resident in Ireland will still need to apply for an Electronic Travel Authorisation when traveling from Ireland to NI²²¹.

Narrow the employment exception on foreign nationals in public service

- 4.29 We recommend that the restriction on persons of a particular birth, nationality, descent or residence being employed in the service of the Crown or certain public bodies should be modified or removed.

Supporting rationale

- 4.30 This change will narrow the exception that permits particular public bodies to restrict certain posts in the civil, diplomatic, armed or security and intelligence services to people of a particular birth, nationality, descent or residence. This exception particularly impacts on the employment of non-UK nationals who are not Commonwealth or Irish nationals, or who are EEA nationals that do not have, or who are not eligible for, status under the EU Settlement Scheme (EUSS). Non-UK nationals who arrived in the UK prior to the end of the Brexit transition period on 31 December 2020 and who have retained their EU rights are not impacted²²².
- 4.31 Following the UK's exit from the EU, the UK Government has published updates to the Civil Service Nationality Rules²²³ and amended the definition of 'a relevant European' in the Aliens Employment Act 1955²²⁴. These changes have impacted the

²²¹ Home Office, 'Statement of changes to the immigration rules - HC 1160', 9 March 2023.

²²² Listed exceptions covering those here prior to Brexit are set out in [the Immigration and Social Security Coordination \(EU Withdrawal\) Act 2020 \(Consequential, Saving, Transitional and Transitory Provisions\) \(EU Exit\) Regulations 2020](#)

²²³ UK Government (January 2021) [Changes to the Civil Service Nationality Rules from the 1st January 2021 Guidance & Departmental Actions](#)

²²⁴ Amendments were made by the Immigration and Social Security Coordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020.

ability of EU/EEA citizens who arrive in the UK, following the end of the transition period (31 December 2020), to work in civil service posts. Prior to these changes fewer restrictions applied to EU nationals, with ‘relevant Europeans’, including all EEA and Swiss nationals, eligible to work in non-reserved Civil Service posts in line with free movement rules.

- 4.32 In general, we consider that all derogations from the general principle of equality of treatment should be applied narrowly and clearly shown to be a proportionate means of achieving a legitimate aim.
- 4.33 We support the views of the Joint Committee on Human Rights which made it clear in 2009 when scrutinising the Equality Bill that it considered that the re-enactment of existing restrictions on the employment of non-UK nationals in the public services represents a “missed opportunity to review these restrictions, to remove those that are no longer justified and to minimise the scope of those that remain”²²⁵.

Clarify, and extend the persons covered by, proportionate and legitimate exceptions from occupational requirements

- 4.34 Action is required to address potential inconsistencies in this area of race law, and Article 8, which we consider is now redundant, should be removed.
- 4.35 Any occupational requirement exception should be extended to persons analogous to employees, such as contract workers, partners, office-holders and volunteers.
- 4.36 It should be explicit that the exception must be applied proportionately and be a means of achieving a legitimate aim.

²²⁵ [Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill*](#), 26th Report of Session 2008-09, 2009,

Supporting rationale

- 4.37 This recommendation would update the existing legislation²²⁶.
- 4.38 Article 8 of the original RRO 1997 allowed for exceptions where being of a particular racial group is a genuine occupational qualification for limited range of jobs²²⁷.
- 4.39 In 2003, article 7A was inserted into the Order to ensure compliance with the Race Equality Directive of 2000²²⁸. It provides for a more general category of exceptions than those allowed for by article 8, namely, where being of a particular race or of particular ethnic or national origins is a genuine and determining occupational requirement. Article 8 was amended in 2003, to make it applicable only in situations where article 7A does not apply. However, it is unclear where the four types of 'qualification' referred to in article 8 would not also constitute a 'requirement' for the purposes of article 7A²²⁹.
- 4.40 Article 7A also prevents the law on race discrimination from applying to an employee's dismissal whereas article 8 does not expressly do so. On the other hand, article 7A applies only if it is proportionate to apply the occupational requirement in the particular case, whereas article 8 is not so limited.
- 4.41 Article 8 is now outdated and should be removed; it mentions only four contexts where an occupational qualification can be deemed relevant and it is not limited by the proportionality principle, as article 7A is.
- 4.42 To avoid doubt²³⁰, the law should explicitly require that the exception be applied proportionately and be a means of achieving a legitimate aim, and the exception should apply to those analogous to employees including volunteers.

²²⁶Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp. 63-65.

²²⁷ Where the job in question involves participation in a dramatic performance or other entertainment, participation as an artist's or photographic model, working in a place where food or drink is provided to members of the public in a particular setting, or providing persons of a racial group with personal services promoting their welfare.

²²⁸ See the [Race Relations Order \(Amendment\) Regulations \(NI\) 2003](#).

²²⁹Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 63.

²³⁰ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 64.

- 4.43 This recommendation is in line with the law in Great Britain²³¹, and would also move the law to become more consistent with legislation in the Republic of Ireland²³².

Clarify law regarding competitive activities.

- 4.44 Current legislation relating to exceptions to race equality law in the context of “any sport or game” should be extended to include “activity of a competitive nature”. This would include activities like e-sports, music and talent competitions.

Supporting rationale

- 4.45 At present, race equality legislation in Northern Ireland²³³ provides an exemption for discrimination on grounds of nationality or place of birth or the length of time of residence in a particular area or place, if the discrimination relates to selecting one or more persons to represent a country, place or area, or any related association, in any sport or game²³⁴.
- 4.46 However, the Equality Act 2010²³⁵ also allows an exemption for ‘a sport or game or other activity of a competitive nature’. This would include activities like e-sports, music and talent competitions, which are analogous to the traditional definition of ‘sport or game’²³⁶. Participants in these activities in Northern Ireland should also be able to benefit from the exemption which currently relates only to the selection of persons to represent an area or to the determination of eligibility to compete *in a sport or game*.

²³¹ Schedule 9 (1)(1) of the [Equality Act 2010](#).

²³² Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 64.

²³³ Article 38 of the [RRO 1997](#).

²³⁴ Or in pursuance of the rules of any competition so far as they relate to eligibility to compete in any sport or game.

²³⁵ Section 195 (6) of the [Equality Act 2010](#).

²³⁶ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p. 105.

5 Enforcement and Remedies

Commission Powers

- 5.1 Any consideration regarding amendments to Commission powers should involve direct engagement with the Commission, and take account of lessons / evidence-base from our experience of implementation.
- 5.2 Aligned to our general approach, any change should deliver upward harmonisation to reflect best international standards, taking account of powers currently available across the full range of equality legislation in Northern Ireland, as well as lessons from Great Britain, Ireland and wider jurisdictions.

Increase powers to issue Race Codes of Practice in a wider range of areas

- 5.3 In particular, we recommend that our powers to issue Race Codes of Practice are extended to cover all areas, including goods, facilities and services, the exercise of public functions and education (at all levels).

Supporting rationale

- 5.4 These changes will enhance our powers to issue additional Race Codes of Practice in a wider range of areas.
- 5.5 Under the race equality legislation, we currently only have the power to issue Codes of Practice in the fields of employment and housing. We therefore do not have the power to issue Race Codes of Practice in relation to the provision of goods, facilities and services, the exercise of public functions or education, either as regards schools or institutions of further and higher education.
- 5.6 Codes of Practice have an important status. Courts and tribunals must take into account any part of a Code of Practice that appears to them to be relevant to any question arising in those proceedings.

- 5.7 For example, the provisions of the *Fair Employment Code*²³⁷ have been referred to extensively by the Fair Employment Tribunal in its decisions. It is of note that the Tribunal has referred to the Fair Employment Code as ‘fundamental to the provision of equality of opportunity’ and stated that ‘it cannot safely be ignored by any employer’.²³⁸
- 5.8 Further, we have issued a wide range of Codes of Practice on other equality grounds which have proved beneficial in helping employers, service providers, etc., to understand their obligations under the equality legislation and encouraging the adoption of good practice measures.
- 5.9 Our ability to issue Codes of Practice is therefore an essential tool in helping us to embed our work to promote equality of opportunity and ensure the elimination of discriminatory practices.
- 5.10 Our recommendation is in line with powers available to the Equality Commission under other equality grounds; for example, under the disability legislation, we have the power to issue Codes of Practices in a wide range of areas, including goods, facilities and services, the exercise of public functions and education.
- 5.11 Our recommendation also aligns with powers that have been granted to the Equality and Human Rights Commission (EHRC) in Great Britain. It, for example, has the power to issue Codes of Practice across all equality grounds including race, in relation to both employment and non-employment areas.

Strengthen formal investigation powers

- 5.12 We recommend that our powers to conduct investigations under the race legislation are strengthened. In particular, we recommend, in line with provisions under the fair employment legislation, that our power to conduct a formal ‘named person’

²³⁷ECNI (2007) [Fair Employment Code of Practice](#)

²³⁸ O’Gara v Limavady Borough Council 31 July 1992 FET.

investigation under the race legislation, does not have to require a “belief” that an unlawful act may have occurred. These powers should apply across employment; and goods, facilities and services issues.

- 5.13 However, unlike FETO, if, in the course of an investigation which was not initiated by a belief that an unlawful act may have occurred, the Commission does form such a belief, the Commission should be empowered to give notice to the appropriate person(s) of the holding of an investigation on this issue, and to make findings of unlawful discrimination.

Supporting rationale

- 5.14 These changes will enhance our ability to undertake formal race investigations by removing unnecessary procedural barriers.
- 5.15 We require effective legal tools in order to support our work and to enable us to work strategically and to take enforcement action when required on racial equality grounds.
- 5.16 Our ability to conduct formal investigations into the practices of employers, service providers, etc., is an important tool in enabling us to tackle deep-rooted and systematic racial discrimination.
- 5.17 Under the race equality legislation, we have the power to conduct two main types of formal investigation. Firstly, there is the power to conduct general investigations into issues within our mandate. These do not result in findings of unlawful discrimination or the issuing of non-discrimination notices. We have, for example, undertaken a general formal investigation under the race equality legislation into the role of employment agencies in the recruitment and employment of migrant workers²³⁹.
- 5.18 We also have the power to conduct ‘named person’ investigations under the race equality legislation, where we reasonably suspect that named persons have committed acts

²³⁹ ECNI (2014) [Role of the recruitment sector in the employment of migrant workers, A formal investigation](#).

of unlawful discrimination. In these investigations, we may make findings of unlawful discrimination.

- 5.19 In relation to our investigation powers under the race legislation, we have encountered difficulties in using our powers. In particular, under the race equality legislation (as well as the sex, sexual orientation and disability legislation), a formal investigation into a particular employer or provider must be based upon a “belief” that an act of discrimination has occurred. Sufficient evidence must therefore be gathered to provide the basis for a reasonable belief that discrimination has occurred before we can initiate an investigation.
- 5.20 Under the fair employment legislation, we have the power to conduct investigations in the employment field. In particular, we have the power to conduct such investigations “for the purpose of assisting it in considering what, if any, actions for promoting equality of opportunity ought to be taken” by a person/s under investigation²⁴⁰.
- 5.21 In contrast to our power to conduct ‘named person investigations’ under the race equality legislation, a formal investigation under the fair employment legislation into a named employer, does not need to be based upon a “belief” that an act of discrimination has occurred.
- 5.22 Prior to commencing a formal investigation under the fair employment legislation, we are not required to have evidence that an act of discrimination has been committed. The lower threshold under this legislation has enabled us to initiate an investigation in order to assist us in considering what, if any, action ought to be done to promote equality of opportunity.
- 5.23 The focus of the investigation is on the promotion of equality of opportunity, rather than looking for discriminatory practices or policies, with related powers to seek undertakings²⁴¹. Formal investigations under the fair employment legislation are therefore less confrontational than investigations on the other equality grounds where there is a requirement to have a “belief” that an act of discrimination has occurred.

²⁴⁰ Article 11 (1) of [FETO](#)

²⁴¹ Article 12 of FETO.

- 5.24 However, if the Commission holds a belief that unlawful discrimination has occurred, or forms such a belief in the course of a named person investigation, it should be able to make findings of unlawful discrimination. This could reflect the current system which allows that if, during the course of a general investigation, the Commission forms a belief that unlawful discrimination has occurred, it can initiate a named person investigation, notifying the person of such. This will allow investigations under racial equality law to continue to tackle discrimination, as well as further equality of opportunity.
- 5.25 We also recommend that our powers that exist under the fair employment legislation in this area are replicated across all equality grounds, including race, for both employment and goods, facilities and services related investigations. Our current investigatory powers under FETO are confined to the employment field.

Ensure provisions in relation to the disclosure of information are appropriate and compliant with data protection

- 5.26 Racial equality legislation should allow appropriate and legally compliant means of disclosure of information where necessary.
- 5.27 We will continue to liaise with TEO on the most efficient means of doing so. Provisions should reflect best international standards, taking account of what is currently available across the full range of equality legislation in Northern Ireland, as well as lessons from Great Britain, Ireland and wider jurisdictions.

Supporting rationale

- 5.28 Article 50 of the RRO 1997 relates to information given to the Commission by any person in connection with a formal investigation. Section 6 of the Equality Act 2006 relates to third party information provided to the EHRC in the course of an inquiry, investigation, assessment, compliance notice process, or a negotiation to obtain an agreement.

- 5.29 We note TEO's view that the GB legislation allows 'gateways' within General Data Protection Regulation (GDPR) which, although still within compliance, would make it easier for ECNI to operate administratively, and their intention to mirror that legislation.
- 5.30 We will further consider how this may impact on us and our duties.

Strengthen and harmonise the Commission's grant-making powers

- 5.31 The Commission's grant making powers in relation to race should be retained.
- 5.32 Race equality legislation should not require that the provision of assistance requires the prior approval of TEO. It is sufficient to follow the normal financial control protocols applying between non-departmental public bodies and their sponsor department.

Supporting rationale

- 5.33 The current legislation²⁴² states the Commission 'may give financial or other assistance to any organisation appearing to the Commission to be concerned with the promotion of equality of opportunity, and good relations, between persons of different racial groups'.
- 5.34 Both EHRC²⁴³ and IHREC²⁴⁴ have the power to make grants to other organisations.
- 5.35 At present under the RRO, TEO approval, with consent from the Department of Finance, is needed to give grants under the race legislation. However, EHRC is not required under the Equality Act 2006 to obtain prior departmental approval, and such approval should not be necessary for ECNI.

²⁴² Article 43 of the [RRO 1997](#).

²⁴³ Section 17 of the [Equality Act 2006](#)

²⁴⁴ Section 10 (2)(l) of the [Irish Human Rights And Equality Commission Act 2014](#)

- 5.36 Any grants made by the Commission should consider other relevant funds, such as the Minority Ethnic Development Fund²⁴⁵, and avoid duplication.
- 5.37 Although we note that the power to give grants does not exist across all areas of other equality law, our general recommendation is for upwards harmonisation.

Maintain powers to undertake research and educational activities

- 5.38 We strongly recommend that the Commission's powers to undertake or to assist the undertaking by other persons of any research or educational activities should be maintained.
- 5.39 These are important powers underpinning our ability to fulfil our duties to tackle discrimination, to promote equality of opportunity and good relations between persons of different racial groups, and to review the legislation.

Supporting rationale

- 5.40 The current legislation²⁴⁶ allows the Commission to undertake or to assist the undertaking by other persons of any research, and any education activities, which appear to us necessary to work towards the elimination of discrimination and harassment; to promote equality of opportunity and good relations between persons of different racial groups; and to keep the legislation under review.
- 5.41 This power remains of vital importance, allowing us both to undertake research ourselves and allowing us to commission research by others, such as the expert paper by Professor Brice Dickson²⁴⁷, which has helped inform these recommendations. Other recent examples of research work including on employer and employees' experiences of

²⁴⁵ TEO (2022) [Racial Equality](#)

²⁴⁶ Article 44 of the [RRO 1997](#).

²⁴⁷ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#)

welcoming and inclusive workplaces²⁴⁸, and public opinion surveys on equality issues²⁴⁹.

- 5.42 Further, our education powers enable us to tackle discrimination and promote equality of opportunity, including by offering advice and training for employers, service providers and public bodies on their equality duties²⁵⁰, including on issues specific to race. We have also hosted conferences on significant issues, such as the need for equality law reform, including race law²⁵¹.
- 5.43 We note TEO's aim to adopt a more consistent approach and highlight that the ability to undertake research and educational activities exists across other areas of equality law²⁵², as well as in relation to our functions in relation to the EU withdrawal agreement²⁵³.
- 5.44 We further note that NIHRC²⁵⁴, EHRC²⁵⁵ and IHREC²⁵⁶ hold similar powers.
- 5.45 Any removal or weakening of powers to undertake research or educational activities may significantly limit our ability to work to further equality of opportunity and work towards the elimination of discrimination in relation to race.

Maintain Commission powers to tackle discrimination

- 5.46 Commission powers to tackle discrimination should be maintained.
- 5.47 In particular our powers to address persistent discrimination, to take action on breaches of articles 29-31, to take preliminary

²⁴⁸ ECNI (2020) [Workplace Research: Shaping Welcoming and Inclusive Workplaces](#)

²⁴⁹ ECNI (2022) [Public Opinion Survey on Equality in Northern Ireland 2021](#)

²⁵⁰ See ECNI (2023) [Training](#) [accessed 18/05/23]

²⁵¹ See ECNI (2022) [The case for equality law reform in Northern Ireland](#) [accessed 18/05/23]

²⁵² For instance, see Section 55 of the [SDO 1976](#) and Regulation 38 of the [Employment Equality \(Age\) Regulations \(Northern Ireland\) 2006](#).

²⁵³ Section 78B (7) of the [NI Act 1998](#)

²⁵⁴ Sections 69 (6) and 78A (7) of the [NI Act 1998](#)

²⁵⁵ Section 13 (1) of the [Equality Act 2006](#)

²⁵⁶ Section 10 (2)(j) of the [Irish Human Rights And Equality Commission Act 2014](#)

action in employment cases, and to seek undertakings should be retained.

- 5.48 Aligned to our overarching view, any change to the Commission's powers in relation to tackling racial discrimination should deliver upward harmonisation to reflect best international standards, taking account of powers currently available across the full range of equality legislation in Northern Ireland, as well as lessons from Great Britain, Ireland and wider jurisdictions.

Supporting rationale

- 5.49 Powers in articles 59-61 (on persistent discrimination, enforcing articles 29-31, and preliminary action in employment cases) are an important tool for the Commission to refer to when engaging with employers and service providers to encourage compliance. Similar powers exist under the SDO 1976²⁵⁷. They should be retained.
- 5.50 Article 60 allows the Commission to bring proceedings to obtain a declaration that someone has done acted unlawful in relation to discriminatory advertising, and instructions and pressure to commit unlawful acts, and, where appropriate, to apply for an injunction to restrain that person from committing further unlawful acts. This is an important means for us to take action to prevent unlawful acts, where there may be no identified victim, especially in the absence of wider powers to take cases in the absence of named individuals. EHRC has similar powers, derived through the Equality Act 2006²⁵⁸, allowing them to apply for an injunction to restrain a person from committing an unlawful act.
- 5.51 Discriminatory advertisements are explicitly prohibited across a range of NI equality legislation²⁵⁹, allowing us to take action beyond our other investigation powers, where there is no identified victim. This provision should be retained. Although there is no direct equivalent for article 29 on discriminatory advertising in the Equality Act, provision for discriminatory advertising is included in the general prohibitions against both

²⁵⁷ Articles 71-73 of the [SDO 1976](#).

²⁵⁸ Sections 24 and 24A of the [Equality Act 2006](#)

²⁵⁹ For example Article 34 of [FETO 1998](#), Article 39 of the [Sex Discrimination Order 1976](#).

direct and indirect discrimination, enforceable by individual complainants, or by EHRC applying for an injunction²⁶⁰.

- 5.52 Powers under article 62 have been used by the Commission to make an Agreement with an estate agent who had used documents in which properties for letting or sale were indicated as not being suitable for members of minority ethnic groups²⁶¹. Similar powers exist under some other areas of equality law in NI²⁶². We note that the EHRC has similar powers. These powers relating to the Commission's ability to seek undertakings should be retained.

Empower the Commission and other representative bodies to bring a claim on behalf of named individuals and in its own name

- 5.53 The Commission recommends that it and other representative bodies, such as trade unions and other suitably qualified interest groups, should be empowered to bring a claim on behalf of named individuals.
- 5.54 The Commission should also have a general standing to bring cases of strategic importance without, in appropriate circumstances, having to name complainants.

Supporting Rationale

- 5.55 The Equality Commission currently does not have the power to bring legal proceedings in its own name on behalf of individuals who have experienced unlawful discrimination or harassment.
- 5.56 However, the Commission, both jointly with and separately from NIHRC, has powers to bring a legal action in its own name (own motion power) in relation to breach (or potential future

²⁶⁰ EHRC (2011) [Employment: Statutory Code of Practice](#), paras 15.59-15.64.

²⁶¹ ECNI (accessed 2023) [Related Work, Housing and Communities – Examples of our Legal Cases Relating to Housing](#) [accessed 19/05/23]

²⁶² For example, see Reg 44 of the [Equality Act \(Sexual Orientation\) Regulations \(Northern Ireland\) 2006](#)

breach) of Article 2 Windsor Framework or intervene in other legal action that engages Article 2 Windsor Framework. The Commissions can also assist persons in legal proceedings in respect of a breach (or potential future breach) of Article 2 Windsor Framework²⁶³.

5.57 The Commission has a longstanding recommendation²⁶⁴ that it should have standing to bring cases on behalf of named individuals and that this standing should also be granted to trade unions and other suitably qualified organisations. A crucial element in the debate upon effective enforcement concerns the extent to which the system of judicial process should move beyond one predicated upon an individual bringing his or her own case²⁶⁵. Although the Commission has assisted many highly significant cases, with ramifications well beyond the facts of the particular case, there are still many examples of discrimination and inequality which are never addressed because individuals, frequently in highly vulnerable positions, do not wish to, or cannot afford, to litigate.

5.58 In highly strategic cases, the issue at stake is whether the policies and practices of an employer or service provider exhibit evidence of institutionalised or systemic discrimination. In such cases, the Commission is of the view that standing should be available even in the absence of a named ‘victim’. The European Parliament, during the passage of the Revised Equal Treatment Directive, proposed an amendment to allow for genuinely autonomous standing for organisations, as follows, “[associations, organisations and other legal entities] may, where national law permits, bring a collective action, in any judicial and/or administrative procedure, on their own initiative and aside from the particular circumstances of an individual case, in order to determine whether or not the principle of equal treatment ... is applied”. A similar provision to allow the Commission and other suitably qualified organisations to bring cases in its own name will help tackle some of the most entrenched aspects of discrimination and inequality²⁶⁶.

²⁶³ Sections 78C - 78D of the [Northern Ireland Act 1998](#)

²⁶⁴ ECNI (2004) [Response to OFMDFM Consultation Paper, ‘A Single Equality Bill For Northern Ireland](#) paras 10.6-10.9.

²⁶⁵ ECNI (2004) [Response to OFMDFM Consultation Paper, ‘A Single Equality Bill For Northern Ireland,](#) para 10.7.

²⁶⁶ ECNI (2004) [Response to OFMDFM Consultation Paper, ‘A Single Equality Bill For Northern Ireland](#) paras 10.10-10.11.

5.59 We have previously supported the call by Equinet for the inclusion of provisions to allow equality bodies to take cases in their own name²⁶⁷. In particular, Equinet has recommended as follows:

“EU legislation should require that all equality bodies have robust litigation powers (including for strategic litigation) with legal standing before the courts (in individual and collective complaints and ex officio) and/or authoritative decision-making powers with legally binding decisions and the capacity to issue effective, proportionate and dissuasive sanctions.”²⁶⁸

5.60 As set out below, in December 2022, the European Commission published its proposals on two Directives on standards for equality bodies²⁶⁹. The draft proposal makes clear, that the litigation powers allow equality bodies to concretely support victims in accessing justice, but also to elicit legal interpretation of rules and social change via strategic litigation. In that regard, it states that “being able to act in their own name, in the public interest, in the absence of an identified victim and in support or on behalf of several victims is particularly important”.

5.61 In particular, under Article 9 of the proposed Directive, it states that: “Member States shall ensure that the equality body can initiate court proceedings in its own name, in particular in order to address structural and systematic discrimination in cases selected by the equality body because of their abundance, their seriousness or their need for legal clarification.”.

5.62 We have set out our recommendations relating to these proposed Directives in the section below.

²⁶⁷ ECNI (2022) Equality Commission for Northern Ireland’s response to the European Commission’s public consultation on Binding standards for Equality Bodies, para 2.25.

²⁶⁸ Equinet (2016) [Developing Standards for Equality Bodies: An Equinet Working Paper](#), p. 7.

²⁶⁹ 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. COM(2022) 689. 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. COM (2022) 688. See Europe Commission [website](#).

Amend NI race equality law, as appropriate, aligned to EU Directive on standards for equality bodies, if introduced

- 5.63 Government must ensure that, to the extent that the EU directive (COM (2022) 689) on standards for equality bodies, if introduced, amends or replaces the Race Equality Directive, race equality law in NI is amended, further to the 'keeping pace' obligations associated with Windsor Framework Article 2
- 5.64 The Executive Office should track and monitor the passage of the draft EU Directives on minimum standards for equality bodies, and particularly in the context of race law reform, Directive COMM (2022) 689, so as to ensure that, if introduced, that equality law in NI is amended to take account of those changes that amend or replace the Race Equality Directive and other Windsor Framework Annex 1 Directives.
- 5.65 Beyond what is required to under the 'keeping pace' requirement, government should *voluntarily* ensure that NI race equality law deliver changes that strengthen the Commission further to this EU directive on standards for equality bodies, if introduced.

Supporting rationale

- 5.66 In addition to its non-diminution commitment under Article 2(1) of the 'Windsor Framework, the UK Government has also committed, further to Article 13 (3) of the Windsor Framework, to ensuring that some of Northern Ireland's equality laws will keep pace with any changes the EU may make to amend or replace the EU equality laws, set out in Annex 1 to the Windsor Framework.
- 5.67 Specifically , as made clear in paragraph 12 of the NIO [Explainer Document](#) on the Article 2 commitment (2020), the UK Government has stated that it has 'committed to ensuring that, if the EU decides to amend or replace the substantive rights in those directives to improve the minimum levels of protection available, the corresponding substantive rights protections in Northern Ireland will also develop to take account of this.'
- 5.68 In particular, Article 13(3) of the Windsor Framework requires that references to EU law in the Windsor Framework be read as

referring to that law ‘*as amended or replaced*’, whenever that amendment or replacement takes place²⁷⁰. Article 13(3) is therefore open-ended and is not time limited. Further, this process has been described as ‘fully automatic; it requires neither the consent of the UK nor any formal process of updating the Protocol or its annexes.’²⁷¹

5.69 The Race Equality Directive²⁷² is listed in Windsor Framework Annex 1 and clearly falls within the scope of the dynamic alignment requirements of Article 13(3) and engages the ‘keeping pace’ commitment.

5.70 In December 2022, the European Commission published its proposals on two Directives on standards for equality bodies.²⁷³ Both proposed Directives cover the mandate, independence, resources, tasks and powers of equality bodies to engage in the prevention of discrimination and awareness raising activities, and to deal with cases of discrimination and assist victims. The goal of the proposed Directives is to set out mandatory standards on equality bodies to ensure that they can: effectively contribute to the enforcement of these Directives: effectively assist victims of discrimination to access justice; and promote equal treatment and prevent discrimination.

5.71 Reference to equality bodies is already included in Article 12 of the Race Equality Directive. Of particular significance to race law reform is the proposed Directive COM (2022) 689. Under this proposed EU Directive, the existing provisions on equality bodies in the Race Equality Directive (and Directive 2004/113/EC) will be deleted and instead a new Directive

²⁷⁰ It states: “Notwithstanding Article 6(1) of the Withdrawal Agreement, and unless otherwise provided, where this Protocol makes reference to a Union act, that reference shall be read as referring to that Union act as amended or replaced.”

²⁷¹ Thomas Liefländer, Commentary on Article 13, in Thomas Liefländer, Manuel Kellerbauer, and Eugenia Dumitriu-Segnana, *The EU-UK Withdrawal Agreement: A Commentary* (OUP, 2021), 8.155.

²⁷² Council Directive [2000/43/EC](#) of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

²⁷³ 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. COM(2022) 689. 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. COM (2022) 688. See Europe Commission [website](#).

dedicated to equality bodies will bring together all relevant provisions for their effective functioning as regards the grounds and fields covered by these Directives.

- 5.72 The Explanatory Memorandum to proposed Directive COM (2022) 689 states that deleting the current provisions means that the current list of tasks of equality bodies can be clarified and supplemented, for example, by *‘explicitly adding the provision of prevention and promotion activities which were not clear enough in the existing provisions’*.²⁷⁴ The Explanatory Memorandum also makes clear that the proposal ‘builds on’ the substance of the existing provisions on equality bodies contained in the Race Equality Directive to ‘replace them’ with a strengthened and more detailed set of rules.²⁷⁵ Further it clarifies that the proposal does not introduce legislation in a new area but rather *‘revises already existing legislation to increase its effectiveness’*.²⁷⁶
- 5.73 As there is the potential for changes to be made to the proposed Directive as it progresses through the different stages of the EU legislative process, we will, at a later stage, give further consideration to, and engage further with, the Executive Office in terms of identifying the specific corresponding changes that we consider would be required to be made to race equality law in Northern Ireland, including specific provisions of race equality law that would need to be amended or replaced.
- 5.74 However, as an indication of where amendments or revision would be likely to be required were the proposed Directives as currently drafted to be adopted in the current situation, we consider that the Race Relations (NI) Order 1997, as amended, is likely to be the principal statutory measure that would require examination with a view to determining the extent to which it does not currently reflect the proposed Directive’s requirements, and including Part VII, and Part VIII therein.
- 5.75 We recognise that the development and adoption of this proposed EU legislation on binding standards for equality bodies would be a significant and important step to ensure that EU equality legislation is better applied, reducing opportunities

²⁷⁴ Ibid, page 9.

²⁷⁵ Ibid, page 4

²⁷⁶ Ibid, page 7.

for any divergence of rights across countries where such legislation applies, including Northern Ireland.

- 5.76 If the changes proposed in the proposed Directive/s were introduced into Northern Ireland equality law, they would be important, and of great value, not only to the Commission in carrying out its role and remit as the designated equality body for Northern Ireland in the areas covered by the Race Equality Directive (and other Annex 1 equality directives) , but, in turn, also of value to individuals in Northern Ireland seeking redress against discrimination in areas covered by the Race Equality Directive (and other Annex 1 equality directives).
- 5.77 The Commission has welcomed the European Commission’s initiative and responded to its proposals for binding standards for equality bodies .²⁷⁷ The Commission has been highlighting the importance of developing standards for equality bodies as an active member of EQUINET and through its engagement with the European Commission and others since EQUINET’s Working Paper on Developing Standards for Equality Bodies in 2016.²⁷⁸

Procedural and remedies

Simplify the enforcement mechanism for education complaints against schools

- 5.78 We recommend that the requirement to give notice to the Department of Education prior to lodgement of complaints is removed.
- 5.79 In addition, the requirement either to wait up to two months or to receive confirmation from the Department of Education that it does not require further time to consider the matter, should also be abolished.

²⁷⁷ ECNI, ECNI’s [response to the European Commission’s proposals on Binding standards for Equality Bodies](#), Feb 2023

²⁷⁸ Equinet, [Developing Standards for Equality Bodies: An Equinet Working Paper](#), 4 November 2016

Supporting rationale

- 5.80 These changes will harmonise and simplify the enforcement mechanism for education complaints against schools. They will also remove unnecessary barriers to pupils in schools making complaints under the race equality legislation.
- 5.81 Currently, under the race equality legislation, the enforcement mechanism requires that before a complaint can be lodged with the county court, notice of the complaint against the school must be given in the first instance to the Department of Education for Northern Ireland.
- 5.82 Further restrictions apply as regards race discrimination complaints against schools on the grounds of colour and nationality. In particular, civil proceedings cannot be lodged with the county court unless the Department of Education has informed the claimant that it does not require further time to consider the matter or a period of two months has elapsed since the claimant gave notice to the Department of Education.
- 5.83 These restrictions unnecessarily prolong the adjudication process and is a form of enforcement not found in other areas covered by the race equality legislation.
- 5.84 It will, however, be noted that complaints against schools under the disability discrimination legislation have a different process and procedure in that complaints are brought to the Special Educational Needs and Disability Tribunal (SENDIST) and not the county court.
- 5.85 The time limits for disability education complaints are, however, consistent with those that apply in other non-employment areas. In particular, disability discrimination complaints must be made to SENDIST within six months of the alleged act of discrimination. Unlike under the race equality legislation, there is therefore no requirement to give prior notice to the Department of Education before lodging proceedings with SENDIST or to allow a period of two months to elapse since giving notice to the Department of Education before lodging proceedings.

Ensure time limits for assistance by Commission and bringing proceedings are fit for purpose

- 5.86 The requirement that a written complaint made to the Commission be considered and decided on within two months should be removed, in relation to cases being brought to an Industrial Tribunal.
- 5.87 In relation to County Court cases, including those relating to education and goods, facilities and services, we recommend that the time limit for the issue of all proceedings is one year.
- 5.88 Alternatively, if there is not an overall increase in time limits for bringing proceedings, the time limit up to three months should be retained in relation to non-Tribunal cases, including education and goods, facilities and services cases, as this extends the time limit to issue proceedings in the County Court.

Supporting rationale

- 5.89 The provisions for assistance by Commission, and the time limits within which proceedings are to be brought, must be fit for purpose.
- 5.90 When an application for assistance from the Commission is made, it must be in writing and the Commission must consider this, decide whether to grant it and inform the applicant of the decision within two months (which can be extended to three)²⁷⁹.
- 5.91 No other Tribunal cases require such a time limit²⁸⁰ for the Commission to consider and decide on applications, and it results in the Commission having potentially reduced information when making decisions. Therefore, the Commission time-limit for considering race Tribunal cases should be removed.
- 5.92 In relation to County Court cases, where there are no early conciliation provisions, the time limit for all proceedings,

²⁷⁹ Article 64(3) and (4) of the [RRO 1997](#).

²⁸⁰ Only the [Equality Act \(Sexual Orientation\) Regulations \(Northern Ireland\) 2006](#) (non-employment) contain an equivalent provision.

whether Commission assistance is sought or not, should be one year. This would allow time for information to be sought and a resolution reached, before starting proceedings, and is clearer to potential claimants.

- 5.93 In the absence of adopting an overall increase to one year, the Commission consideration time frame of up to three months should be retained in relation to non-Tribunal cases, including education and goods, facilities and services cases, as this extends the time limit to issue proceedings in the County Court. This allows the Commission and individuals time to try to resolve cases before proceedings are issued, which may assist in reducing costs for all sides.
- 5.94 This approach reflects the sexual orientation regulations, where there is a time limit in relation to non-Tribunal cases, but not in relation to employment.
- 5.95 If the latter approach is taken, given that the extension of three months is nearly always used, consideration should be given to stipulating that the Commission consideration time frame is automatically three months, rather than the current requirement to write and give notice of the extension.

Clarify rights of individuals to take cases relating to instructions to discriminate

- 5.96 Individuals' ability to take cases if they have suffered detriment from someone instructing or pressurising another to racially discriminate should be clear in statute.
- 5.97 This approach has already been codified in the NI age regulations²⁸¹, and racial equality legislation should also be harmonised upwards to ensure clarity in protections and remedies.

²⁸¹ Regulation 5 of the [Employment Equality \(Age\) Regulations \(Northern Ireland\) 2006](#)

Supporting rationale

- 5.98 Currently, proceedings in respect of a contravention of Article 30 or 31 of the RRO 1997, relating to instructions and pressure to commit unlawful acts²⁸² can only be brought by the Commission²⁸³.
- 5.99 However, as case law makes clear, proceedings can be brought by those who have been instructed to commit unlawful acts under direct discrimination provisions, such as where a person is dismissed for refusing to carry-out a racially discriminatory instruction issues by their employment²⁸⁴.
- 5.100 The Equality Act 2010²⁸⁵ also explicitly allows proceedings to be brought by a party who suffers detriment in relation to instructing, causing or inducing contraventions, as well as the EHRC. This party may be a person who is instructed, caused or induced to commit a contravening act, or the third-person who is discriminated against. Similar clarification would be welcome in NI race equality law.
- 5.101 Further, the EU Race Equality Directive²⁸⁶ states that ‘An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination’. As above, case law has already confirmed this is within the scope of UK law, but the suggested reform may assist in clarifying compliance with the Directive.

Ensure the appropriate parties can be held liable for unlawful acts

- 5.102 We recommend that both employers and employees, and principles and agents, face appropriate liability for discriminatory acts.
- 5.103 Likewise, third-parties who have knowingly aided unlawful acts should continue to be able to held liable.

²⁸² As above, there is a proposal to further prevent persons influencing others to discriminate.

²⁸³ Article 60 of the [RRO 1997](#).

²⁸⁴ *Showboat Entertainment Centre Ltd v Owens* [1984] IRLR 7

²⁸⁵ Section 111(50) of the [Equality Act 2010](#).

²⁸⁶ Article 2 (4) of the [Race Equality Directive \(Race\)](#): Directive 2000/43/EC of 29 June 2000.

Supporting rationale

- 5.104 Under current race equality legislation, the employee and the employer are both deemed in the first instance to be jointly liable for the employee's discriminatory acts. The employer may subsequently be able to escape liability by showing they took reasonably practicable steps to prevent the employee from doing that act, or doing acts of that description in the course of employment. If employers can successfully use this reasonably practical steps defence, the employee must take sole responsibility.
- 5.105 We consider that the current approach in Northern Ireland, including appropriate measures in situations where employers or principals have told employees an act was not unlawful, largely strikes an appropriate balance. We note that Professor Dickson considered²⁸⁷ that no amendment was required in relation to the liability of employees and agents.
- 5.106 At the moment, it is necessary in Northern Ireland to show that an employee or agent knew the act was unlawful to be liable. This requirement has been removed in GB.
- 5.107 Third-parties who are not employees or agents should continue to be able to be held personally liable if they have knowingly aided unlawful acts²⁸⁸, similar to provisions within the Equality Act 2010²⁸⁹.

Increase powers for tribunals

- 5.108 We recommend that the race equality legislation is strengthened by providing increased powers for tribunals to make recommendations that benefit the whole workforce and not simply the person bringing the discrimination complaint ('the complainant').

²⁸⁷ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), pp. 17-18.

²⁸⁸ Article 33 of the [RRO 1997](#).

²⁸⁹ Section 112 (1) of the [Equality Act 2010](#).

5.109 There should be effective, proportionate and dissuasive sanctions in the case of non-compliance with a tribunal recommendation. FETO may offer a potential model.

Supporting rationale

5.110 Our recommendation would widen the powers of tribunals to make recommendations that benefit the whole workforce.

5.111 For example, recommendations by tribunals, for the purpose of obviating or reducing the adverse effect on a person other than the complainant of any unlawful discrimination, could include the following:-

- that the respondent ensures that its practices and procedures comply with the relevant equality legislation and accompanying Code of Practice. If the facts of the case reveal the need for an employer to amend a particular policy or practice (for example, its recruitment policy or procedures) then this could be specifically referred to in the recommendation;
- that the respondent undertakes equality training in relation to the equality area in question (for example, racial equality training), or more specifically on particular policies (for example, recruitment, selection and promotion procedures or terms and conditions of employment).

5.112 Our recommendation is in line with powers already available to the Fair Employment Tribunal under the fair employment legislation. For example, pursuant to its powers under the fair employment legislation, in the fair employment cases of *Grimes -v- Unipork Limited*²⁹⁰ and *McGrath -v- Viper International Limited*,²⁹¹ the Fair Employment Tribunal made a recommendation that the employer display on a works notice board, a statement to the effect that the complainant (a former employee) had been unlawfully discriminated against on the grounds of religious belief.

²⁹⁰ 22.05.1992 FET

²⁹¹ 30.10.1991 FET

- 5.113 We also recommend that the race equality legislation is amended to ensure, in the case of non-compliance with a tribunal recommendation, that there are sanctions which are effective, proportionate and dissuasive, such as those available under FETO²⁹².
- 5.114 Our recommended changes also reflect the original approach adopted in Great Britain under the Equality Act 2010; which contained provisions granting tribunals wider powers to make recommendations (although did not provide for enforcement, unlike FETO²⁹³). The UK Government repealed these provisions through the 2015 Deregulation Act²⁹⁴, suggesting they are an ‘unnecessary burden on business’²⁹⁵. However, the removal of these provisions was controversial and a House of Lords Select Committee recommended in 2016 that they be reinstated²⁹⁶, pointing to the ability of tribunals to have a longer-term impact on the extent of discrimination in society.

Maintain the questionnaire procedure, and allow for tailoring of questions

- 5.115 The rights of individuals to obtain information through the questionnaire procedure should be retained. The procedure should allow for tailoring of questions to align with the specific areas of concern in a case.
- 5.116 We would encourage the use of templates as models of questions, and a promotion of their use pre-proceedings, but there should not be a prescribed questionnaire.
- 5.117 This recommendation would mean individuals in Northern Ireland would have access to information from potential respondents exceeding those available to individuals in Great Britain where the questionnaire procedure has been removed.

²⁹² Article 39(8) of [FETO 1997](#).

²⁹³ Article 39(8) of [FETO 1997](#).

²⁹⁴ Section 2 of the [Deregulation Act 2015](#).

²⁹⁵ GEO (2012) [Equality Act 2010: A Consultation](#), paras 3.1-3.4.

²⁹⁶ Select Committee on the Equality Act 2010 and Disability (2016) [The Equality Act 2010: The Impact on Disabled People](#), HL Paper 117, paras 411-416. This relates to disability discrimination, but the arguments raised are also applicable to racial discrimination.

Supporting rationale

- 5.118 The current questionnaire procedure²⁹⁷ is intended to help a person who thinks they have been discriminated against by another to obtain information from that person in order to decide whether or not to bring legal proceedings, and if proceedings are brought, to present their complaint in the most effective way.
- 5.119 The former equivalent in Great Britain²⁹⁸ was repealed by the Enterprise & Regulatory Reform Act 2013, due to concern about the impact on business²⁹⁹.
- 5.120 The procedure can benefit both the complainant and respondent as:
- If the respondent's answers satisfy the complainant that the treatment was not unlawful discrimination, there will be no need for legal proceedings.
 - Even if the respondent's answers do not satisfy the complainant, they should help to identify what is agreed and what is in dispute between the parties. For example, the answers should reveal whether the parties disagree on the facts of the case, or, if they agree on the facts, whether they disagree on how the Order applies. In some cases, this may lead to a settlement of the grievance, again making legal proceedings unnecessary.
 - If it turns out that the complainant institutes proceedings against the respondent, the proceedings should be simpler because the matters in dispute will have been identified in advance.
- 5.121 The current model allows claimants to tailor questions to their specific areas of concern, and helps to prevent irrelevant questions being asked of employers. This fits into a model of openness and transparency before the hearing of the case, assisting both sides to make informed choices about the merits of their case.

²⁹⁷ Article 63 of the [RRO 1997](#).

²⁹⁸ Section 66 of the [Equality Act 2010](#).

²⁹⁹ Department for Business Innovation and Skills (2013) [Enterprise and Regulatory Reform Bill: Policy Paper](#), p. 23.

- 5.122 A prescribed questionnaire may be too restrictive, and prevent all the relevant issues being raised.
- 5.123 The questionnaire procedure also exists across different areas of equality law³⁰⁰ in NI and to remove it would disadvantage those complaining on grounds of racial discrimination.

³⁰⁰ For example, Article 44 of [FETO 1998](#); Reg 42 of the [SOR 2006](#); Article 74 of the [SDO 1976](#).

6 Ethnic equality monitoring

Ensure provision for effective ethnic equality monitoring to improve the delivery of public services

- 6.1 We recommend that any revised racial equality legislation includes provision for effective ethnic equality monitoring to ensure the effective design and delivery of law, policy and public services.
- 6.2 The Commission continues to call for all the key measures of government to not only be measured in aggregate, but also disaggregated across all equality grounds, including racial equality grounds.
- 6.3 The Commission recommends that the government and Department's ensure appropriate equality monitoring and related evaluation are in place across all areas of public policy and service provision.
- 6.4 The development of any specific proposals for equality monitoring (on race or any other grounds) will need to consider the areas to be covered; how any proposals interact with and support requirements on Public Authorities under Section 75 of the Northern Ireland Act; and consider issues such proportionality and effectiveness.
- 6.5 Such considerations should be informed by detailed consultation with key stakeholders, including ethnic minority communities, and learning from the public sector. Any consideration should involve direct engagement with the Commission, giving due regard to lessons / evidence from our experience of implementation to date.
- 6.6 We further recommend that the Executive should adopt a systemic approach to produce disaggregated equality data which not only meets the specific needs of Northern Ireland but where possible is comparable with common international frameworks.

Supporting rationale

- 6.7 The Equality Commission has long identified the need for robust equality data, including in relation to race, in Northern Ireland, both to enable good evidence-based policy making and to assist with effective compliance with the equality and good relations duties established by the Northern Ireland Act 1998.
- 6.8 The Commission's recommendations for statutory monitoring have to date centred on the effective delivery of public services. While the Commission has for a number of years supported³⁰¹ employers who wish to *voluntarily* develop an 'Employment Equality Plan' and monitor diversity in their specific workforce, the Commission has not to date called for employment monitoring on a *statutory* basis, beyond that which was considered helpful to clarify considerations under the Fair Employment and Treatment Order (1998).
- 6.9 The Section 75 statutory duties require public authorities pay the appropriate level of regard when revising and developing policies. In order to assess the equality impacts and monitor any adverse impacts of policies, public authorities need information to ensure that decisions and equality assessments are evidence based and appropriate. The type and volume of such information should be relevant, appropriate and proportionate to the policy under consideration.
- 6.10 The Commission has consistently recommended that public authorities collect disaggregated equality information / equality disaggregated data to inform public policy making and service delivery, so that equality considerations are at the heart of public policy making and are informed by the specific needs of those experiencing inequalities. We have also highlighted both the lack of equality data generally, and the lack of data disaggregated by equality ground, that is available to policymakers in Northern Ireland, including recently in the context of the COVID-19 pandemic.
- 6.11 Government has been aware of the importance ethnic equality monitoring for a considerable time. The Racial Equality Strategy 2005-2010 noted³⁰² that 'To have a racial equality

³⁰¹ For example, see ['ECNI \(2009\) A Unified Guide To Promoting Equal Opportunities In Employment'](#) including Annex 10 / p99

³⁰² OFMdFM (2005) [A Racial Equality Strategy for Northern Ireland 2005-2010](#), para 4.21.

policy without ethnic monitoring has been likened to aiming for good financial management without keeping financial records'. Likewise, the current 2015-2025 Strategy highlight how important gathering data on ethnicity is, the latter noting that progress will not be made in tackling racial inequalities unless gaps our filled in our existing knowledge base³⁰³.

- 6.12 Any provisions will also need effective support and guidance, including clarity on roles and responsibilities. Consideration will be needed to how these roles will be fulfilled, with associated resources to deliver and oversee.

7 Conclusion

- 7.1 It is clear that there is a robust case for addressing significant gaps and weaknesses within the race equality legislation in Northern Ireland. We believe that our recommended changes to the race equality legislation in Northern Ireland will strengthen the rights of individuals against racial discrimination and harassment and ensure a more comprehensive, harmonised and consistent legislative framework.
- 7.2 We welcomed the commitment in the 2015-2025 Racial Equality Strategy to reform race equality law, and look forward to the enactment of reformed legislation, taking full account of our recommendations, being achieved within its lifespan.
- 7.3 As many of the gaps and inconsistencies that exist in the race equality legislation also exist under other areas of equality law, we further recommend action to address similar legislative gaps in other areas of equality law in order to ensure a consistent and best practice approach is adopted across the equality legislative framework. This should be taken forward through single equality legislation.
- 7.4 In addition, we have, and will continue to, proactively engage with a wide range of key stakeholders, including MLAs, Assembly Committees, and representatives from the race sector. Government should ensure the full involvement of stakeholders in their work to develop and implement improved equality legislation.

³⁰³ OFMdfM (2015) [Racial Equality Strategy 2015-2023](#), para 7.1

- 7.5 In support of securing change, we would welcome any steps you could take to raise awareness of these recommendations and their supporting evidence base. We encourage you to write to, or engage directly with, Ministers, elected representatives, or key government officials to call for the adoption of these proposals.
- 7.6 Please visit www.equalityni.org/RaceLawReform for further information. There you can download full, summary and key point briefing versions of our recommendations and supporting arguments, along with wider materials.

May 2023.