



# **EQUALITY COMMISSION FOR NORTHERN IRELAND**

**Response to consultation:**

**European Commission - Addressing possible gaps  
in the Racial Equality Directive**

**April 2022**

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# 1 Introduction

- 1.1 The Equality Commission for NI (ECNI) welcomes the opportunity to respond to the European Commission’s consultation on addressing possible gaps in the Racial Equality Directive<sup>1</sup>.
- 1.2 The Equality Commission for Northern Ireland (‘the Equality Commission’) is an independent public body established under the Northern Ireland Act 1998. Our role and remit is outlined in Annex A.
- 1.3 The Commission has particular duties under the Race Relations (Northern Ireland) Order 1997, (‘RRO 1997’) as amended. It has a duty to work to eliminate unlawful racial discrimination and harassment, to promote equality of opportunity, to promote good relations between persons of different racial groups and to keep the working of the legislation under review.
- 1.4 Following the UK’s exit from the EU, the UK Government has committed under Article 2 of the Ireland/Northern Ireland Protocol (‘the Protocol’) 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, has been given additional powers and responsibilities, as the ‘dedicated mechanism’, to ensure that the UK Government’s commitment under Article 2 of the Protocol is met<sup>2</sup>.
- 1.5 In responding to this consultation, the Commission has set out views relevant to our remit, including the role of Article 2 of the Ireland/Northern Ireland Protocol to the Withdrawal Agreement, legal protections against discrimination, monitoring and equality bodies.

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<sup>1</sup> European Commission (2022) [Addressing possible gaps in the Racial Equality Directive](#)

<sup>2</sup> 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 Overarching comments

- 2.1 The Equality Commission welcomes and supports the European Commission's commitment to identifying potential gaps in the Racial Equality Directive and suitable measures to address them.
- 2.2 The Equality Commission notes that the current consultation follows the initial announcement in the EU anti-racism action plan 2020-2025<sup>3</sup> which commits to identifying possible gaps related to EU legislation prohibiting discrimination based on ethnic and racial origin and presenting any legislation required to address shortcomings.
- 2.3 We also note that the recent European Commission report on the application of the Racial Equality Directive and the Employment Equality Directive<sup>4</sup> pointed to some limitations in the scope and application of the Directive, including the scope and concept of discrimination, the notion of ethnic and racial discrimination, enforcement of rights, availability of equality data, awareness raising and dialogue with civil society organisations, the risks of new technologies such as Artificial Intelligence, discrimination against Roma people and the role of equality bodies.
- 2.4 Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of 'racial or ethnic origin' has shaped the legal protection against discrimination on grounds of ethnic or racial origin over two decades. In Northern Ireland Council Directive 2000/43/EC is implemented through the Race Relations (Northern Ireland) Order 1997<sup>5</sup>, which was amended by the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003<sup>6</sup>, to implement the EU Framework Employment Directive, and the

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<sup>3</sup> [EU Anti-racism Action Plan 2020-2025](#)

<sup>4</sup> [Report](#) from the Commission to the European Parliament and the 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'), 19 March 2021

<sup>5</sup> [The Race Relations \(Northern Ireland\) Order 1997](#)

<sup>6</sup> The 2003 Amendment Regulations only apply to employment and training. The Framework Employment Directive covered the grounds of race, ethnic or national origins – not colour or nationality.

Race Relations Order (Amendment) Regulations (Northern Ireland) 2009<sup>7</sup>.

- 2.5 The Equality Commission highlights the urgent need for legislative reform to strengthen the rights of individuals in Northern Ireland against racial discrimination and harassment and ensure, at minimum, the law here keeps pace with legislative developments in Great Britain.
- 2.6 Further, under Article 2(1) of the Protocol, the UK Government has committed to ensuring there is no diminution of rights, safeguards and equality of opportunity protections and provisions as set out in the relevant part of the Belfast (Good Friday) Agreement.
- 2.7 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 to the Protocol<sup>89</sup> that enhance protections against discrimination in Northern Ireland Annex 1 of the Protocol includes the Racial Equality Directive.
- 2.8 Therefore, as a result of this commitment in the Protocol, 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.
- 2.9 There is also a need to combat prejudicial attitudes and to develop robust and reliable statistical information to better target and monitor key policies and actions.

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<sup>7</sup> The 2009 Amendment Regulations changed the definition of indirect discrimination.

<sup>8</sup> 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.

<sup>9</sup> 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

- 2.10 We **recommend** that the NI Executive, Departments and other key stakeholders take priority action in the following areas, including via the Racial Equality Strategy 2015-2025:
- Reform of the law, to address key shortfalls in legal protections
  - Tackling Prejudicial Attitudes, Racism and Hate Crime
  - Ensuring equality of opportunity in education, employment, accommodation, healthcare and access to social welfare
  - Ensuring effective monitoring and evaluation, supported by robust data collection
- 2.11 We also highlight the importance of taking account of multiple identities and the importance of the appropriate development and implementation of the Racial Equality Strategy.
- 2.12 The Commission **recommends** specific long-term measures to: eliminate racism and racial discrimination; to tackle prejudicial attitudes and to promote values of acceptance and respect for difference.
- 2.13 We **recommend** the reduction and elimination of racial violence through a range of actions including; addressing issues of under reporting; reducing the risk of low level hate crime escalating through early intervention; improving the operational response to hate crime; providing support for victims of racist hate crime and publishing data which would allow for end-to-end tracking of hate crime cases.
- 2.14 We also **recommend** a range of initiatives aimed at encouraging migrants, asylum seekers and refugees to take an active role in political and public life.
- 2.15 Although this consultation response primarily focus on legal protections, monitoring and equality bodies given the content of the consultation, our full range of [Racial Equality Policy: Priorities & Recommendations](#) are available online.

### 3 Racial equality legal protections

- 3.1 We believe that urgent changes are required to strengthen the legal protections for race equality in Northern Ireland. The changes are aimed at strengthening, simplifying and harmonising the race equality legislation.
- 3.2 It will also help address key racial inequalities in Northern Ireland. The changes we recommend will, for example, provide greater protection for individuals against racial discrimination and harassment who currently have no or limited protection under the race equality law. They will also result in the removal of unjustifiable exceptions which limit the scope of the race equality legislation.
- 3.3 ECNI has made a range of recommendations relating to racial equality law. These have primarily focused on domestic law as a means of achieving change.
- 3.4 However, several of these recommendations may be of particular interest when identifying gaps in the Racial Equality Directive, including:
- Increasing protection on **grounds of colour and nationality**;
  - Ensure broader protection against racial discrimination and harassment by **public bodies when carrying out their public functions**;
  - Introducing new protection against **multiple discrimination**;
  - Greater protection for employees against **racial harassment by customers or clients**;
  - Increase protection against **victimisation**
- 3.5 The full range of ECNI recommendations relating to race law reform should be considered, and any measures the European Commission can take to improve protection against racial discrimination, harassment and victimisation would be welcomed.
- 3.6 It should be noted that some of our race equality law recommendations include greater domestic alignment with the

Race Equality Directive, including defining harassment as unwanted conduct ‘related to’ racial grounds<sup>10</sup>, and expanding the scope of voluntary positive action to the extent allowed by the Directive<sup>11</sup>.

- 3.7 ECNI’s race law recommendations are summarised in Annex B, with a full report on available on our website; [Strengthening protection against racial discrimination: Recommendations for law reform](#).

### ***Colour and nationality***

- 3.8 The Commission has a long-standing call<sup>12</sup> for **increased protection on grounds of colour and nationality**. This is a priority area for reform of race equality law.
- 3.9 In Northern Ireland, there are currently ‘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.
- 3.10 This ‘two tier’ level of protection came about following the introduction in Northern Ireland of legislation to implement the Race Directive<sup>13</sup> in 2003<sup>14</sup>. As the Race Directive only applied to the grounds of race, ethnic and national origin, the Regulations introduced in order to give effect to the Race Directive, did not amend the provisions in the RRO 1997 as regards the grounds of colour and nationality.
- 3.11 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.

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<sup>10</sup> ECNI (2014) [Strengthening protection against racial discrimination: Recommendations for law reform](#), paras 3.38-3.46.

<sup>11</sup> ECNI (2014) [Strengthening protection against racial discrimination: Recommendations for law reform](#), paras 3.125-3.138.

<sup>12</sup> ECNI (2009) [Proposals for Legislative Reform](#), pp. 5-9.

<sup>13</sup> [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

<sup>14</sup> Namely, the Race Relations Order (Amendment) Regulations (NI) 2003

- 3.12 It is of note that, in the case of *Abbey National PLC v Chagger*<sup>15</sup>, 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.
- 3.13 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.
- 3.14 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<sup>16</sup>.
- 3.15 We have recommended changes in domestic law to increase protection on the grounds of colour and nationality, and there is a commitment within the current Racial Equality Strategy 2015-2025 to address this issue,<sup>17</sup> but to date no further action has been taken to address this anomaly in Northern Irish legislation<sup>18</sup>.

### ***Public functions***

- 3.16 We **recommend** that protection is strengthened to afford increased protection for individuals against racial discrimination and harassment by public bodies **when carrying out their public functions**.

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<sup>15</sup> UK EAT/0606/07/RN

<sup>16</sup> [Concluding observations of the Committee on the Elimination of Racial Discrimination: United Kingdom, \(2003\)](#).

<sup>17</sup> OFMdfM (2015) [Racial Equality Strategy 2015-2025](#), paras 5.7-5.13

<sup>18</sup> Changes to address this gap in protection have already been implemented in Great Britain under the [Equality Act 2010](#)

- 3.17 We further **recommend** that this prohibition should apply as regards **all public functions**, except in some clearly defined limited areas<sup>19</sup>, and 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**.
- 3.18 We note that the EU Anti-Racism Action Plan specifies that law enforcement will be considered in the context of possible new legislation<sup>20</sup>.
- 3.19 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.
- 3.20 The legislation was limited to these four areas to reflect the scope of the Race Directive<sup>21</sup> 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**.
- 3.21 ‘Public functions’ cover a wide range of functions including arrests, detention and restraint by the police, the charging and 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 complaints<sup>22</sup>.
- 3.22 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

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<sup>19</sup> 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.

<sup>20</sup> European Commission (2020) [EU Anti-Racism Action Plan 2020-2025](#), p.4

<sup>21</sup> [Race Directive](#) Council Directive 2000/43/EC of 29 June 2000.

<sup>22</sup> EHRC (2011) [EHRC Code of Practice on Services, Public functions and associations.](#), para 11.16.

prison or a voluntary organisation taking on responsibilities for child protection.

- 3.23 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.
- 3.24 In those circumstances, the provisions under the race equality legislation relating to the provision of goods, facilities and services<sup>23</sup> will apply. Such activities will therefore **not be covered** by the provisions relating to the exercise of public functions.
- 3.25 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.
- 3.26 Cases brought before the courts in Great Britain revealed gaps in protection; 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.
- 3.27 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** to be covered by the provisions relating to goods and services under the race equality legislation<sup>24</sup>. 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 services<sup>25</sup>.
- 3.28 Further, the extension of the race legislation to **all** public functions, unless specifically falling within an exception, will

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<sup>23</sup> Article 21 of the Race Relations (NI) Order 1997

<sup>24</sup> See the race discrimination case of *Farah v Commissioner of Police of the Metropolis*<sup>24</sup>, the Court of Appeal in England, [1997] 2 WLR 824.

<sup>25</sup> 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.

**ensure clarity** both for those with rights under the legislation and those public bodies with responsibilities under the law.

- 3.29 Further, 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 Northern Ireland’s race equality legislation in relation to public functions’<sup>26</sup>.

### ***Multiple discrimination***

- 3.99 We **recommend** the introduction of protection against **intersectional multiple discrimination** so that there is protection for individuals who experience discrimination or harassment because of a combination of equality grounds, including racial grounds. This change will **remove unjustifiable legal barriers** that individuals face when trying to prove discrimination on multiple equality grounds.
- 3.100 Individuals experiencing intersectional 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.
- 3.101 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.
- 3.102 The introduction of express and specific provisions prohibiting intersectional multiple discrimination would **provide clarity and certainty** for individuals that this gap had been addressed.
- 3.103 Our recommendation reflects the need for stronger legal protection in light of the **clear evidence** that individuals

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<sup>26</sup> [Second Opinion on the UK, the Advisory Committee on the Framework Convention for the Protection of National Minorities](#), June 2007

experience discrimination because of a combination of equality grounds.

- 3.104 For example, a NICEM research report (2013) on the experiences of ethnic minority women in Northern Ireland<sup>27</sup> 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.
- 3.105 Further, an EU Fundamental Rights Agency 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 years<sup>28</sup>.
- 3.106 In addition, statistics collected by ECNI 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 2020 - 31 March 2021), we received 74 hybrid race discrimination enquiries /applications. These represented complaints where individuals were alleging discrimination due to a combination of equality grounds including race<sup>29</sup>.
- 3.107 These concerns have been recognised by the NI Executive; the 2015-2025 Racial Equality Strategy<sup>30</sup> recognises that some individuals, particularly minority ethnic women are vulnerable to discrimination on the basis of more than one characteristic. The Strategy commits to exploring 'how we might provide protection against forms of multiple discrimination'.
- 3.108 Our recommendation is also in line with the recommendations of international human rights monitoring bodies.
- 3.109 In particular, the need for multiple discrimination provisions to be included in equality legislation has been highlighted by

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<sup>27</sup> NICEM (2013) [Experiences of Ethnic Minority women in Northern Ireland](#).

<sup>28</sup> FRA (2017) [Second European Union Minorities and Discrimination Survey: Main results](#), p. 23.

<sup>29</sup> This represented 28% of the overall number of enquiries/applications on race (namely 406 enquiries).

<sup>30</sup> OFMDFM (2015) [Racial Equality Strategy 2015 – 2025](#), paras 3.22-3.25

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, CERD<sup>31</sup> recommended that both states should explicitly provide for the prohibition of multiple discrimination.

3.110 The extension of protection against multiple discrimination on more than two grounds has already been embraced by other national jurisdictions; including nine EU Member States<sup>32</sup>, Canada<sup>33</sup> and South Africa<sup>34</sup>.

3.111 Finally, as this gap exists across all equality strands, we **recommend** provisions to prohibit multiple discrimination are introduced **across all equality grounds**, including race.

### ***Third party harassment***

3.112 We **recommend** greater protection for employees against **racial harassment by a third party**, such as, by a customer or client of an employer.

3.113 Our recommendation reflects the need for stronger duties on employers to take action in light of the **clear evidence** that black minority ethnic employees **are being subjected to racial harassment by customers/clients**.

3.114 For example, *BAYANIHAN! The Filipino Community in Northern Ireland*, a report produced by the Northern Ireland Council for Ethnic Minorities (NICEM) in 2012, reports that 44.4% of Filipino healthcare workers surveyed had been racially harassed by customers/service users.<sup>35</sup>

3.115 In addition, as highlighted in the NICEM report, Filipinos on a Work Permit/Tier Two find it particularly difficult to challenge harassment experienced in the workplace because their right to

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<sup>31</sup> 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.

<sup>32</sup> Fundamental Rights Agency (2017) [Fundamental Rights Report](#), p. 69; Austria, Bulgaria, Croatia, Germany, Greece, Italy, Romania, Slovenia and Sweden.

<sup>33</sup> Section 3(1) of the [Canadian Human Rights Act 1985](#).

<sup>34</sup> Section 9 (3) of the [Constitution of the Republic of South Africa, 1996. Chapter 2: Bill of Rights](#).

<sup>35</sup> A survey of 231 Filipino healthcare workers in Northern Ireland, [Bayanihan! The Filipino community in NI](#), January 2012, NICEM

work and reside in Northern Ireland is dependent upon employment.

- 3.116 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 BME employees and the need for the race equality legislation to effectively protect them against harassment.
- 3.117 More recently, a UK-wide TUC survey<sup>36</sup> 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.
- 3.118 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. We further **recommend** that employers are liable if they know that the employee has been subjected to third party harassment on **one previous occasion**, or in circumstances that they **ought to have been reasonably aware** of the risk of third party harassment.

### ***Wider definition of ‘victimisation’***

- 3.119 We **recommend** changes designed to amend the overall **definition of victimisation**. In particular, we **recommend** that there is no longer a domestic requirement for the person 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.
- 3.120 This change will **make it easier for individuals** to show that they have been subjected to victimisation.
- 3.121 Take, for example, a situation where a BME employee makes a race discrimination complaint against his employer and as a

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<sup>36</sup> Ashe, S. et al (2019) [Racism Ruins Lives: An analysis of the 2016-2017 Trade Union Congress Racism at Work Survey](#), pp. 27-30.

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.

## 4 Monitoring

- 4.1 The Commission **recommends the collection, monitoring and evaluation of appropriate data** to ensure effective policy / service development and delivery and to fulfil obligations arising from Section 75 of the Northern Ireland Act 1998. The Commission recommends that the Executive and Department's ensure appropriate monitoring and evaluation are in place for the Racial Equality Strategy and across all relevant policy areas.
- 4.2 We further **recommend** that the Executive should adopt a systemic approach to produce disaggregated data that is comparable at EU level.
- 4.3 We note consideration of the collection of equality data in the European Commission's Report on the Implementation of the Racial Equality Directive and the Employment Equality Directive<sup>37</sup>. Measures to improve the collection of racial equality data would be welcomed.
- 4.4 Research by the Joseph Rowntree Foundation<sup>38</sup> has noted that 'with the current absence of robust, reliable statistical or administrative analysis, significant gaps exist in the knowledge base'<sup>39</sup> on BME groups in Northern Ireland. The report also highlighted that 'any impact on outcomes for people of ethnic minority backgrounds is unclear as data is required to demonstrate the policy effectiveness'<sup>40</sup>.

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<sup>37</sup> European Commission (2021) [Report on the Implementation of the Racial Equality Directive and the Employment Equality Directive](#), pp. 14-16.

<sup>38</sup> Joseph Rowntree Foundation (2013) [Poverty and Ethnicity in Northern Ireland](#).

<sup>39</sup> Joseph Rowntree Foundation (2013) [Poverty and Ethnicity in Northern Ireland](#), p. 9.

<sup>40</sup> Joseph Rowntree Foundation (2013) [Poverty and Ethnicity in Northern Ireland](#), p. 22.

- 4.5 The Racial Equality Strategy for Northern Ireland 2015-2025 committed to 'examine where ethnic monitoring should be introduced and consult on proposals for implementation'<sup>41</sup>.
- 4.6 The Executive Office subsequently commissioned research from the NI Assembly Research Service 'Ethnic Monitoring – The Way Forward'. The report recommends that the RRO 1997 is amended to incorporate provisions analogous to Great Britain's Equality Act 2010<sup>42</sup> (but on the racial equality ground only), so as to impose a general duty on specified public authorities to work towards the elimination of racial discrimination and a specific duty to collect data on racial equality and set racial equality objectives.
- 4.7 The Commission understands that while the proposals set out in the report have not yet been formally considered by Ministers, TEO is contemplating a pilot ethnic monitoring scheme across a small number of public authorities.
- 4.8 The UN Committee on the Elimination of All Forms of Racial Discrimination has recommended the systematic collection and publication of disaggregated data on the enjoyment of rights by members of ethnic minorities in all fields of life by government in Northern Ireland<sup>43</sup>. The Advisory Committee on the Framework Convention on the Protection of National Minorities has recommended that: '*The authorities should prioritise integrating the collection of disaggregated equality data on the situation of persons belonging to national and ethnic minorities into the practices of all relevant departments and agencies in Northern Ireland as a means to adopting and implementing effective minority protection and equality promotion policies*'<sup>44</sup>.

## 5 Equality Bodies

- 5.1 The Equality Commission welcomes the European Commission's recent review of key equal treatment legislation,

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<sup>41</sup> OFMdFM (2015) [Racial Equality Strategy 2015-2025](#), p. 5

<sup>42</sup> Specifically sections 149 and 153 of the Equality Act 2010.

<sup>43</sup> United Nations Committee on the Elimination of All Forms of Racial Discrimination (2016): [Concluding observations on the twenty-first to twenty-third periodic reports of United Kingdom of Great Britain and Northern Ireland](#), paragraph, 14 page 4.

<sup>44</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities (2017): [Fourth Opinion on the United Kingdom adopted on 25 May 2016](#), paragraph 50, page 17

the Racial Equality Directive and the Employment Directive, and its recent consultation on binding standards for equality bodies<sup>45</sup>.

- 5.2 In its recent review of the Racial Equality Directive and Employment Equality Directive, the European Commission said it would assess whether to propose possible legislation to strengthen role of national equality bodies. The Equality Commission has recently responded to this public consultation on proposed legislation on standards for equality bodies.
- 5.3 We recognise that Article 13 of the Racial Equality Directive provides for a role for equality bodies in relation to matters within the remit of the Directive. Specifically, it provides competencies for the functioning of equality bodies to promote equal treatment by providing independent assistance to victims of discrimination, conducting independent surveys, publishing independent reports and making recommendations on matters relating to discrimination<sup>46</sup>.
- 5.4 As mentioned above we note that the European Commission is considering introducing binding standards for equality bodies and therefore this may result in the powers and role/remit of equality bodies being enhanced and/or widened across a range of equality areas, including race. It is not clear from the Racial Equality Directive consultation, whether views are being sought regarding enhancing the powers or remit of equality bodies via changes to Article 13 of the Racial Equality Directive.
- 5.5 Should they be relevant to the review and for ease of reference we have included key recommendations raised in our response to the European Commission's consultation on binding standards for equality bodies, set out below. We would also be content to send on our full response if required.
- 5.6 Specifically, the Equality Commission considers that equality bodies should have a comprehensive mandate which covers all

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<sup>45</sup> European Commission, [Equality bodies: Bodies for the promotion of equal treatment and non-discrimination](#)

<sup>46</sup> The Equality Commission also notes that three subsequent Annex 1 equality Directives entrusted equality bodies with the same missions in their respective field: [the Gender Equality Directives in the field of goods and services](#), [in the field of employment](#) and in the field of [self-employment](#).

grounds of discrimination<sup>47</sup> prohibited under EU law, and in all aspects of life – including discrimination based on race or ethnic origin.

- 5.7 We also support Equinet’s recommendation that the mandate of equality bodies should cover both the public and private sectors<sup>48</sup>.
- 5.8 Further, we support Equinet’s recommendation on the mandate of equality bodies covering all forms of discrimination, including direct and indirect discrimination, harassment, and instruction to discriminate, as well as victimisation<sup>49</sup>.
- 5.9 We believe that equality bodies should have adequate powers to promote and mainstream equality effectively. This could include provisions within future legislation to allow for formal engagement and input into policy and legislative processes and ensuring the provision of robust litigation powers.
- 5.10 The European Commission’s report on the application of the Racial Equality and the Employment Equality Directives notes that some equality bodies lack sufficient litigation powers to ensure sufficient support to victims of discrimination. We support the call by Equinet for the inclusion of provisions to allow equality bodies to take cases in their own name. In particular, Equinet has recommended as follows:
- 5.11 “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.”<sup>50</sup>
- 5.12 We also consider that equality bodies should have the power to promote and mainstream equality, including in the areas of awareness raising and data collection.

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<sup>47</sup> As listed in Article 19 of the [Treaty on the Function of the European Union](#) (TFEU) - sex/gender, racial or ethnic origin, religion or belief, disability, age and sexual orientation

<sup>48</sup> Equinet (2016), [Developing Standards for Equality Bodies: An Equinet Working Paper](#) pp. 6-7

<sup>49</sup> Equinet (2016), [Developing Standards for Equality Bodies: An Equinet Working Paper](#)

<sup>50</sup> Equinet (2016), [Developing Standards for Equality Bodies: An Equinet Working Paper](#), p. 7

## **6 Conclusion**

- 6.1 We welcome the process to identify potential gaps in the Racial Equality Directive and suitable measures to address them.
- 6.2 We remind the European Commission that, as a result of the Protocol 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.
- 6.3 We have developed a range of recommendations relating to racial equality law, which may of use in identifying gaps in the Racial Equality Directive.
- 6.4 We trust that the proposals and recommendations set out in this response are of assistance. If further discussion would be useful, please do not hesitate to contact us.

## **Annex A: Role and Remit of the Equality Commission NI**

- 7.1 The Equality Commission for Northern Ireland (“the Commission”) is an independent public body established under the Northern Ireland Act 1998.
- 7.2 In general terms, our statutory remit provides that we are to:
- promote equality of opportunity and affirmative action
  - work towards the elimination of unlawful discrimination and harassment
  - keep relevant legislation under review
  - promote good relations between persons of different racial groups and good disability practice
  - oversee the effectiveness of statutory equality duties on public authorities.
- 7.3 Our powers and duties derive from a number of statutes. These provide protection against discrimination in employment and in the provision of goods, facilities and services on grounds of disability, race, religion and political opinion, sex and sexual orientation. On the grounds of age, protection against discrimination is available only in respect of employment.
- 7.4 We also have responsibilities arising from the Northern Ireland Act 1998 and Disability Discrimination Act 1995 in respect of overseeing the statutory equality and good relations duties on public authorities on the promotion of equality of opportunity and good relations.
- 7.5 The Commission, with the Northern Ireland Human Rights Commission, has been designated under the United Nations Convention on the Rights of Disabled Persons (UNCPRD) as the independent mechanism tasked with promoting, protecting and monitoring implementation of UNCPRD in Northern Ireland.
- 7.6 The European Union (Withdrawal Agreement) Act 2020 gave new duties and powers to the Commission, and to the Northern Ireland Human Rights Commission (NIHRC), effective from 1 January 2021. These enable the Commission to monitor, advise and report on, and enforce the UK Government’s adherence to its commitment set out in Article 2 (1) of the

Ireland/Northern Ireland Protocol to the Withdrawal Agreement. This commitment is to ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from the UK's withdrawal from the Union, including in the area of protection against discrimination.

## Annex B: Summary of ECNI race equality law recommendations

8.1 We recommend action is taken to address legislative gaps in the **race equality legislation**, including via the Racial Equality Strategy 2016-2026 (RES). We also recommend that the **fair employment legislation** is strengthened in order to improve workforce monitoring on racial grounds. In summary<sup>51</sup>, we **recommend the race equality legislation** is amended to:

- provide increased protection against discrimination and harassment on the grounds of **colour** and **nationality**. We are clear that this is a **priority area** for reform<sup>52</sup>.
- ensure broader protection against racial discrimination and harassment by **public bodies when carrying out their public functions**;
- give stronger protection against **racial harassment**, including greater protection for employees against racial harassment by customers or clients;
- increase protection for certain categories of **agency workers** against racial discrimination and harassment;
- introduce new protection for **Councillors** against racial discrimination and harassment by local councils;
- increase protection against **victimisation**;
- introduce new protection against **multiple discrimination**, so that individuals have protection if they experience discrimination or harassment because of a combination of equality grounds;
- expand the scope of voluntary **positive action**, so as to enable employers and service providers to lawfully take a wider range of steps to promote racial equality;

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<sup>51</sup> ECNI (2014) [Strengthening protection against racial discrimination: Recommendations for law reform](#)

<sup>52</sup> ECNI (2009) [Proposals for Legislative Reform](#)

- remove or modify certain **exceptions**, including those relating to immigration and the employment of foreign nationals in the civil service;
- increase the **powers of the Equality Commission** to issue additional Race Codes of Practice and to effectively carry out formal investigations;
- strengthen **tribunal powers** to ensure effective remedies for individuals bringing race discrimination complaints; and
- harmonise and simplify the **enforcement mechanism for education complaints**.

8.2 We have also **recommended**, as a priority area for reform<sup>53</sup>, that the **fair employment legislation** is strengthened so as **require** registered employers in Northern Ireland to collect **monitoring information** as regards **nationality** and **ethnic origin**, in addition to monitoring the community background and sex of their employees and job applicants<sup>54</sup>.

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<sup>53</sup> ECNI (2009) [Proposals for Legislative Reform](#)

<sup>54</sup> The primary reason for this change is to ensure the continuing usefulness of the fair employment Monitoring Regulations, and in particular, to enable employers to make a more accurate and meaningful assessment of fair participation in employment in their organisation.