EQUALITY COMMISSION FOR NORTHERN IRELAND

Consultation Response:

The Executive Office:

Consultation on the Review of the Race Relations (NI) Order 1997

June 2023

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Executive summary

i. The Commission welcomes the opportunity to respond to TEO's consultation on the Review of the Race Relations (NI) Order 1997.

ii. We continue to recommend that single equality legislation is the most effective way to harmonise, strengthen and clarify equality law in Northern Ireland. However, in the absence of such legislation, we recommend urgent reform of race equality law.

iii. We welcome that, following significant engagement with TEO, many of their proposals align with our advice. However, we are disappointed that the consultation has not addressed all of our recommendations, in particular combined discrimination, which we have identified as a priority area for change. In some sections of the consultation, further clarity would be of assistance to understand and comment more fully upon TEO's proposals.

iv. The Department must follow its approved Section 75 equality scheme commitments when developing or revising policies. The 'screening' assessment of the policy does not appear to 'seek out' opportunities to promote equality of opportunity and good relations, therefore it is unclear how or whether this 'screening' equality assessment has informed the policy proposals.

v. Given the significance of the Race Relations Order review, a more detailed Equality Impact Assessment (EQIA) on the policy would be appropriate. In addition, there is no consideration of 'mitigation' or alternative policies and no Section 75 monitoring arrangements set out. Further advice on Section 75 is available from the Commission.

vi. In summary[1], our response outlines that we recommend action to:

Overarching recommendations

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

[1] Our recommendations as outlined in this executive summary reflect the structure of the TEO Consultation, presenting recommendations where they are first of relevance in our response. Some recommendations are of relevance to multiple questions asked by TEO e.g. in relation to increasing protection on grounds of colour and nationality.

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

Changes affecting multiple provisions

- Increase protection on grounds of colour and nationality
- Remove the comparator requirement in the definition of victimisation and maintain scope of protections
- Widen the definition of ‘racial harassment’
- Further limit exemptions to race equality law (public order, national security and public safety)
- Define direct racial discrimination in terms of treatment occurring ‘because of’ racial grounds
- Introduce protections against combined discrimination

Education

- Increase protection against victimisation for pupils in schools
- Ensure greater protection in relation to admission to educational establishments
- Clarify protection in provision of education
- Simplify the enforcement mechanism for education complaints against schools

Employment

- Clarify, and extend the persons covered by, proportionate and legitimate exceptions from occupational requirements
- Ensure greater protection for employees against third party racial harassment
- Extend protection from qualification bodies
- Enhance protection regarding providers of employment services
- Increase protection for agency and contract workers

- Ensure the appropriate parties can be held liable for unlawful acts
- Expand the scope of positive action to better address disadvantage and disproportionately low participation, and meet differential needs
- Narrow the employment exception on foreign nationals in public service
- Ensure protection for Councillors against racial discrimination and harassment by local councils
- Clarify protections against victimisation for office-holders
- Expand protection for law enforcement officers

Provision of goods, facilities and services

- Increase protection for individuals against racial discrimination and harassment by public bodies when carrying out their public functions
- Extend protection after relationships (members of clubs / associations) have come to an end
- Clarify law regarding competitive activities

Equality Commission for Northern Ireland

- Introduce additional preventions against influencing others to discriminate
- Strengthen and harmonise the Commission's grant-making powers
- Maintain powers to undertake research and educational activities
- 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 legislation
- 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

Enforcement

- Increase powers for tribunals
- Maintain the questionnaire procedure, and allow for tailoring of questions
- 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

Others

- Ensure provision for effective ethnic equality monitoring to improve the delivery of public services
- Provide legal protection for volunteers
- Define 'racial grounds' non-exhaustively, and specifically include caste and descent

Excepted matters

- Remove the immigration exception which permits discrimination on the grounds of ethnic or national origins in carrying out immigration functions
- Allow political parties to take positive action measures when selecting candidates

vii. This Executive Summary, and the fuller response to the consultation below, are based upon the Commission's recommendations relating to race equality law reform. To read more about those, along with additional underpinning detail, visit www.equalityni.org/RaceLawReform

viii. We look forward to further engagement with stakeholders and decision-makers on reform of racial equality law.

1 Introduction

1.1 We welcome the opportunity to respond to TEO's consultation on the Review of the Race Relations (NI) Order 1997 ('the RRO').

1.2 The Commission has made a range of detailed recommendations on race law reform, following engagement with officials and stakeholders. Nevertheless, we continue to recommend that the most effective way to reform equality law in Northern Ireland is through single equality legislation.

1.3 It is welcome that, following engagement between the Commission and TEO, many of the proposals in the consultation align with recommendations made by the Commission. However, we are disappointed to note that not all of our recommendations have been included in consultation proposals, in particular combined discrimination, which we have identified as a priority area for change.

1.99 As expanded on further below, we urge TEO to **share their position on the introduction of combined discrimination** in writing with the Commission and wider stakeholders, including any concerns they may have on implementation.

1.100 In some sections of the consultation, further information / detail would be of assistance to assist us and others to more fully understand TEO's proposals and be able to comment more fully on them. We include pointers to such areas in our response.

1.101 We look forward to further engagement with TEO and other key stakeholders to ensure strengthened, harmonised and clearer race equality law which better delivers for all in Northern Ireland.

Single Equality Legislation

1.102 We continue to call for action to deliver harmonised single equality legislation for Northern Ireland[2].

[2] ECNI (2022) Single Equality Act

1.103 Single equality legislation is the most effective means of strengthening and maintaining protections against discrimination in Northern Ireland.

1.104 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.

1.105 It is fundamentally unfair that different equality groups have different protections without justifiable reason. Such differing protections contribute to a 'hierarchy of rights'.

1.106 We call on decision-makers to take steps to legislate for a single equality act in Northern Ireland.

1.107 This legislation should reflect international human rights standards and best practice, taking account of lessons from Great Britain, Ireland and wider jurisdictions. 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.

1.108 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.

1.109 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. We understand from the consultation document[3] that TEO aims to bring forward a new Racial Equality Bill to replace the Order.

Overarching approach to equality law reform

1.110 In general, we recommend that decision-makers ensure equality law reform reflects best international standards, advances equality of opportunity, prevents discrimination, and clarifies the law.

[3] TEO (2023) Review of the Race Relations (NI) Order 1997: Consultation Document, p. 8.

1.111 Equality law in Northern Ireland should reflect best international standards, taking account of best practice and lessons from Great Britain, Ireland and wider jurisdictions.

1.112 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.

1.113 Furthermore, law reform should serve to make equality law as clear and easily understandable as possible.

Windsor Framework

1.114 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 (formerly the Ireland/Northern Ireland Protocol) [4]. Any future new draft legislation should also make clear in its Explanatory Memorandum what consideration has been given to Article 2 of the Windsor Framework

1.115 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.

1.116 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 protections[5].

[4] 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

[5] 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

1.117 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.[6]

1.118 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.[7] Further, the Commissions have, as a result of the findings of the research, developed a number of key policy recommendations.[8]

1.119 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 what legal and policy changes might be made as required and as a matter of best practice.[9]

1.120 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.[10]

Wider benefits of race law reform

1.121 In relation to the issues raised by TEO, we have outlined below the rationale for our position. However, there are also wider overarching benefits to reforming the racial equality law, as

[6] For further information on our recommendation relating to race law reform and Article 2 of the Windsor Framework, see ECNI (2023) Race Law Reform: Priorities and Recommendations.
[7] 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
[8]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.
[9] Ibid page 43.
[10] Ibid page 45.

outlined here, and highlighted in further detail in our full position paper[11]:

- 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

Priorities for Action

1.122 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

1.123 We welcome that many of these priorities are reflected in the consultation, as expanded upon below. However, we note that TEO has raised concerns around expanding the scope of racial grounds to include caste and descent, and the consultation proposals do not include any consideration of combined discrimination. We urge TEO to reform race equality law in line with these priorities.

[11] ECNI (2023) Race Law Reform: Priorities and Recommendations.

1.124 For further detail on these priorities and our wider recommendations, including supporting rationales, please see www.equalityni.org/RaceLawReform

2 Section 75 Screening Document

2.1 The Commission provided advice to the Department on a document titled '*EQIA screening'* of this policy, in December 2021 and that advice remains. At that time, we referred to ensuring that commitments made in the Department's equality scheme, are implemented. Commission advice on the current consultation 'screening' document is as follows:

Purpose of Screening and Equality Impact Assessments (EQIA's)

2.2 The purpose of an 'equality assessment' (whether 'screening' or 'EQIA'), is that during policy development, the assessment is used to **seek out opportunities** to better promote equality of opportunity and good relations. Any equality assessment should therefore aim to '**inform'** the proposed policy and lead to mitigations (changes or improvements) to the policy and/or consideration of alternative policies, to better promote equality of opportunity and good relations. It is unclear how this 'screening' document has informed the policy.

Undertake an EQIA

2.3 Given the significance of the Race Relations Order review, we anticipated that an EQIA on the policy would be conducted, in line with the criteria set out in TEO's equality scheme. This may have enabled a more detailed assessment of the potential equality impacts and consideration of alternative policies.

Screening policy out without mitigation

2.4 The screening decision is to 'screen out the policy without mitigation' on the basis that '*there are major but positive impacts on those from a minority ethnic background'* (underline our emphasis). The document refers throughout to the policy benefiting all.

2.5 Where a policy, such as this, is being drafted to address inequalities for a particular Section 75 group, it is still vital that an appropriate equality assessment is undertaken. The Department should equality impact assess such policies, in order to assess and seek out if there are opportunities to further promote equality of opportunity and good relations for the Section 75 groups, in relation to these policies. Such an assessment should consider the needs and inequalities experienced by different racial groups and multiple identity issues across the Section 75 groups e.g. needs of ethnic minority, disabled, women. The rationale for the screening decision and the conclusion that '*No mitigating action required'* is therefore queried.

No Section 75 monitoring arrangements

2.6 '*Part 4: Section 75 Monitoring'* of the document is not completed and there are no Section 75 monitoring arrangements included in the document.

2.7 The Department must set out in an equality assessment (whether screening or EQIA), how, once the policy is adopted, they are going to monitor the actual impacts of the policy, across the Section 75 categories, as per Equality Scheme arrangements. Once this data is collected, it must then be published in line with Equality Scheme arrangements. Given that the Department identified in the evidence section of the 'screening' document that there are gaps in data i.e. ' …… *aspects for which robust data is currently unavailable and to fill known gaps in the knowledge base….*'. the Section 75 monitoring arrangements should set out specifically the monitoring arrangements to address these data gaps.

2.8 The Commission has limited this Section 75 advice to the key issues identified. If you would like to discuss this advice or would like more detailed advice, please contact:

Patrice Hardy, ECNI Public Sector Equality Manager,
Email: phardy@equalityni.org, Tel: 028 90 500 616

3 Changes affecting multiple provisions

3.1 We welcome TEO's aim 'to provide better overall protection', by widening the scope of the legislation, in relation to reforms which will affect multiple provisions.

3.2 As above, reformed race equality legislation should reflect best international standards, advance equality of opportunity, prevent discrimination, and clarify the law.

Racial discrimination (colour and nationality)

3.3 Increasing protection on the grounds of colour and nationality has been a long-standing priority area for the Commission, and we welcome that TEO intends to address the current 'two-tier' system.

3.4 However, as below, we also recommend that the scope of racial grounds is expanded, to be non-exhaustive and explicitly include caste and descent.

3.1 TEO should be clear that it intends to harmonise colour and nationality upwards to ensure greater protection across all racial grounds.

3.2 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.

3.3 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 Framework.

3.4 This change will help to clarify, strengthen, harmonise and simplify the legislation.

3.5 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.

3.6 This 'two tier' level of protection came about following the introduction in Northern Ireland of legislation to implement the EU Race Directive[12] in 2003[13]. 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.

3.7 The main impacts of this 'two tier' level of protection are summarised below, and attention to these will be required when reforming racial equality law:

- 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 functions, this prohibition does not extend to the grounds of colour or nationality.
- Although the race legislation prohibits discrimination against office holders, such as chairpersons or board members of non-departmental public bodies, this 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

[12] 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
[13] Namely, the Race Relations Order (Amendment) Regulations (NI) 2003

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 people[14], premises[15] 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[16] [17].
- 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 ethnic or national origins, but does not apply to the same provisions in relation to colour and nationality.

3.8 These anomalies have led to difficulties and confusion for those seeking to understand their responsibilities and to exercise their

[14] Article 12 of the RRO 1997.
[15]Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp.66-68.
[16] See below in relation to narrowing the employment exception on foreign nationals in public service
[17]Dickson, 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).

rights under the legislation, as well as resulting in reduced protection on the grounds of colour and nationality.

3.9 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 legislation[18] likewise defines the 'ground of race' as 'race, colour, nationality or ethnic or national origins'.

3.10 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.

3.11 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.

3.12 Further, reform 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.

3.13 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

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

review the law's protection against colour and nationality discrimination[19].

Discrimination by way of victimisation

Individuals

3.14 We disagree with the proposal to restrict the definition of victimisation to cover only individuals. Non-individuals, such as limited companies, should continue to be protected from victimisation, in line with their protections against discrimination.

3.15 The victimisation provision protects the right of a victim of unlawful discrimination to complain about it without being subjected to retaliation for doing so.

3.16 We note that the Equality Act 2010[20] restricts the victimisation provision only to individuals. However, 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 discrimination[21].

3.17 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.

Comparators

3.18 We agree that there should no longer be a 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.

[19] OFMdFM (2015) Racial Equality Strategy 2015-2025, para 5.13
[20] Section 27(4) of the Equality Act 2010.
[21] Relevant case law includes Race Relations Board –v- Applin [1974] UKHL 3 and Re Northern Ireland Electricity Service's Application [1987] QBD.

3.19 This change will make it easier for individuals to will make it easier for claimants to show subjection to victimisation.

3.20 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 compliant 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.

3.21 Professor Dickson argued[22] 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.

3.22 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.

Harassment – 'related to'

3.23 We agree 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.

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.

3.24 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 person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment[23].

3.25 This recommendation would enhance the protection of people who are being harassed, since proving that harassment was

[22]Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 44-45.
[23] See Article 4A of the RRO 1997.

'related to' race can be easier to do than proving that it was 'on grounds of' race[24].

3.26 This is in line with the definition of harassment under the EU Race Directive[25] which refers to an unwanted conduct "related to" racial or ethnic origin.

3.27 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 Directive[26]. 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,[27] [28] which enhance protections, including the Race Equality Directive.

3.28 It is of note that in the sex discrimination case of *R (Equal Opportunities Commission) v Secretary of State for Trade and Industry*[29], 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 accord with the requirements of the amended Equal Treatment Directive[30].

3.29 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

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

[25] See Article 2 of Race Directive

[26] 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

[27] 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.

[28] 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

[29] [2007] ICR 1234

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

substantially the same terms as the amended Equal Treatment Directive.

3.30 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.

3.31 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.

3.32 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.

3.33 Finally, we continue to recommend[31] 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.

Acts safeguarding national security

Exemptions

3.34 We agree that the **current exemption in race equality law based on public order should be removed**. **Exemptions based on national security and public safety should be limited.**

3.35 The law in Northern Ireland is much more permissive of exemptions than the law in England, Wales and Scotland.

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

3.36 At present, race equality law[32] includes an exemption for the purpose of safeguarding national security or protecting public safety or public order. However, in Great Britain[33] there is only an exemption for the purpose of safeguarding national security.

3.37 Defining national security, public safety and public order is notoriously difficult[34]. 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 proportionate[35].

3.38 Dickson argues[36] 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.

3.39 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 2010[37].

Justified/ proportionate

3.40 As above, **any exemptions relating to national security or public safety should be limited.**

3.41 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.

[32] Article 41 of the RRO 1997.
[33] Section 192 of the Equality Act 2010.
[34] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 109-110
[35] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 109-110..
[36] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 110.
[37] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 110.

3.42 Using the language of 'proportionate', rather than 'justified' would helpfully align with other areas of the RRO 1997[38], and also with the approach in GB[39].

Combined discrimination

3.43 We have identified ensuring protection against combined discrimination as a priority issue.

3.44 As already communicated to TEO officials, we are disappointed that proposals and related arguments for or against the inclusion of combined discrimination in reformed race equality legislation are not being presented to consultees for consideration and input as part of this consultation. In the absence of written rationale within the consultation, it is difficult for us and other stakeholders to consider proposals and offer support and/or potential improvements.

3.45 While our preference remains for single equality legislation, we consider that combined protection can be given effect to via standalone race equality law. We note that Professor Dickson recommended the inclusion of combined discrimination in standalone racial equality law, stating in his expert report[40] that 'Making express provision for claims of combined discrimination has to start somewhere'.

3.46 We urge TEO to **share their position on the introduction of combined discrimination** in writing with the Commission and wider stakeholders, including any concerns they may have on implementation.

3.47 The importance of this issue has already been recognised by the NI Executive; the 2015-2025 Racial Equality Strategy[41] 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

[38] 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
[39] Section 192 of the Equality Act 2010
[40] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 33.
[41] OFMDFM (2015) Racial Equality Strategy 2015 – 2025, paras 3.22-3.25

we might provide protection against forms of multiple discrimination'.

3.48 We continue to 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.

3.49 Courts and tribunals should be able to take into account the effect of the combination of racial discrimination with discrimination on other grounds.

3.50 This change will remove unjustifiable legal barriers that individuals face when trying to prove discrimination on more than one equality ground.

3.51 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.

3.52 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.

3.53 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.

3.54 Although case law[42] 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

[42] 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.

would provide clarity and certainty for individuals that this legislative gap had been addressed.

3.55 The Fundamental Rights Agency's Handbook on European Non-Discrimination Law[43] 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.

3.56 However, finding agreed definitions has proven difficult[44] and therefore the phrase 'combined discrimination' may be helpful[45]. This reflects the Canadian approach, which prohibits discrimination on one or more grounds, and the effect of a combination of grounds[46]. Professor Dickson argues[47] that this 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'.

3.57 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.

3.58 For example, a NICEM research report on the experiences of ethnic minority women in Northern Ireland[48] 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

[43] FRA (2019) Handbook on European non-discrimination law, p 59.
[44] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 28-29.
[45]Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 28-29.
[46] 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'
[47] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 29.
[48] NICEM (2013) Experiences of Ethnic Minority women in Northern Ireland.,

a combination of being both a woman and an ethnic minority or migrant.

3.59 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 years[49].

3.60 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 race[50].

3.61 Our recommendation is also in line with the recommendations of international human rights monitoring bodies, and the approach embraced by other jurisdictions.

3.62 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, CERD[51] recommended that both states should explicitly provide for the prohibition of multiple discrimination.

3.63 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 2010[52].

3.64 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

[49] FRA (2017) Second European Union Minorities and Discrimination Survey: Main results, p. 23.
[50] This represented 28% of the overall number of enquiries/applications on race (namely 406 enquiries).
[51] 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.
[52] 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.

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 Commission raised concerns over the approach taken in the Equality Act 2010[53] [54].

3.65 Despite being broadly welcomed, these provisions on dual discrimination did not come in force and in April 2011[55] 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.

3.66 The extension of protection against combined discrimination on more than two grounds has already been embraced by other jurisdictions, including nine EU Member States[56], Canada[57] and South Africa[58].

3.67 To ensure consistency and harmonisation, legislation should protect against combined direct and indirect discrimination, as well as harassment and victimisation[59].

Direct discrimination – 'because of' racial grounds

3.68 Although not included in the consultation, we have recommended that 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.

3.69 Current legislation[60] 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.

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[53] ECNI (2007) Response to the DLR Consultation on a single equality Bill.
[54] ECNI (2009) Response to the Government Equalities Office consultation on multiple discrimination, p. 3.
[55] Government Equalities Office (2013) Equality Act Guidance.
[56] Fundamental Rights Agency (2017) Fundamental Rights Report, p. 69; Austria, Bulgaria, Croatia, Germany, Greece, Italy, Romania, Slovenia and Sweden.
[57] Section 3(1) of the Canadian Human Rights Act 1985.
[58] Section 9 (3) of the Constitution of the Republic of South Africa, 1996, Chapter 2: Bill of Rights.
[59] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland.
[60] Article 3(1)(a) of RRO 1997.

3.70 However, Professor Dickson argues that 'because of' includes more behaviour than 'on grounds of' and includes factors beyond motivation[61].

3.71 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. It therefore makes sense to define direct discrimination as occurring 'because of' certain treatment rather than 'on grounds of' certain treatment.

3.72 This reform would be in line with changes made in Great Britain[62].

4 Education

4.1 It is welcome that TEO proposes to make several reforms to improve protections within educational establishments.

Discrimination by way of victimisation

4.2 We agree that **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.

4.3 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.

4.4 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.

[61] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 35-36.
[62] Section 13 (1) of the Equality Act 2010.

4.5 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 sibling[63].

4.6 Confirming pupils in schools have protection from being victimised if they make a discrimination or harassment complaint, for example, a complaint that they have been racially harassed by a teacher, would clarify the law[64].

4.7 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.

4.8 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 discrimination[65] 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 sibling[66]. 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.

Bodies in charge of educational establishments – recreational facilities

4.9 We note TEO's intention to introduce a duty not to discriminate in the provision of recreational and training facilities. 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.

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[63] 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.
[64] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 92-93.
[65] Section 85(4)(5) of the Equality Act 2010.
[66] Section 86(2) of the Equality Act 2010.

4.10 Nevertheless, we would highlight that within the consultation document, TEO has referred to Section 93 of the Equality Act 2010, and noted there is no express equivalent in Northern Irish legislation. We consider that Section 93 of the Equality Act 2010 relates to local authorities in England and Wales, who are responsible for providing education there. Educational establishments in NI are already under a duty not to discriminate under Article 18 of the RRO, and this duty is intended to be further extended through amendments to Article 18, as below. The Education Authority and CCMS are additionally prohibited under Article 19 from any discrimination which may fall outside Article 18.

4.11 We note that Professor Dickson considered the issue of local Councils and recreational facilities, which are covered by Section 93 of the Equality Act 2010, and found there was no need for amendment[67].

Bodies in charge of educational establishments – arrangements in application process

4.12 We welcome TEO's recognition that 'it is important to strengthen the legislation to make sure no application process discriminates on grounds related to Race', and intention to add 'arrangements' to cover the application process.

4.13 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.

4.14 The current protections in Northern Ireland against discrimination by a school, college or university are in the terms 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.

4.15 This could help ensure admissions criteria are not racially discriminatory.

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

4.16 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 discriminatory[68].

4.17 It is unlawful[69] 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.

4.18 However, the Equality Act 2010[70] 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 situation[71].

Bodies in charge of educational establishments – catch-all

4.19 We welcome reform to ensure that the **law explicitly states that racial discrimination in the way an educational establishment provides, or does not provide, education for a student is prohibited.**

4.20 Racial discrimination in the way an educational establishment provides or does not provide education is not currently mentioned in the Northern Irish legislation, whereas it is explicitly stated in Great Britain's law[72]. It may already be covered by the protection against suffering 'any other detriment'[73], but specific provision would remove doubt.

4.21 Dickson argues[74] this would 'make it abundantly clear to educational establishments, especially schools, that they cannot use race as a reason for distinguishing between

[68] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p.94.
[69] Article 18 (1) of the RRO 1997.
[70] Sections 85(1) and 91(1) of the Equality Act 2010.
[71] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 94-95.
[72] Sections 85 (2) and 91 (2) of the Equality Act 2010.
[73] Article 18(1)(c) of the RRO 1997.
[74] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 90.

students either in the way that they are taught or in the way that they are excluded from being taught'.

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

Claims under Part III

4.23 We welcome the intention to **remove the two month notice period which must be given to the Department of Education before a claim of discrimination is made.** .

4.24 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.**

4.25 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.

4.26 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.

4.27 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.

4.28 These restrictions unnecessarily prolong the adjudication process and is a form of enforcement not found in other areas covered by the race equality legislation.

4.29 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.

4.30 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.

5 Employment

5.1 We welcome that TEO have made several proposals to strengthen protections in relation to employment.

Applicants and employees

5.2 As above, we **broadly welcome taking steps to ensure gaps in legislation are addressed**, if in doing so, there is better protection against discrimination, harassment and victimisation.

5.3 In general, we would welcome the intent to ensure that all forms of employees and employment are protected from racial discrimination. The removal of the exception in relation to the grounds of colour and nationality and employment in private households would align with our priority recommendation to increase protection on these grounds.

5.4 However, it would be helpful if TEO provided further detail as to how it intends to ensure wider cover for those in the gig economy, zero-hours contracts and self-employed people, beyond existing protections.

Exception for Genuine Occupational Requirement – Article 7A and 8

5.5 We welcome the proposed amendments in relation to occupational requirements.

5.6 **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.

5.7 Any occupational requirement exception should be extended to persons analogous to employees, such as contract workers, partners, office-holders and volunteers.

5.8 It should be explicit that the exception must be applied proportionately and be a means of achieving a legitimate aim.

5.9 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 jobs[75].

5.10 In 2003, article 7A was inserted into the Order to ensure compliance with the Race Equality Directive of 2000[76]. 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 7A[77].

5.11 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.

5.12 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.

[75] 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.
[76] See the Race Relations Order (Amendment) Regulations (NI) 2003.
[77] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 63.

5.13 To avoid doubt[78], 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.

5.14 As noted in the consultation document, this recommendation is in line with the law in Great Britain[79], and would also move the law to become more consistent with legislation in the Republic of Ireland[80].

5.15 As above, we have recommended a harmonised approach to colour and nationality.

Contract workers

5.16 Although not raised in the consultation, we note that, unlike the legislation in Great Britain[81], contract workers in Northern Ireland are not explicitly protected against victimisation, which may reduce the likelihood of victims raising concerns[82]. We therefore recommend that **racial equality legislation specifies that both contract and agency workers are protected against victimisation.**

Third-party harassment

5.17 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**. The Commission has identified this as a priority area for change.

5.18 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.

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[78] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 64.
[79] Schedule 9 (1)(1) of the Equality Act 2010.
[80]Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 64.
[81] Section 41 of the Equality Act 2010.
[82] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 99

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

5.20 We note that the consultation highlights this issue in relation to contract workers, but we understand consideration is being given to ensuring this applies across sectors. It would be welcome if TEO confirmed this more widely.

5.21 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.

5.22 For example, BAYANIHAN! The Filipino Community in Northern Ireland, a report produced by the Northern Ireland Council for Ethnic Minorities (NICEM) in 2012[83], 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.

5.23 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.

5.24 More recently, a UK-wide TUC survey[84] 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.

5.25 Whilst we supported the introduction in the sex equality legislation of a clear duty on employers to take reasonably

[83] NICEM (2012) *Bayanihan! The Filipino community in NI,*
[84] Ashe, S. et al (2019) Racism Ruins Lives: An analysis of the 2016-2017 Trade Union Congress Racism at Work Survey, pp. 27-30.

practicable steps to prevent employees being subjected to third party harassment, we do not agree that the employee should have to wait until the third incident of harassment before an employer is required to take action.

5.26 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".

5.27 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 incident[85].

5.28 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.

5.29 It will be noted that the UN Committee on CERD expressed concern[86] about the UK Government's Red Tape challenge[87]. The Committee indicated that it threatened "to dilute or reverse the State Party's achievements in the fight against racial

[85] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 71-75.
[86] CERD (2011) Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK (2011) CERD/C/GBR/CO/18-20.
[87] 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

discrimination and inequality". It recommended that the UK Government implemented all of the provisions of the Equality Act and ensure there is no regression from the current levels of protection[88].

5.30 We note that there is currently a Private Members' Bill[89] progressing through Parliament on this issue, and has received Government support in the House of Commons.

5.31 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.

5.32 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*[90] 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.

5.33 It should also be noted that the equality legislation in the Republic of Ireland[91] 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.

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[88] CERD (2011) Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK (2011) CERD/C/GBR/CO/18-20.
[89] UK Parliament (2023) Worker Protection (Amendment of Equality Act 2010) Bill [accessed 25/05/23].
[90] UKEAT/0247/18/JOJ (18 October 2019, Choudhury J), [2020] ICR 849.
[91] Section 14A of the Employment Equality Act, 1998.

5.34 Any post-harassment discriminatory treatment of employees by employers should also by explicitly prohibited, as is the case in the Republic of Ireland[92].

Partnerships

5.35 We note TEO's intention to reform provisions relating to partnerships in article 12 of the RRO 1997. It is our understanding that article 12, which prohibits firms from discrimination against a Person, relates to a position as a *partner* in the firm, while article 6 protects *employees*, including those employed by any size of a partnership. This understanding is in contrast to the TEO consultation which suggests article 12 relates to employees.

5.36 The consultation document states that TEO[93] intends to '*delete the exception for organisations with six or more partners*'[94]. We would understand that this should read '*delete the limitation of protection to organisations with six or more partners'* or similar, as the current provisions relate to prohibiting discrimination by firms consisting of six or more partners across the racial grounds.

5.37 Currently, the limitation of protection in relation to partnerships to six or more partners only applies to colour and nationality, with smaller partnerships prohibited from discriminating in relation to a position as partner in the firm on grounds of race or ethnic or national origins.

5.38 As above, we **recommend 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, and would therefore welcome the removal of this recommendation.

3.1 As above, 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

[92] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 74-75.
[93] The equivalent provision in GB is section 44 of the Equality Act 2010. The explanatory notes for this section state that 'Because partners are mainly governed by their partnership agreements, rather than by employment contracts, separate provisions are needed to provide protection from discrimination, harassment and victimisation for partners in ordinary and limited partnerships'.
[94].TEO (2023) Review of the Race Relations (NI) Order 1997: Consultation Document, p. 19.

the Windsor Framework, as regards provisions within scope of the Racial Equality Directive.

Qualifying bodies

5.39 We agree that 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'.

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

5.41 Currently, the law in Northern Ireland[95] 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
- when they withdraw the qualification or vary the terms on which it is held.

5.42 However, the law in Great Britain[96] 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.

5.43 Professor Dickson argues[97] 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'.

[95] Article 14(1) of the RRO 1997.
[96] Sections 53 (d) and (e) of the Equality Act 2010.
[97] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 94.

Persons concerned with provision of vocational training

Widen range of employment service providers

5.44 We agree that 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'.

5.45 Current legislation[98] 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 services[99], including providers of vocational guidance, and providers of assessments required for particular professions or trades.

5.46 Dickson argues[100] 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'.

5.47 Under the Equality Act 2010 in Great Britain[101] 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'.

5.48 Northern Irish law only contains the 'any other detriment' provision in relation to vocational training[102], but not

[98] Article 15 of the RRO 1997.
[99] Section 56 (2) of the Equality Act 2010.
[100] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 96.
[101] Sections 54(1)(a), 54(2)(a) and 55(2)(d) of the Equality Act 2010.
[102] Article 15 of the RRO 1997.

employment agencies[103]. There is therefore a gap in protection compared to Great Britain, which should be filled.

Victimisation

5.49 We note the intention to ensure there is express provision for victimisation in relation to provision of vocational training, rather than relying on provisions such as Article 4.

5.50 As above, the Commission recommends that **equality law is as clear and easily understandable as possible.**

5.51 The approach of specifying victimisation would align with the approach recommended by the Commission in relation to other provisions.

Employment agencies

5.52 We welcome TEO's intent to increase **increased protection against racial discrimination and harassment for certain categories of agency workers** who currently fall outside the scope of the race equality legislation, if discriminated against by the end-user. We would add that **protection should also be explicitly applied against victimisation.**

5.53 There is currently a gap in protections for agency workers who are discriminated against by the end user, if there is no contract between the worker and the end user.

5.54 The need for reform in this area has been highlighted by the Northern Ireland case of *Bohill v Police Service of Northern Ireland (PSNI)*[104] and the case in Great Britain of *Muschett v-HM Prison Service (HMPS)*[105]. 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.

5.55 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

[103] Article 16 of the RRO 1997..
[104] [2011] NICA 2, http://www.bailii.org/nie/cases/NICA/2011/2.html
[105] [2010] EWCA Civ 25, http://www.bailii.org/ew/cases/EWCA/Civ/2010/25.html

equality legislation. Importantly, the NI Court of Appeal also highlighted this was an area of law likely to benefit from law reform.

5.56 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.

5.57 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 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.

5.58 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'.

5.59 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 LJ[106] that a gap might exist in the remedies available to workers in the appellant's position would appear to be confirmed".

5.60 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."

5.61 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

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

from the attention of the section of the office of OFMDFM concerned with legislative reform."

5.62 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."

5.63 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.

5.64 Of further note is the Court of Appeal in Great Britain's decision in the case of *Muschett v HM Prison Service (HMPS)* in 2010[107]. 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.

5.65 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.

5.66 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.

5.67 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.

[107] [2010] EWCA Civ 25, http://www.bailii.org/ew/cases/EWCA/Civ/2010/25.html

5.68 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.

5.69 Whilst the Agency Workers Regulations (NI) 2011[108] 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 form of contract under which they undertake to perform work and services personally for the agency[109].

5.70 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 legislation[110]. 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.

Barristers

5.71 We note the intention to specify protection against victimisation by a barrister of a pupil or a tenant.

5.72 As above, the Commission **welcomes reform to clarify equality law.** 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.

5.73 Specifying the prohibition of victimisation would align to Commission recommendations in relation to other aspects of race equality law reform.

[108] Agency Workers Regulations (NI) 2011 came into force in Northern Ireland on 5 December 2011.
[109] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 100.
[110] Article 9 of the RRO 1997.

Liability of employers and principles

5.74 We recommend that **both employers and employees, and principles and agents, face appropriate liability for discriminatory acts.**

5.75 Likewise, third-parties who have knowingly aided unlawful acts should continue to be able to held liable.

5.76 We note that TEO wishes to 'provide for employee /agent personal liability for unlawful acts', and references Section 109 of the Equality Act 2010. However, it is unclear from the consultation document to what extent Section 110 of the Equality Act 2010, which addresses the liability of employees and agents, and should be read with Section 109, has been considered. As Section 110 has not been referred to in the consultation, it is difficult to understand the implications of TEO's proposals, and comment upon them.

5.77 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.

5.78 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 considered[111] that no amendment was required in relation to the liability of employees and agents.

5.79 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.

5.80 **Third-parties who are not employees or agents should continue to be able to be held personally liable if they have**

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

knowingly aided unlawful acts[112], similar to provisions within the Equality Act 2010[113].

Discriminatory training

5.81 It is welcome that TEO wants to **widen the scope for voluntary positive action** that employers, service providers and public bodies can lawfully take to promote racial equality. This is a priority recommendation for the Commission. We have also called for the **removal of unnecessary barriers** relating to collecting statistical information before taking such action.

5.82 It would be helpful for TEO to provide further information as to what extent they intend to mirror the Equality Act 2010, or other NI equality legislation.

5.83 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.**

5.84 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 activity[114].

5.85 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.

5.86 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.

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[112] Article 33 of the RRO 1997.
[113] Section 112 (1) of the Equality Act 2010.
[114] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 55.

5.87 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.

5.88 Current provisions allowing positive action under the race equality legislation in Northern Ireland are more limited[115] than what is permissible under EU law[116].

5.89 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 Windsor Framework Annex 1, that enhance protections[117] which includes the Race Equality Directive [118].

5.90 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.

5.91 Section 33 of the Republic of Ireland's Employment Equality Act 1998, as amended by the Equality Act 2004, allows

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

[116] 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."

[117] 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.

[118] 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.

measures taken which promote integration in the working environment. We note that Professor Dickson[119] 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.

5.92 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 2010[120].

5.93 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.

5.94 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.

5.95 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

[119] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 53-57.
[120] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 55.

services, targeting resources or induction or training opportunities to benefit a particular disadvantaged group.

5.96 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. This is likely to present difficulties due to a lack of statistical information about the extent of participation by individuals from minority ethnic groups in the workplace[121].

5.97 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 period[122]; 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.

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

5.99 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.

5.100 Since 2011 in Great Britain[123] 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 qualified[124], and is considered to be

[121] The current provisions state that certain types of positive action can only be taken if it reasonably appears that within the previous 12 months there were no or a relatively small proportion of persons of that racial group undertaking that work in Northern Ireland or in an area within Northern Ireland.
[122] 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.
[123]Section 159 of the Equality Act 2010.
[124] EHRC (2014) Supplement to the Employment Statutory Code of Practice, p. 8.

little used in practice[125]. 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 limited[126].

5.101 Given these complexities, we propose that further consideration and guidance would be needed before introducing such measures.

Acts done under statutory authority

5.102 We agree that the **restriction on persons of a particular birth, nationality, descent or residence being employed in the service of the Crown or certain public bodes should be modified or removed.**

5.103 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 impacted[127].

5.104 Following the UK's exit from the EU, the UK Government has published updates to the Civil Service Nationality Rules[128] and amended the definition of 'a relevant European' in the Aliens Employment Act 1955[129]. These changes have impacted the

[125] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 60-61.
[126] 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.
[127] 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
[128] UK Government (January 2021) Changes to the Civil Service Nationality Rules from the 1st January 2021 Guidance & Departmental Actions
[129] 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.

5.105 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.

5.106 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"[130].

Other office holders

Councillors

5.107 We agree that **local Councillors should be protected against racial discrimination and harassment by their local councils when they are carrying out their Councillor functions**. They should also be **specifically protected against victimisation**, in line with other suggested reforms to clarify protection against victimisation throughout the legislation.

5.108 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.

5.109 It would, for example, enable a Councillor to bring a racial discrimination complaint if they were denied access to facilities

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

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.

5.110 Professor Dickson argues[131] 'there can be no justification for continuing to exclude such protection'.

5.111 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.

Ministerial/ Departmental Appointments

5.112 We agree that 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.

5.113 We also agree that protections should apply on the grounds of colour and nationality, in line with our priority recommendations as outlined above.

5.114 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 religion[132].

5.115 The current law in Northern Ireland concerning discrimination against office-holders is complex and needs to be clarified to ensure protection for all office-holders[133]. It does not include an

[131] Dickson, B (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp 79-80.
[132] EHRC (2011) Employment Statutory Code of Practice, para 11.32.
[133] 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.

explicit right for office-holders not to be victimised, unlike the Equality Act 2010[134].

5.116 Office-holders in Northern Ireland who believe they have been victimised may be protected by the general prohibition[135] against victimisation. However, clarification would be beneficial[136].

5.117 The Equality Act 2010 refers to victimisation at several points, despite also having a general provision outlawing victimisation[137], 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 Ireland[138].

5.118 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 NI[139].

The PSNI and the Police Service of NI Reserve

5.119 We agree that 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.

5.120 The law should make it clear that police officers from other forces who are in Northern Ireland to give assistance to the PSNI[140], as well as those in other law enforcement services, such as the Belfast Harbour Police,[141] the Belfast International

[134] Sections 49(8), 50(9) and 50(10) of the Equality Act 2010,
[135] Article 4 of the RRO 1997.
[136] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 76-78.
[137] Section 27 of the Equality Act 2010.
[138] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 77.
[139] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 76-78.
[140] 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.
[141] In existence since 1847 under the Harbours, Docks, and Piers Clauses Act of that year.

Airport Constabulary[142] and the National Crime Agency,[143] are all protected by the race equality laws while serving in Northern Ireland.

5.121 Police cadets should be covered too, similar to the status of police trainees.

5.122 Currently, some law enforcement officers are protected against racial discrimination in Northern Ireland, while others may not be[144].

5.123 Police trainees and police reserve trainees in Northern Ireland are currently protected against discrimination by the Police (NI) Act 2000[145].

5.124 However, if police cadets were to be appointed in Northern Ireland (none have been to date), they would not currently be protected against discrimination because there is no provision for them comparable to provision for police trainees.

5.125 Professor Dickson has argued[146] 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'.

6 Provision of goods, facilities, services and premises

6.1 We welcome the intention of TEO to reform protections in relation to goods, facilities and services.

Public authorities

6.2 We welcome the intention to **remove the limitation on protection against racial discrimination and harassment by**

[142] Article 19 of the Airports (NI) Order 1994.
[143] 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).
[144] Article 72B of RRO 1997 may already provide for that, but it is not clear.
[145] 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'.
[146] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 81.

public bodies to the four areas of social security, healthcare, social protection or social advantage. The Commission has identified this as a **priority area for change.**

6.3 We note the intention to match the approach taken in GB under the Equality Act 2010. However, TEO should ensure that they fully consider and assure themselves that all the exceptions included in the GB legislation can be objectively justified.

6.4 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 justified[147].

6.5 This prohibition should apply to all racial grounds. Under current legislation, protection only exists on the grounds of race, ethnic or national origins and not on the grounds of colour or nationality.

6.6 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.

6.7 As noted in the consultation document, when being updated in 2003, the legislation was limited to these four areas to reflect the scope of the Race Directive[148] 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.

6.8 '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

[147] The exceptions in Section 21C of the Disability Discrimination Act1995 may be useful to consider. These include some limited exceptions relating to judicial acts and the making, confirming or approving of legislation.
[148] Race Directive Council Directive 2000/43/EC of 29 June 2000.

transport), planning control, licensing and investigation of complaints[149].

6.9 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.

6.10 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.

6.11 In those circumstances, the provisions under the race equality legislation relating to the provision of goods, facilities and services[150] will apply. Such activities will therefore not be covered by the provisions relating to the exercise of public functions.

6.12 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.

6.13 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.

6.14 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[151]. Further, the application of immigration controls was considered not to be covered by the

[149] See for examples EHRC (2011) *EHRC Code of Practice on Services, Public functions and associations*.para 11.16.
[150] Article 21 of the RRO 1997.
[151] See the race discrimination case of *Farah v Commissioner of Police of the Metropolis*, the Court of Appeal in England, [1997] 2 WLR 824.

provisions in the race equality legislation relating to the provision of goods and services[152].

6.15 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.

6.16 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.

6.17 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"[153].

6.18 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.

6.19 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.

6.20 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

[152] 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.
[153] OFMDFM (2004) *A Single Equality Bill for Northern Ireland: Discussion Paper*.

Stephen Lawrence[154]. 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.

6.21 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.

6.22 However, Professor Dickson has raised concerns that some of the exemptions in the Equality Act 2010 may be unjustifiably broad[155]. 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.

6.23 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 areas[156].

6.24 Exemptions have not been referred to in the consultation. Any such exemptions in Northern Ireland should be carefully considered to ensure they are narrowly defined and objectively justified.

6.25 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

[154] Changes were introduced via the Race Relations (Amendment) Act 2000 following the *Macpherson report* into the murder of Stephen Lawrence.
[155] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 41.
[156] 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'[157].

6.26 Finally, in line with our above comments on harmonising protections on colour and nationality grounds, 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.

Small dwellings

6.27 We note the intention to widen the exception under article 23 relating to small dwellings, by covering more relationships. However, this exception currently only applies to colour and nationality. It is unclear why TEO would amend the wording regarding relationships in this article if the intention is to harmonise protections under colour and nationality upwards.

6.28 As above, such **exceptions which apply only to colour or nationality should be considered for removal or modification**, unless there is a justifiable reason to retain them. To our reading, the consultation document does not provide any rationale for maintaining this exception.

6.29 We note TEO's intention[158] in relation to Article 3 to 'ensure that all areas are covered throughout the new Bill'. Protections should be harmonised upwards to the highest standards. Any diminution in rights in relation to race or ethnic or national origins may be a potential breach under Article 2 of the Windsor Framework, as regards provisions within scope of the Race Equality Directive.

6.30 Professor Dickson recommended that article 23 be deleted, arguing[159] that it 'makes no sense to make the exemption inapplicable to only some of the racial grounds which the race equality law is designed to protect'.

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[157] *Second Opinion on the UK, the Advisory Committee on the Framework Convention for the Protection of National Minorities*, June 2007

[158] TEO (2023) Review of the Race Relations (NI) Order 1997: Consultation Document, p. 12.

[159] Dickson., B (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 66-67.

6.31 We note that this exception does not apply to race under the Equality Act 2010[160].

Discrimination: associations not within Article 13

6.32 We would **welcome changes being made to these provisions where they strengthen or clarify the law.**

6.33 As above, equality law in Northern Ireland should reflect best international standards, taking account of best practice and lessons from Great Britain, Ireland and wider jurisdictions. We note that TEO's proposals take account of the Equality Act 2010 and the Equal Status Act 2000.

6.34 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.

6.35 Furthermore, law reform should serve to make equality law as clear and easily understandable as possible.

6.36 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.

6.37 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.

6.38 We note that the addition of the word 'arrangements' in relation to Article 25 may align with recommendations we have made in

[160] Schedule 5 of the Equality Act 2010.

relation to other provisions, such as admission to educational establishments.

Relationships which have come to an end

6.39 We agree that **equality law should ensure that former members of associations are able to bring claims for discrimination or harassment** because of race.

6.40 Currently[161] discrimination or harassment following the end of a 'relevant relationship'[162] 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.

6.41 However, this does not apply to former members of clubs/ associations[163].

6.42 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 were formerly in an employment relationship, an educational relationship or a business-customer relationship[164].

6.43 As noted in the consultation, this reform would be in line with legislation in Great Britain[165], where provision dealing with relationships that have ended is more general.

Sports and competitions

6.44 We agree that 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

[161] Article 27A of the RRO 1997.
[162] 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
[163] 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.
[164] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland pp. 107-108.
[165] Section 108 of the Equality Act 2010.

would include activities like e-sports, music and talent competitions.

6.45 At present, race equality legislation in Northern Ireland[166] 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 game[167].

6.46 However, as noted in the consultation document, the Equality Act 2010[168] 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'[169]. 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*.

7 Equality Commission for Northern Ireland

7.1 We welcome that TEO is considering several long-standing Commission recommendations to strengthen our powers and improve our ability to tackle discrimination, and further equality of opportunity.

7.2 We continue to advise that single equality legislation is the most effective way of reforming equality law, including in relation to Commission powers. As Commission powers vary across different legislation, a consideration of Commission powers is less effective when considered on a ground by ground basis through the lens of reform of only one piece of legislation. **It is important that Commission powers are maintained, and, where appropriate, harmonised upwards.**

7.3 Any consideration regarding amendments to Commission powers should involve direct engagement with the Commission,

[166] Article 38 of the RRO 1997.
[167] Or in pursuance of the rules of any competition so far as they relate to eligibility to compete in any sport or game.
[168] Section 195 (6) of the Equality Act 2010.
[169] Dickson., B (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 105.

and take account of the lessons and evidence-base from our experience of implementation.

7.4 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.

7.5 Further, it is vital that the Commission receives adequate resources to fulfil our duties. The Commission has been subject to successive year on year cuts for more than a decade. Our budget has reduced by nearly 40% in that period and our staffing numbers are currently 50% less than our establishment figure. This is despite the Commission taking on new statutory responsibilities.

7.6 In addition, in December 2022, the European Commission published its proposals on two Directives on standards for equality bodies[170]. 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. As set out below, TEO should be cognisant of developments, and our recommendations, in relation to these EU proposals on Standards for Equality Bodies, which may be relevant to this issue.

7.7 It is essential that the Commission has both appropriate powers and resources to fulfil its duties.

Discriminatory advertisements

7.8 **Provisions around discriminatory advertisements should be retained**. Article 29 of the RRO 1997 prohibits unlawfully

[170] 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.

discriminatory advertisements, while article 60 gives the Commission powers to enforce these provisions.

7.9 Discriminatory advertisements are explicitly prohibited across a range of NI equality legislation[171], allowing us to take action beyond our other investigation powers, where there is no identified victim. This provision should be retained.

7.10 Although there is no direct equivalent for article 29 in the Equality Act 2010, provision for discriminatory advertising is included in the general prohibitions against both direct and indirect discrimination, enforceable by individual complainants, or by EHRC applying for an injunction[172].

7.11 Individual complainants may be able to take cases if they suffer discrimination in relation to the arrangements made for determining who should be offered employment[173].

Instructions to commit unlawful acts

Indirect inducement

7.12 We agree that 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.

7.13 The current legislation in Northern Ireland[174] prohibits instructing, procuring, attempting to procure, inducing or attempting to induce a person to so discriminate. The Equality Act 2010 covers causing or attempting to cause a person so to discriminate, rather than procuring[175].

7.14 Dickson argues[176] that the verb 'procure' is not defined in the 1997 Order, but it is almost certainly embraced by the verb

[171] For example Article 34 of FETO 1998, Article 39 of the Sex Discrimination Order 1976.
[172] EHRC (2011) Employment: Statutory Code of Practice, paras 15.59-15.64.
[173] Article 6 (1)(a) of the RRO 1997
[174] Articles 30 and 31 of the RRO 1997.
[175] Section 111 of the Equality Act 2010.
[176] Dickson, B (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 46-47.

'cause', which may also include a wider range of situations not currently covered.

7.15 Dickson also argues[177] the law should reflect the Equality Act 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 unlawfully[178].

Cover for relationships that have ended

7.16 We agree that **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.

7.17 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.**

7.18 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.

7.19 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 Act[179].

[177] Dickson, B (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 46-47.
[178] EHRC (2011) Employment Statutory Code of Practice, para 9.18.
[179] EHRC (2011) Employment Statutory Code of Practice, para 9.22.

7.20 Further, the Equality Act 2010 covers a wider array of fields when prohibiting influencing discrimination[180]. Among the fields covered by the Equality Act, but not the RRO, are relationships that have ended and the aiding of contraventions / unlawful acts.

7.21 Dickson recommends that these points should also be reflected in the law in Northern Ireland[181].

Individuals' standing to take cases

7.22 Although not addressed in the consultation, the Commission recommends that it **should be clear in statute that individuals are able to take cases if they have suffered detriment from someone instructing or pressurising another to racially discriminate.**

7.23 Currently, proceedings in respect of a contravention of article 30 or 31 of the RRO 1997, relating to instructions and pressure to commit unlawful acts[182] can only be brought by the Commission[183].

7.24 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 employment[184].

7.25 This approach has already been codified in the NI age regulations[185].

7.26 The Equality Act 2010[186] 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

[180] 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..
[181] Dickson, B (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 46-47.
[182] As above, there is a proposal to further prevent persons influencing others to discriminate.
[183] Article 60 of the RRO 1997.
[184] Showboat Entertainment Centre Ltd v Owens [1984] IRLR 7
[185] Regulation 5 of the Employment Equality (Age) Regulations (Northern Ireland) 2006
[186] Section 111(50) of the Equality Act 2010.

is discriminated against. Similar clarification would be welcome in NI race equality law.

7.27 Further, the EU Race Equality Directive[187] 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.

Assistance to organisations/ research and investigations

Assistance to organisations

7.28 The Commission's **grant making powers in relation to race should be retained.**

7.29 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.

7.30 The current legislation[188] 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'.

7.31 Both EHRC[189] and IHREC[190] have the power to make grants to other organisations.

7.32 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.

[187] Article 2 (4) of the Race Equality Directive (Race): Directive 2000/43/EC of 29 June 2000.
[188] Article 43 of the RRO 1997.
[189] Section 17 of the Equality Act 2006
[190] Section 10 (2)(l) of the Irish Human Rights And Equality Commission Act 2014

7.33 Any grants made by the Commission should consider other relevant funds, such as the Minority Ethnic Development Fund[191], and avoid duplication.

7.34 Although we note that the power to give grants does not exist across all areas of other equality law, our general approach is that reform 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.

Research and education

7.35 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**.

7.36 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.

7.37 The current legislation[192] 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.

7.38 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 Dickson[193], which has helped inform these recommendations. Other recent examples of research work including on employer and employees' experiences of

[191] TEO (2022) Racial Equality
[192] Article 44 of the RRO 1997.
[193] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland

welcoming and inclusive workplaces[194], and public opinion surveys on equality issues[195].

7.39 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 duties[196], including on issues specific to race. We have also hosted conferences on significant issues, such as the need for equality law reform, including race law[197].

7.40 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 law[198], as well as in relation to our functions in relation to the EU withdrawal agreement[199].

Codes of practice

7.41 We welcome TEO's intention to **increase ECNI powers to issues Race Codes of Practice.**

7.1 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).

7.2 These changes will enhance our powers to issue additional Race Codes of Practice in a wider range of areas.

7.3 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.

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[194] ECNI (2020) Workplace Research: Shaping Welcoming and Inclusive Workplaces
[195] ECNI (2022) Public Opinion Survey on Equality in Northern Ireland 2021
[196] See ECNI (2023) Training [accessed 18/05/23]
[197] See ECNI (2022) The case for equality law reform in Northern Ireland [accessed 18/05/23)
[198] For instance, see Section 55 of the SDO 1976 and Regulation 38 of the Employment Equality (Age) Regulations (Northern Ireland) 2006.
[199] Section 78B (7) of the NI Act 1998

7.4 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.

7.5 For example, the provisions of the *Fair Employment Code*[200] have been referred to extensively by the Fair Employment Tribunal in its decisions. If 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'[201].

7.6 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.

7.7 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.

7.8 This reform is in line with our powers 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.

7.9 It also aligns with powers that have been granted to the 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.

Power to conduct formal investigations/ Terms of Reference

7.10 We welcome that TEO intends to **increase the powers of the ECNI to carry out formal investigations** by removing procedural barriers.

[200] ECNI (2007) Fair Employment Code of Practice
[201] O'Gara v Limavady Borough Council 31 July 1992 FET.

7.11 We agree that our powers to conduct investigations under the race legislation should be strengthened.

7.12 Although we have not formed a view on the relative merits or shortcomings of EHRC and IHREC investigation powers, we note that the consultation advises the proposed changes would match those possessed by the EHRC. We would highlight that the EHRC has powers to conduct investigations and inquiries, with specific provisions relating to each, under the Equality Act 2006.

7.13 The consultation document also points to part 3 of the Irish Human Rights and Equality Commission Act 2014. Section 35 of the IHREC Act 2014 addresses inquiries, although it requires IHREC to consider that there has been a serious violation of human rights or equality of treatment, or a systemic failure to comply with human rights or equality of treatment obligations, in order to conduct an inquiry. There would therefore seemingly be considerable differences between TEO's proposals and IHREC's inquiry powers.

7.14 We recommend, in line with provisions under the fair employment legislation, that **our power to conduct a formal 'named person' 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.

7.15 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.

7.16 These changes will enhance our ability to undertake formal race investigations by removing unnecessary procedural barriers.

7.17 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.

7.18 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.

7.19 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 workers[202].

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

7.21 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.

7.22 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 investigation[203].

7.23 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

[202] ECNI (2014) Role of the recruitment sector in the employment of migrant workers, A formal investigation.
[203] Article 11 (1) of FETO

named employer, does not need to be based upon a "belief" that an act of discrimination has occurred.

7.24 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.

7.25 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 undertakings[204]. 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.

7.26 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.

7.27 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.

Restriction on the disclosure of information

7.28 Racial equality legislation should allow **appropriate and legally compliant means of disclosure of information where necessary**.

[204] Article 12 of FETO 1998.

7.29 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.

7.30 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[205] 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.

7.31 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.

7.32 We will further consider how this may impact on us and our duties.

Articles 59-62 of the RRO 1997

7.33 We note that TEO is considering removing a range of Commission powers to tackle discrimination. We recommend that these powers are maintained by the Commission, to assist us in fulfilling our duties.

7.34 In particular our **powers to address persistent discrimination, enforce of articles 29-31, take preliminary action in employment cases, and seek undertakings should be retained.**

7.35 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.

[205] We note that the consultation document refers to section 6 of the Equality Act 2010, but TEO have verbally confirmed with us that this should be section 6 of the Equality Act 2006.

7.36 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 1976[206].

7.37 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 2006[207], allowing them to apply for an injunction to restrain a person from committing an unlawful act.

7.38 As above, discriminatory advertisements are explicitly prohibited across a range of NI equality legislation[208], 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 direct and indirect discrimination, enforceable by individual complainants, or by EHRC applying for an injunction[209].

7.39 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 groups[210]. Similar powers exist under some other areas of equality law in NI[211]. We note that the EHRC has similar powers. These

[206] Articles 71-73 of the SDO 1976.
[207] Sections 24 and 24A of the Equality Act 2006
[208] For example Article 34 of FETO 1998, Article 39 of the Sex Discrimination Order 1976.
[209] EHRC (2011) Employment: Statutory Code of Practice, paras 15.59-15.64.
[210] ECNI (accessed 2023) Related Work, Housing and Communities – Examples of our Legal Cases Relating to Housing [accessed 19/05/23]
[211] For example, see Reg 44 of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006

powers relating to the Commission's ability to seek undertakings should be retained.

ECNI power to bring cases in its own name

7.40 We note that the consultation considers whether we should be able to take cases in our name. However, the consultation document does not seem to reflect the full extent of the Commission's recommendation, with TEO stating that we recommend we should be 'able to bring cases for individuals in its own name rather than the individual having to be named'.

7.41 We would clarify that the focus of our recommendation is that **we 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**; and the Commission should also have a **general standing to bring cases of strategic importance** without, in appropriate circumstances, having to name complainants.

7.42 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.

7.43 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 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 Framework[212].

7.44 The Commission has a longstanding recommendation[213] 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

[212] Sections 78C - 78D of the Northern Ireland Act 1998
[213]ECNI (2004) Response to OFMDFM Consultation Paper, 'A Single Equality Bill For Northern Ireland paras 10.6-10.9.

bringing his or her own case[214]. 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.

7.45 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 inequality[215].

7.46 We have previously supported the call by Equinet for the inclusion of provisions to allow equality bodies to take cases in their own name[216]. 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."*[217]

[214] ECNI (2004) Response to OFMDFM Consultation Paper, 'A Single Equality Bill For Northern Ireland, para 10.7.
[215] ECNI (2004) Response to OFMDFM Consultation Paper, 'A Single Equality Bill For Northern Ireland paras 10.10-10.11.
[216] 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.
[217] Equinet (2016) Developing Standards for Equality Bodies: An Equinet Working Paper, p. 7.

7.47 In December 2022, the European Commission published its proposals on two Directives on standards for equality bodies[218]. 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".

7.48 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".

7.49 As expanded on below, TEO should be cognisant of developments and our recommendations in relation to EU Proposals on Standards for Equality Bodies, which may be relevant to this issue.

EU Directive on standards for equality bodies

7.50 Although not considered in the consultation document, **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

7.51 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

[218] 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.

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.

7.52 Beyond what is required to under the 'keeping pace' requirement, government should ***voluntarily*** **ensure that NI race equality law deliver changes that strengthen the ECNI** further to this EU directive on standards for equality bodies, if introduced.

7.53 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.

7.54 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.'

7.55 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 place[219]. 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.'[220]

7.56 The Race Equality Directive (2000/43/EC) [221] is listed in Windsor Framework Annex 1 and clearly falls within the scope

[219] 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."
[220] 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.
[221] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

of the dynamic alignment requirements of Article 13(3) and engages the 'keeping pace' commitment.

7.57 In December 2022, the European Commission published its proposals on two Directives on standards for equality bodies.[222] 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.

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

7.59 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'.*[223] 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

[222] 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.

[223] Ibid, page 9.

strengthened and more detailed set of rules. [224] Further it clarifies that the proposal does not introduce legislation in a new area but rather *'revises already existing legislation to increase its effectiveness'.*[225]

7.60 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.

7.61 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.

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

7.63 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).

7.64 The Commission has welcomed the European Commission's initiative and responded to its proposals for binding standards

[224] Ibid, page 4
[225] Ibid, page 7.

for equality bodies .[226] 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.[227]

8 Enforcement

8.1 It is vital that there are strong enforcement mechanisms in place to allow individuals who may have faced discrimination, harassment or victimisation to seek redress.

8.2 We would also draw TEO's attention to our recommendation that that the NI Executive reviews remedies available under NI equality law so as to ensure that these remedies result in real and effective judicial protection of the rights derived from the Annex 1 equality directives and Article 47 of the Charter of Fundamental Rights of the European Union[228].

Jurisdiction of industrial tribunals/Remedies on complaint under Article 52

Recommendations which benefit the whole workforce

8.3 We note that consideration is being given to increasing powers for tribunals to make recommendations that benefit the whole workforce and not simply the person bringing the discrimination complaint. We recommend that the race equality law is reformed in this way, to **widen the powers of tribunals to make recommendations that benefit the whole workforce**.

8.4 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

[226] ECNI (2023) ECNI's response to the European Commission's proposals on Binding standards for Equality Bodies
[227] Equinet, (2016) Developing Standards for Equality Bodies: An Equinet Working Paper,
[228] ECNI (2023) 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, paras 3.24-3.31.

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).

8.5 As noted in the consultation document, this 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* [229] and *McGrath -v- Viper International Limited,*[230] 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.

8.6 This reflects 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 FETO[231]). The UK Government repealed these provisions through the 2015 Deregulation Act[232], suggesting they are an 'unnecessary burden on business'[233]. However, the removal of these provisions was controversial and a House of Lords Select Committee recommended in 2016 that they be reinstated[234], pointing to the ability of tribunals to have a longer-term impact on the extent of discrimination in society.

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[229] 22.05.1992 FET
[230] 30.10.1991 FET
[231] Article 39(8) of FETO 1997.
[232] Section 2 of the Deregulation Act 2015.
[233] GEO (2012) Equality Act 2010: A Consultation, paras 3.1-3.4.
[234] 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.

Sanctions

8.7 We note that the consultation document also refers to Commissions existing investigation powers as a potential means for enforcing non-compliance with a Tribunal recommendation.

8.8 We have recommended that the legislation is amended to ensure that there are **sanctions which are effective, proportionate and dissuasive, in the case of non-compliance with a tribunal recommendation**. FETO may offer a potential model.

Burden of proof: industrial tribunals

8.9 We note that TEO intends to remove the anomaly whereby the reverse burden of proof applies only to some claims under the Order.

8.10 As above, law reform should make **equality law as clear and easily understandable as possible.** 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.

8.11 The consultation does not specify which claims TEO intends to expand the reverse burden of proof to apply to. We note that this reform may assist in harmonising colour and nationality with other grounds. We also note that victimisation is currently not included within provisions relating to the reversal of the burden of proof.

8.12 Article 8 of the Race Equality Directive makes provision around the reversal of the burden of proof[235].

8.13 We note that the consultation focuses on industrial tribunals; it is important that TEO also consider provisions in relation to county courts.

[235] Article 8 of Race Equality Directive (Race): Directive 2000/43/EC.

Help for aggrieved persons in obtaining information

8.14 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.

8.15 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.

8.16 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.

8.17 The current questionnaire procedure[236] 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.

8.18 The former equivalent in Great Britain[237] was repealed by the Enterprise & Regulatory Reform Act 2013, due to concern about the impact on business[238].

8.19 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

[236] Article 63 of the RRO 1997.
[237] Section 66 of the Equality Act 2010.
[238] Department for Business Innovation and Skills (2013) Enterprise and Regulatory Reform Bill: Policy Paper, p. 23.

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.

8.20 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.

8.21 A prescribed questionnaire may be too restrictive, and prevent all the relevant issues being raised.

8.22 The questionnaire procedure also exists across different areas of equality law[239] in NI and to remove it would disadvantage those complaining on grounds of racial discrimination.

8.23 We note that the consultation suggests that 'the use of the questionnaire has widened and also become longer and more detailed', leading to these provisions being removed from the Equality Act 2010. Information on the evidence sources that TEO have used to reach this conclusion would be helpful, and we would again highlight the importance of not being constrained by approaches taken in GB, which may not reflect best practice.

Assistance by Commission/ Period within which proceedings to be brought

8.24 We note TEO's consideration of provisions around time periods within which the Commission should process applications for assistance, and the period within which proceedings are to be brought.

8.25 It is unclear from the consultation document whether TEO are considering removing the whole of Article 65, or parts within it, and further clarity would be welcome.

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

8.26 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**.

8.27 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**.

8.28 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.

8.29 The provisions for assistance by Commission, and the time limits within which proceedings are to be brought, must be fit for purpose.

8.30 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)[240].

8.31 No other Tribunal cases require such a time limit[241] 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.

8.32 In relation to County Court cases, where there are no early conciliation provisions, the time limit for all proceedings, 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.

8.33 In the absence of adopting an overall increase to one year, the Commission consideration time frame of up to three months

[240] Article 64(3) and (4) of the RRO 1997.
[241] Only the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (non-employment) contain an equivalent provision.

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.

8.34 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.

8.35 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.

9 Others

9.1 We note that TEO is considering several issues which fall outside the above categories.

Plans to introduce Ethnic Equality Monitoring

9.2 We note TEO's intention to include a section in reformed race equality law to allow Ethnic Equality Monitoring to be enacted through secondary legislation, at a later date.

9.3 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***.

9.4 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.

9.5 The Commission **recommends that the government and Departments ensure appropriate equality monitoring and related evaluation are in place across all areas of public policy and service provision.**

9.6 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.

9.7 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.

9.8 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.

9.9 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.

9.10 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 supported[242] 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).

9.11 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

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

such information should be relevant, appropriate and proportionate to the policy under consideration.

9.12 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.

9.13 Government has been aware of the importance ethnic equality monitoring for a considerable time. The Racial Equality Strategy 2005-2010 noted[243] that 'To have a racial equality 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 base[244].

9.14 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.

9.15 We note that the consultation document references the report received by the Department in November 2020 relating to ethnic equality monitoring. To our knowledge this report has not been published. We would encourage TEO to ensure that stakeholders have access to sufficient information to allow them to reach an informed position.

Volunteers

9.16 We note TEO is consulting on ensuring protections for volunteers and their view that it is very complex.

[243] OFMdFM (2005) A Racial Equality Strategy for Northern Ireland 2005-2010, para 4.21.
[244] OFMdFM (2015) Racial Equality Strategy 2015-2023, para 7.1

9.17 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.

9.18 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.

9.19 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.

9.20 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'[245].

9.21 Further, we have worked with Volunteer Now, producing a guide on Promoting Equality and Diversity in the Workplace[246]. 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.

9.22 Concerns have been raised that such protections could expose small, volunteer-led organisations to a disproportionate level of liability[247]. The UK Government[248], 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.

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[245] ECNI (2004) Response to OFMDFM Consultation Paper 'A Single Equality Bill for Northern Ireland, para 4.6.2.
[246] ECNI and Volunteer Now (2019) Promoting Equality and Diversity in Volunteering: A Guide for Volunteer Involving Organisations, p. 7.
[247] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland pp. 103.
[248] UK Government (2021) Consultation on sexual harassment in the workplace: government response, para 4.3.

9.23 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 not[249].

Descent and caste

9.24 We note TEO is considering the inclusion of caste and descent in the legislation. We recommend that **caste and descent be specifically named in the legislation**, and the **definition of 'race' and 'racial ground' should be non-exhaustive**.

9.25 This should be clear in statute and reflects best international practice, in accordance with human rights standards. The Commission has identified action to harmonise and expand the scope of racial grounds as a priority area for action.

9.26 Research[250] commissioned by the 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'.

9.27 In *Mandla v Dowell Lee*, Lord Fraser set out a wide range of shared characteristics which may suggest a distinct community and ethnic group[251]. 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 Britain[252]. Therefore, claims based on descent or caste might already fall within the protected characteristic of 'ethnic origin'[253]. However, it would be helpful for this to be confirmed in statute.

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[249] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland p. 103.
[250] Dhanda, M. et al (2014) Caste in Britain: Socio-legal Review , EHRC Research Report 91, p. iii.
[251] *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.
[252] *Chandhok v Tirkey* [2015] ICR 527, also available at https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKEAT/2014/0190_14_1912.html.
[253] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 24.

9.28 The Equality Act 2010[254] allows for 'caste' to be a protected characteristic in England, Wales and Scotland. However, following consultation, the UK Government[255] announced it believed the best way to provide protection against caste-based discrimination was to rely on emerging case law, such as *Tirkey v Chandhok*, citing reasons including low case numbers and difficulty defining caste.

9.29 This decision was controversial[256], 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'[257].

9.30 Further, in its Concluding Observations on the UK in both 2011[258] and 2016[259], CERD recommended that the UK act to ensure that caste-based discrimination is explicitly prohibited.

9.31 Likewise, in 2016 the Advisory Committee on the Framework Convention for the Protection of National Minorities called upon the UK to amend its statutes so as to include caste as a ground of discrimination under the definition of race[260].

9.32 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 certainty[261].

9.33 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 Discrimination[262]. CERD has indicated that they understand that discrimination based on 'descent' includes 'discrimination against members of

[254] Section 9 (5)(a) of the Equality Act 2010.
[255] Government Equalities Office (2018) Caste in Great Britain and equality law: a public consultation Government consultation response, p. 14.
[256] Law Commission (2021) Hate Crime Laws: Final Report, paras 4.56-4.66.
[257] EHRC (2018) Caste consultation: our response to the government statement.
[258] CERD (2011) Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK (2011) CERD/C/GBR/CO/18-20, para 30.
[259] 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).
[260] Advisory Committee of the Framework Convention (2016) Fourth Opinion on the United Kingdom, para 32.
[261] Dhanda, M. et al (2014) Caste in Britain: Socio-legal Review , EHRC Research Report 91, p. 26.
[262] UN (1965) International Convention on the Elimination of All Forms of Racial Discrimination, Art. 1.

communities based on forms of social stratification such as caste'[263].

9.34 Professor Dickson argues[264] 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.

9.35 Further, the definition of racial grounds should be phrased in a non-exhaustive way[265]. Currently, NI equality law defines racial grounds as 'colour, race, nationality or ethnic or national origins'[266]. However, the legislation in Great Britain defines race as *including* colour; nationality; ethnic or national origins[267].

9.36 Professor Dickson[268] 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 race[269], but a statutory change would aid clarity in the law.

Non-devolved

9.37 We understand from engagement with officials that TEO have not considered issues in this consultation which they consider falls outside the legislative scope of the NI Assembly.

9.38 However, we would encourage officials and elected representatives to **take action to secure progress on these issues via Westminster**, in particular relating to immigration exception and positive action in relation to political parties.

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[263] CERD (2002) General Recommendation 29.
[264] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 23
[265] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 23-26.
[266] Article 5 of the RRO 1997.
[267] Section 9(1) of the Equality Act 2010.
[268] Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 23.
[269] 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

Immigration exception

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

9.40 This change will result in the removal of an unjustified exception[270] which permits immigration practices that can have a discriminatory and disproportionate impact on minority groups.

Political parties

9.41 **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.

9.42 There should be consideration of time-limiting any such measures.

[270] See Article 20C of RRO 1997.

10 Conclusion

10.1 We welcome TEO's consultation on reform of the racial equality law.

10.2 We would underline our continued recommendation that comprehensive single equality legislation is the best means of reforming equality law in Northern Ireland.

10.3 In the absence of single equality legislation, we have made a series of recommendations for reform of Northern Ireland's racial equality legislation, which we would urge decision-makers to adopt.

Further Information

10.4 We look forward to further engagement with stakeholders and decision-makers on the reform of racial equality law.

10.5 We remain available for further engagement with TEO to assist in the refinement of proposals for improved racial equality law.

10.6 Further information on our policy recommendations for race law reform, along with additional underpinning detail, can be obtained via www.equalityni.org/RaceLawReform or emailing publicpolicy@equalityni.org

10.7 More detailed advice on the consideration of equality impacts under Section 75 can be obtained from Patrice Hardy, ECNI Public Sector Equality Manager, Email: phardy@equalityni.org, Tel: 028 90 500 616.

11 Annex A: Role and remit of the Equality Commission NI

11.1 The Equality Commission for Northern Ireland ("the Commission") is an independent public body established under the Northern Ireland Act 1998.

11.2 Our powers and duties derive from a number of statutes enacted over the last decades. 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.

11.3 We also have responsibilities arising from the Northern Ireland Act 1998 and Disability Discrimination Act 1995 in respect of the statutory equality and good relations duties which apply to public authorities - the s75 duties and the disability duties.

11.4 The Commission, with the Northern Ireland Human Rights Commission, has been designated under the United Nations Convention on the Rights of Disabled Persons(UNCRPD) as the independent mechanism tasked with promoting, protecting and monitoring implementation of UNCRPD in Northern Ireland.

11.5 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.

11.6 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.