Race Equality Law Reform: Strengthening Protection

Report to the Equality Commission for Northern Ireland

by

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Contents

Executive Summary

i. This report was commissioned by the Equality Commission in April 2021. Its purpose was to review the anti-discrimination provisions in the Race Relations (NI) Order 1997 with a view to determining what changes should be made to enhance protection against race discrimination in Northern Ireland.

ii. Chapter 1 sets out the context against which the report was produced. The Executive Office in the Northern Ireland government has begun a review of the Race Relations (NI) Order 1997 as part of its commitments under the Racial Equality Strategy for Northern Ireland 2015–2025. The Equality Commission is updating its own previous work on the 1997 Order and this report is part of that work. The terms of reference require the report to focus on the discrimination provisions in the Order but not to consider the Equality Commission's powers under the Order, the powers of any tribunal or court, or the enforcement of the racial discrimination provisions more generally. The report also does not examine whether there should be compulsory monitoring of the racial or ethnic background of any group, such as employees. The report's remit excluded how criminal law should deal with racism, a topic already dealt with in some detail in Judge Marrinan's 2020 report on the law on hate crimes in Northern Ireland.

iii. Chapter 1 continues with some reflections on the commissioned task. It queries the wisdom of the Executive Office's decision to proceed with discrete reform of race equality legislation rather than attempting to reform equality legislation more generally, as had been the plan in the early 2000s. Reforming only race equality legislation will exacerbate the differences between race equality legislation and other types of equality law in Northern Ireland, including disability and age equality legislation. It appears that there is sufficient political consensus within the Northern Ireland Executive for race equality law reform but not, unfortunately, for reform of other types of equality law.

iv. The chapter also points out some of the practical and theoretical limitations to the methodology adopted for the compilation of this report. It observes that, because it does not exist, the report was unable to draw on robust research into the precise impact on individuals or groups of the alleged deficiencies in the Race Relations (NI) Order.

v. The chapter indicates that there is a school of thought that anti-discrimination laws will never by themselves be enough to eliminate racial inequalities. They also need to be addressed by making more fundamental changes to the ways that private and public organisations go about their business. Black Lives Matter protests in Northern Ireland during 2020 were evidence of a deeply-felt malaise around racial inequalities both in this jurisdiction and elsewhere.

vi. Chapter 2 sets out a set of 11 findings. They are all at a fairly general level because the following chapter makes no fewer than 29 recommendations for detailed reforms to race equality legislation. It is hoped that the findings will help guide the Equality Commission in its work in this field over the next few years.

vii. In summary, the 11 general findings are that:

(1) People living in Northern Ireland continue to be less well protected against racial discrimination than people living in England, Wales, Scotland or the Republic of Ireland.

(2) Northern Ireland's law also lags behind that of other prominent common law jurisdictions, such as Australia, Canada and the USA. As well it is increasingly out of line with the requirements of international human rights law.

(3) Both the UN Committee on the Elimination of All Forms of Racial Discrimination (in 2016) and the Committee of Ministers of the Council of Europe (in 2018) have called upon the UK to adopt comprehensive legislation on equality or otherwise to strengthen racial equality in Northern Ireland.

(4) Although the Ireland / Northern Ireland Protocol to the EU-UK Withdrawal Agreement of 2019 requires the law of Northern Ireland to keep pace with any changes made by EU law which amend or replace the Race Directive of 2000, this will not alter the fact that in a number of respects the law of Northern Ireland will remain less protective than the law applying elsewhere in the UK or Ireland.

(5) The Equality Commission's previous work on how best to amend race equality legislation in Northern Ireland remains very pertinent. This report's recommendations endorse many of the Commission's earlier recommendations but go further on some issues, such as descent, caste, positive action (including by political parties), the

disposal of premises, immigration law and the protection of self-employed workers and volunteers.

(6) The race equality legislation could be amended by passing legislation altering the wording of articles in the Race Relations (NI) Order 1997 but it would be preferable to take the opportunity to completely replace the 1997 Order with a new Race Equality Bill.

(7) While race equality legislation applicable in Northern Ireland is certainly in need of amendment, it would be a better use of time and effort if the amendments were to be made in conjunction with amendments to other types of equality law. A Single Equality Bill, long advocated by the Equality Commission, would be an ideal vehicle for this.

(8) There is an opportunity to enhance equality more generally if an equality principle were to be included in a Bill of Rights for Northern Ireland, whether by Westminster or by the Northern Ireland Assembly. The Equality Commission was right to stress this in its evidence to the Assembly's Ad Hoc Committee on a Bill of Rights in April 2021.

(9) Even if there is insufficient consensus for the enactment of a Single Equality Bill or a Bill of Rights for Northern Ireland, the Assembly should consider enacting a short Bill, comparable to the guarantee contained in many countries' Constitution, guaranteeing the principle of equality for every person under the law.

(10) Greater equality could also be achieved if Protocol 12 of the European Convention on Human Rights were applicable in Northern Ireland. The Equality Commission could consider calling on the UK government to ratify that Protocol as soon as possible.

(11) Even if the reforms already mentioned were introduced, there would still be structural and systemic inequalities within Northern Ireland. A lot more needs to be done to address racial inequalities at the policy-making level to allow racial characteristics to be taken fully into account.

viii. Chapter 3 of the report sets out 29 recommendations for reform. For each recommendation there is, at (a), an underpinning rationale and, at (b), an indication of whether the Equality Commission has previously adopted a position on the point. There is then, at (c), an indication of how the recommendation could best

be implemented by legislation. At (d), (e) and (f) an explanation is given of how the recommendation compares with, respectively, the position under other types of equality law in Northern Ireland, the position under the law applying in England, Wales and Scotland, and the position under the law applying in the Republic of Ireland. Finally, at (g), an indication is given of how the recommendation relates to international human rights law.

ix. The report's 29 recommendations are summarised below. They do not always reflect the full width of the recommendation. One asterisk against a recommendation indicates that its implementation would bring the law of Northern Ireland into line with that which already applies in England, Wales and Scotland. Two asterisks indicate that its implementation would move the law of Northern Ireland beyond that of England, Wales and Scotland, making it more protective of the right to racial equality. Five of the recommendations (1, 5, 7, 17 and 19) simply reaffirm what the Equality Commission has recommended in the past, while six (3, 6, 9, 10, 15 and 22) reaffirm previous recommendations but build on them to a degree. The remaining 18 recommendations go beyond what the Commission has to date proposed.

***Recommendation 1 – Colour and nationality**

People in Northern Ireland should be protected against discrimination (and harassment) on the basis of their colour or nationality to the same extent as they are protected on the basis of their race, ethnic origin or national origin, unless there are justifiable reasons for not doing so or some statutory exception to protection.

****Recommendation 2 – Descent, caste and other aspects of race**

'Race' and 'racial grounds' should be defined in a more expansive and non-exhaustive way. The definition should say that 'race' and 'racial grounds' 'includes' race, colour, nationality, ethnic or national origins, descent and caste'.

****Recommendation 3 – Combined discrimination**

The legislation should expressly permit allegations of racial discrimination to be combined with allegations of other types of discrimination and tribunals and courts should be permitted to take into account the effect

of the combination of racial discrimination with other types of discrimination.

***Recommendation 4 – Direct discrimination**

Direct racial discrimination should be defined in terms of treatment occurring 'because of' racial grounds.

***Recommendation 5 – Racial harassment**

When outlawing racial harassment, the legislation should use 'related to' in place of 'on grounds of'.

****Recommendation 6 – Protection against public authorities**

People should be protected against racial discrimination when public authorities are exercising any of their public functions, rather than just in specified areas such as employment, the provision of goods, facilities or services, and the fields of social security, healthcare, social protection and social advantage.

***Recommendation 7 – Victimisation and comparators**

A person should be able to complain of victimisation without having to show that he or she was treated differently from some other comparable person.

***Recommendation 8 – Causing or inducing a person to discriminate**

The circumstances in which a person is prohibited from influencing another to discriminate against a third person should be widened.

****Recommendation 9 – Acts done under statutory authority**

There should be no exemption for discrimination because of colour and the exemption for discrimination because of nationality should apply only to acts done for the purposes of complying with the law on immigration, or if there is otherwise express statutory provision for the discrimination.

***Recommendation 10 – Positive action**

Positive action with a view to promoting racial equality should be permitted in a wider range of circumstances.

***Recommendation 11 – Positive action in recruitment and promotion**

Positive action in the recruitment and promotion field should be lawful in more circumstances than at present.

***Recommendation 12 – Occupational requirements**

The legislation on race equality in Northern Ireland should be amended so as to ensure that any occupational requirement which is put in place by way of an exception to the provisions on race discrimination is always a means of achieving a legitimate aim. Any such exception should also be available regarding persons analogous to employees, such as contract workers, partners and office-holders.

***Recommendation 13 – Premises**

The exemption for owner-occupiers regarding the disposal of their premises should be deleted, as should the exemption for occupiers of small premises regarding the provision of accommodation, the disposal of the premises or the withholding of any consent.

***Recommendation 14 – Political parties**

The law should allow for positive measures to be taken by political parties regarding the selection of their candidates for elections to the UK Parliament, the Northern Ireland Assembly and the local government bodies.

****Recommendation 15 – Employers' liability for third parties**

Employers should be liable if they fail to take reasonably practicable steps to prevent racial harassment of an employee by a third party, regardless of whether or not a previous instance of harassment against an employee has already occurred.

***Recommendation 16 – Protection for office-holders**

The law should make it clearer that office-holders are protected against victimisation.

***Recommendation 17 – Protection for local councillors**

The law should extend protection to local councillors against racial discrimination by their local council when they are carrying out their councillor functions.

***Recommendation 18 – Protection for law enforcement officers**

All law enforcement officers in Northern Ireland – not just those in the Police Service of Northern Ireland – should be treated as employees for the purposes of the race equality law. Police cadets, if appointed, should also be so treated.

****Recommendation 19 – Exemption for immigration law**

There should be no blanket exemption for actions taken in the implementation of immigration law. Exemption should apply only in relation to actions taken because of a person's nationality, only when there is ministerial authorization and only when the exemption is consistent with the person's rights under the European Convention on Human Rights.

***Recommendation 20 – Protection for applications to educational establishments**

Educational establishments should be required not to discriminate on racial grounds as regards the arrangements made for deciding who is to be offered admission to educational establishments.

***Recommendation 21 – Protection against discrimination within educational establishments**

Educational establishments should be required not to discriminate on racial grounds when providing, or not providing, education for a student.

***Recommendation 22 – Protection against the victimisation of school pupils**

Children in schools should be protected from being victimised, including after an allegation of discrimination has been raised by the child's parent or sibling.

***Recommendation 23 – Protection against qualification bodies**

The 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'.

***Recommendation 24 – Protection against providers of employment services**

The law should be amended to extend the definition of 'providers of employment services' and the type of discrimination by such providers which is unlawful.

****Recommendation 25 – Protection for contract workers and other workers**

Protection against victimisation should be extended to contract workers and protection against discrimination and victimisation should be extended to workers, and to those who apply for work, who are not or will not be contract workers or agency workers.

****Recommendation 26 – Volunteers**

Persons who work as volunteers should be legally protected, to the same extent as employees, against racial discrimination and harassment by the person or organisation that engages them.

***Recommendation 27 – Protection relating to competitive activities**

The law should be amended to make it more permissive of exceptions to race equality law in the context of competitive activities.

***Recommendation 28 – Protection after relationships have come to an end**

Former members of associations should be able to bring claims against the association for discrimination or harassment because of race.

****Recommendation 29 – Exemptions based on public safety and national security**

The exemption to race equality law based on public order should be removed and the exemptions based on public safety and national security should be limited.

1 Chapter 1: The Context

What the Commission has already done

1.1 It is clear that the Equality Commission has already undertaken a lot of work in this area. For example:

- The Commission has repeatedly called for a Single Equality Bill in Northern Irelands since it was first proposed in a consultation paper issued by the Office of the First Minister and Deputy First Minister in 2004.[1]
- In 2009 the Commission issued proposals for legislative reform across the whole of equality law.[2] Proposal 2 focused on race equality law.
- In 2014 the Commission published Strengthening Protection Against Racial Discrimination, a detailed 72-page report making 16 distinct recommendations for legislative reform.[3] Each recommendation was accompanied by a clear rationale. Throughout the report a comparison was made between race equality law in Northern Ireland, as set out in the Race Relations (NI) Order 1997, and race equality law in Great Britain, as set out in the Equality Act 2010.
- Since 2014 the Commission has continued to take account of how race equality law in Northern Ireland has failed to keep pace with developments in race equality law elsewhere in these islands. It has also examined the observations and recommendations issued by international human rights monitoring bodies,

[1] See Equality Commission, *Response to OFMDFM Consultation Paper 'A Single Equality Bill for Northern Ireland*, 2004, available at https://www.equalityni.org/ECNI/media/ECNI/Consultation%20Responses/older/OFMDFM-Single_Equality_Bill_for_NI2004.pdf?ext=.pdf.

[2] See Equality Commission, *Proposals for Legislative Reform,* 2009, available at https://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/Proposals_for_legislative_reform060209.pdf?ext=.pdf.

[3] Equality Commission, *Strengthening Protection Against Racial Discrimination*, 2014, available at https://www.equalityni.org/Delivering-Equality/Addressing-inequality/Law-reform/Related-work.

such as the UN Committee on the Elimination of Racial Discrimination and the Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities. All of this work has informed its engagement with the Executive Office in the Northern Ireland government and with others.

1.2 The work of the Equality Commission in this field was noted by the Council of Europe's Commission Against Racism and Intolerance (ECRI) which, in its 2016 report on the United Kingdom, 'strongly recommended that the authorities of Northern Ireland consolidate equality legislation into a single, comprehensive Equality Act, taking inspiration from the Equality Act 2010, and taking account of the recommendations of the Equality Commission for Northern Ireland, as well as ECRI's recommendations'.[4] In 2019 ECRI reported that there had been no progress on this matter within the Northern Ireland government but that the Executive Office had established a team to conduct a review of the Race Relations (NI) Order 1997.

1.3 In 2020 the Executive Office considered the Equality Commission's 2014 proposals as part of its work on implementing the Racial Equality Strategy for Northern Ireland 2015–2025. The first proposed action within that Strategy was a review of the Race Relations (NI) Order 1997, the development of which is ongoing.

The terms of reference for this report

1.4 This report is the product of a request from the Equality Commission for an expert legal briefing paper setting out recommendations aimed at strengthening protection under the race equality legislation in Northern Ireland. Each recommendation made is underpinned by a robust supporting rationale built upon a detailed analysis of the legislative gaps that exist under the race equality legislation in Northern Ireland when compared with the rights and protections under other areas of equality law in Northern Ireland and with the race

[4] ECRI Conclusions on the Implementation of the Recommendations in respect of the United Kingdom Subject to Interim Follow-Up, adopted on 3 April 2019, p 5, available at https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/united-kingdom.

equality legislation in Great Britain. To a large extent this entailed reconsidering the analyses conducted by the Commission in the preparation of its 2014 proposals. At the same time the Commission asked for consideration to be given to legislative reforms that might go further than the Equality Act 2010 in providing protection against race discrimination and this has led to several such proposals being made (see Recommendations 6, 9, 15, 19, 25, 26 and 29).

1.5 In addition, the terms of reference called for a comparison to be made between race equality law in Northern Ireland and race equality law in the Republic of Ireland and also, where relevant, for rationales for reform to be strengthened by referring to key points arising out of analysis of race equality legislation in other common law jurisdictions, especially those in Australia, Canada and the USA. But again the author was free to make recommendations for Northern Ireland that would provide greater protection against discrimination than that found in any of those various jurisdictions. In the Republic of Ireland the relevant legislation is the Employment Equality Acts 1998-2021 and the Equal Status Acts 2000-2018.[5] In the three other common law jurisdictions the main federal legislation, as amended, is in Australia the Racial Discrimination Act 1975, in Canada the Human Rights Act 1985 and in the USA the Civil Rights Act of 1964 (Title VII).

1.6 In Chapter 2 of this report 11 general findings are set out based on the review conducted for this report. These are worded in general, high-level terms. In Chapter 3, 29 specific recommendations for legislative reform are set out, together with supporting rationales. For each recommendation there is also an explanation of:

[5] The Acts of the Oireachtas (the Irish Parliament) are available online at http://www.irishstatutebook.ie/eli/acts.html but, unfortunately, they are not available there in their amended form. However, lists of the provisions which have been amended, together with the source of the amendments, are provided. Also, online 'revised' versions of many Acts are available through the website of the Irish Law Reform Commission at https://revisedacts.lawreform.ie/eli/2000/act/8/revised/en/html. This is the case for both the Employment Equality Act 1998 and the Equal Status Act 2000. At the time of writing, all amendments up to 14 October 2020 were included in the revised versions of both Acts. The 1998 Act has since been further amended by the Gender Pay Gap Information Act 2021.

- how it relates to the Equality Commission's previous recommendations
- how it could best be implemented by legislation
- how it relates to other types of equality laws applying in Northern Ireland
- how it relates to the law applying in England, Wales and Scotland
- how it relates to the law applying in the Republic of Ireland
- how it relates to international human rights law.

1.7 It is important to note that the report does not cover the following issues:

- remedies
- the powers of the Equality Commission
- the powers of tribunals and courts
- enforcement procedures more generally
- the scope of the public sector equality duties
- the law relating to racial monitoring
- the criminal law as it applies to racism.

The last of these issues – the criminal law as it applies to racism – was recently examined in an extensive report on hate crime legislation compiled by retired County Court Judge Desmond Marrinan.[6]

Reflections on how the report was compiled

1.8 The report builds upon the extensive work already undertaken by the Equality Commission in the field of racial discrimination, in particular its 2009 and 2014 documents on enhancing legal protection against racial discrimination

[6] This comprehensive report, *Hate Crime Legislation: Independent Review*, was published in November 2020 and made 34 recommendations. The Executive Summary alone runs to 48 pages. See https://www.justice-ni.gov.uk/sites/default/files/publications/justice/hate-crime-review.pdf.

1.9 Work was undertaken on the basis that the Commission was seeking, not least because of the passage of time, expert input regarding key areas for race law reform, to supplement its own earlier assessments. As Chapters 2 and 3 below make clear, the report provides that reassurance. The Commission's 2014 recommendations remain very relevant.

1.10 Before setting out and critiquing the methodology employed during the work on this project, there are three more general points to make.

1.11 The first is that the exclusion of several aspects of the race equality laws from the terms of reference means that at times it was difficult to make a reliable judgement as to whether the recommendations would make a real difference in practice. There is little point in having what seem to be good laws on paper unless, for example, there are processes in place to ensure that people who wish to rely upon those laws can do so fairly easily and that the remedies they may achieve are appropriate.

1.12 The second point is that the whole thrust of the Commission's proposals for reform of the law on race equality might suggest that the Commission is singling out that aspect of equality law for special treatment. Of course, that is not the case because the Commission has also issued proposals for reforms to all other aspects of equality law too.[7]

1.13 Thirdly, if the Race Relations (NI) Order 1997 is replaced by a new Race Equality Bill, the existing differences between the ways in which the various protected characteristics are dealt with under Northern Ireland's anti-discrimination laws will be exacerbated and it will be more difficult for employers, providers of goods and services and schools (amongst others) to understand their legal obligations not to improperly discriminate. Legal advisers, too, could be easily confused. But, against that, one has to accept that reform has to begin somewhere. Rather than make things perfect one can begin by making them better.

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[7] *ECNI Proposals for Legislative Reform*, 2009, n 2 above. See too ECNI, *Full Age Equality: Policy Priorities and Recommendations*, 2017. See https://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/AgePolicyPriorities-Full.pdf

1.14 The fact remains that the administrative and political effort invested in reforming race equality laws is unlikely to be drastically increased if at the same time reforms were made to equality laws relating to other protected characteristics. Many of the rationales for reforming aspects of race equality laws would apply equally strongly to reform of other equality law. Both Great Britain and the Republic of Ireland have developed anti-discrimination laws as whole packages, not in discrete parcels. So have most other common law jurisdictions, including Australia, Canada and the USA, both at the federal and at the state level in each case. The questions which arise are often common to all or most of the protected characteristics and if reforms are justifiable in one area of law they are likely to be justifiable in other areas as well. The Equality Commission is therefore right to continue to make it clear that it remains very much in favour of a Single Equality Bill for Northern Ireland, i.e. a piece of legislation which will, like the Equality Act 2010 in Great Britain, provide a comprehensive and unified approach to anti-discrimination laws

The Methodology: Practical Limitations

1.15 This report primarily adopts a doctrinal methodology. That is to say, it is very much focused on the wording of the legislation which currently governs racial discrimination in Northern Ireland, comparing it with the legislation applying in Great Britain, the Republic of Ireland and some other common law jurisdictions. It also takes into account the case law which has interpreted and applied those different pieces of legislation. In assessing the effectiveness of the laws the report bears in mind the views of enthusiasts for ever-stronger laws on equality and non-discrimination as well as the views of those, mostly on the government and business side, who believe that such laws can impose undue burdens on public authorities and private firms. In all such debates it is important to rely on hard evidence for the point of view expressed. Unfortunately, in many instances no-one has yet undertaken empirical research required to produce such evidence. There is sometimes anecdotal evidence for one view or another, but there is rarely any data that has been rigorously collected and is statistically robust.

1.16 The report supplements the examination of relevant legislation and case law by using information gleaned from various

commentaries about the topic of equality law in general and race equality law in particular. It also takes account of opinions expressed in conversations or in writing by a number of people who have personal or professional experience of the way in which the current race equality laws are applied in Northern Ireland. Some of the individuals concerned were from Black and Minority Ethnic communities or were very familiar with the particular concerns of those communities. It was important to ensure that any recommendations made were grounded in lived experience and that in concentrating on legislative wording the report did not turn a blind eye to real-life problems which victims of racial discrimination face but are not currently addressed by the legislation. Here again, the fact that several aspects of the implementation of race equality laws were excluded from the terms of reference possibly imposed practical limitations on the effectiveness of the research. As regards the law on race discrimination in the Republic of Ireland, the report relies in part on a very informative country report on Ireland published by the European Equality Law Network.[8]

The Methodology: Theoretical Limitations

1.17 As regards the possible theoretical limitations to the methodology adopted for this report, some might claim that focusing on relatively minor amendments to existing statutory provisions is to ignore the more fundamental point that our society is riddled with structural and systemic inequality of a kind which can never be effectively addressed by anti-discrimination laws alone. Many academics have made this point, not just in the area of race equality but also, indeed more so, in the area of gender equality. Prominent amongst these academics is Professor Sandra Freeman at the University of Oxford. She has written that:

> *whereas it is clear that the right to equality should move beyond a formal conception that likes should be treated alike, a substantive conception resists capture by a single principle. Instead, drawing on the strengths of the familiar principles in*

[8] 'Country Report on Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78', authored by Prof Judy Walsh of University College Dublin in 2020 and available at https://www.equalitylaw.eu/country/ireland.

> *the substantive equality discourse, a four dimensional principle is proposed: to redress disadvantage; to address stigma, stereotyping, prejudice and violence; to enhance voice and participation; and to accommodate difference and achieve structural change. Behind this is the basic principle that the right to equality should be located in the social context, responsive to those who are disadvantaged, demeaned, excluded, or ignored.*[9]

1.18 Yet even this wide-ranging approach to equality has been criticised as inadequate. Catharine MacKinnon, for example, has argued that it contains 'a gaping hole' in that it does not recognise that it is when a focus is placed on 'hierarchy' that the substantive content of inequalities is revealed.[10] MacKinnon adds that the failure to identify the substance of substantive equality has led the Supreme Court of Canada down blind alleys and 'restricted its express development of an equality doctrine that continues to have immense unrealised promise'. Her approach leads her to claim, for example, that gender-based violence is a substantive form of sex inequality. In the light of the Black Lives Matter campaign, especially following the murder of George Floyd in Minneapolis on 25 May 2020, it seems clear that, in some jurisdictions at least, police violence is also a substantive form of race inequality.[11]

1.19 The Covid-19 pandemic has brought to light even more than before the inequalities that exist in Northern Ireland regarding access to education, health and social care, transport, green spaces, the internet and alternative income streams. It would appear that limited research has yet been conducted on the extent to which race has been a determining factor in how people have been affected by the pandemic in this jurisdiction,

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[9] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 *International Journal of Constitutional Law* 712, 713. See too Sandra Fredman and Sarah Spencer, 'Beyond Discrimination: It's Time for Enforceable Duties on Public Bodies to Promote Equality Outcomes' (2006) 6 *European Human Rights Law Review* 598.

[10] Catharine MacKinnon, 'Substantive equality revisited: A reply to Sandra Fredman' (2016) 14 *International Journal of Constitutional Law* 739, 744-5.

[11] In South Africa, under the Promotion of Equality and Prevention of Unfair Discrimination Act 2000, s 7(a), the first item of what amounts to unfair discrimination on the ground of race is 'the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence'.

but we do know that Black Lives Matter protestors were the object of poor policing in 2020, even if the Police Ombudsman did not attribute this to race or ethnicity,[12] and that in 2021 the Public Prosecution Service decided not to prosecute 14 suspects on whom reports had been submitted by the police in connection with attendance at Black Lives Matter protests in 2020.[13] Amongst the reasons given were that the protestors may have had a reasonable excuse for their actions and that 'the gatherings involved protests relating to a matter of important social concern, were peaceful, and were organised in a manner that sought to minimise any risk of transmission of the [corona] virus'.

1.20 In 2020 Judge Marrinan's very thorough report on hate crime also highlighted the insidious phenomenon of physical and verbal attacks on individuals because of their colour, race, nationality or ethnic or national origins.[14] He noted that since 2016 the number of racist hate motivated incidents was higher than sectarian motivated incidents. In 2018-19 there were 1,124 racist hate motivated incidents as against 865 sectarian hate motivated incidents, while in 2019-20 the respective figures were 890 and 879.[15] Racist hate incidents tend to amount to about 50 per cent of all reported hate incidents. Judge Marrinan proposed a suite of recommendations which would make the criminal law in this sphere more effective. For example, he recommended that a hate crime be defined as 'a criminal act perpetrated against individuals or communities with protected characteristics based on the perpetrator's hostility, bias, prejudice, bigotry or contempt against the actual or perceived status of the victim or victims' (Recommendation 1, emphasis added). He also recommended that any new legislation in this field should provide 'appropriate recognition of the importance of intersectionality' (Recommendation 11), a topic referred to in this report's Recommendation 3. The

[12] See the report of the Police Ombudsman for Northern Ireland, 22 December 2020, available at https://www.policeombudsman.org/Media-Releases/2020/Discrimination-concerns-are-justified,-but-not-on-.

[13] 'No prosecutions in relation to 2020 Black Lives Matter protests', press statement available at https://www.ppsni.gov.uk/news-centre/no-prosecutions-relation-2020-black-lives-matter-protests.

[14] See the Criminal Justice (No 2) (NI) Order 2004, art 2(5), referring to the Race Relations (NI) Order 1997, art 5(1).

[15] See n 6 above, paras 4.9 and 4.10.

Marrinan report demonstrated clearly that tackling racism and racial inequality requires much more than just effective anti-discrimination laws.

1.21 The terms of reference of this project did not, however, permit an approach to the reform of current race equality legislation in Northern Ireland which would turn it into full-blown substantial equality legislation. Adopting that approach would entail the drafting of entirely new legislative provisions which would address not just discriminatory treatment but also unequal structures and systems. Such an enterprise may no doubt desirable but to embark upon it solely in relation to racial equality would probably be unwise since it would leave untouched a large number of other types of structural and systemic inequalities that are also very deserving of reform.

A right to equality?

1.22 To some extent many of these inequalities could be addressed, at least in part, if a law were introduced for Northern Ireland that is comparable to the provisions in various Constitutions guaranteeing the right to equality under, or before, the law. For example, Article 40.1 of Ireland's Constitution provides:

> *All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the state shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.*

Canada's Constitution Act 1982 provides in section 15(1):

> *Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

And in the USA, the 14th Amendment to the Constitution includes the words 'No State shall… deny to any person within its jurisdiction the equal protection of the laws'.

1.23 To date, however, none of these provisions has been applied in a manner which addresses the kind of structural or systemic

inequalities identified by Sandra Fredman and Catharine MacKinnon. But with bolder and more creative judges in post, they still might be.

1.24 In Northern Ireland a similar provision could be included in a Bill of Rights, whether enacted by the Westminster Parliament or (for transferred matters and/or, with the Secretary of State's consent, reserved matters) by the Northern Ireland Assembly. The Equality Commission has already given evidence to the Assembly's Ad Hoc Committee on a Bill of Rights and one of its recommendations was for the inclusion of a principle of equality in a Bill of Rights:

> *In particular, we recommend that this principle includes a statement that everyone is equal before and under the law and has the right to equal protection and equal benefit of the law, including the full and equal enjoyment of all rights and freedoms. The principle could also make clear that individuals should not be discriminated against across a range of equality grounds.*[16]

1.25 Equality would also be enhanced in Northern Ireland if the UK were to ratify Protocol 12 to the European Convention on Human Rights. Under that Protocol 'the enjoyment of any right set forth by law [and not just by the Convention itself] shall be secured without discrimination' – and 'no-one shall be discriminated against by any public authority' – on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Unfortunately, the current UK government does not seem to have any intention of ratifying Protocol 12. That means that the Northern Ireland Assembly would not itself have the competence to implement the Protocol because it constitutes an 'excepted matter' under the terms of the Northern Ireland Act 1998.[17]

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[16] Equality Commission, *Submission to Ad Hoc Committee on a Bill of Rights for Northern Ireland*, April 2021, para 4.3, available at http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/written-briefings/. The Commission also submitted evidence to the Committee in March 2021 (see in particular para 4): ibid.

[17] Sch 2, para 3(c).

2 Chapter 2: General Findings

2.1 As Chapter 3 of this report sets out 29 specific recommendations together with the rationales for them, this short chapter sets out some more general, high-level findings that have been reached following consideration and engagement undertaken during the compilation of the report.

2.2 First, there is a wide gap between the degree to which people living in Northern Ireland are protected against racial discrimination and the degree to which people living in England, Wales, Scotland and the Republic of Ireland are so protected. In this field, the legal system of Northern Ireland has not kept pace with the rate of change in those other jurisdictions since the Belfast (Good Friday) Agreement of 1998. The Equality Commission is right to maintain its position that 'there is a need to address any gaps in protection, if in doing so this would better protect against racial discrimination, harassment and victimisation'. Although it relates only indirectly to race equality, it is worth noting that in the Republic of Ireland, since 2015,18 being in receipt of rent supplement, housing assistance (construed in accordance with Part 4 of the Housing (Miscellaneous Provisions) Act 2014) or any payment under the Social Welfare Acts, has been a ground on which a person cannot be discriminated against in relation to the provision of accommodation or related services or amenities. There is no comparable provision in the law of Northern Ireland or of the rest of the United Kingdom.

2.3 Second, Northern Ireland's law also lags behind that of other prominent common law jurisdictions, such as Australia, Canada and the USA. Although the initial anti-discrimination laws in those jurisdictions were enacted in the 1970s and 1980s, they have been constantly amended in order to keep pace with fresh thinking and with new types of discrimination not previously recognised. They have also responded to their international human rights obligations as set out in, for example, the UN Convention on the Elimination of All Forms of Racial Discrimination (agreed in 1965). A feature which is shared by those jurisdictions is that they have developed their approach to laws on race equality in parallel with their approach to laws on

[18] Equal Status Act 2000, ss 3(3B) and 6(1)(c), as amended by the Equality (Miscellaneous Provisions) Act 2015, ss 13(b), in force from 1 January 2016.

other types of equality such as gender, age, disability, etc. They also locate equality more squarely within a human rights framework, not just an anti-discrimination framework and they tend to be more accepting of positive measures designed to counter disadvantages traditionally experienced by members of minority groups.

2.4 Third, in 2016 the UN's Committee on the Elimination of All Forms of Racial Discrimination called for the UK to '[e]nsure that the authorities of Northern Ireland act without further delay to adopt comprehensive legislation prohibiting racial discrimination, in accordance with the provisions of the [UN Convention on the Elimination of All Forms of Racial Discrimination 1965, ratified by the UK on 7 March 1969 and in force from 6 April 1969]'. Clearly the UN does not think that Northern Ireland race equality law fully complies with the UK's international obligations. In 2018 the Committee of Ministers of the Council of Europe (not an EU body) passed a resolution calling upon the United Kingdom to 'adopt robust and comprehensive unified legislation on equality or otherwise strengthen racial equality in Northern Ireland, and harmonise protection across the UK'.[19]

2.5 Fourth, although the Ireland / Northern Ireland Protocol to the EU-UK Withdrawal Agreement of 2019 requires the law of Northern Ireland to keep pace with interpretations of and amendments to the EU's Race Equality Directive of 2000 (as well as several other Directives), this does not alter the fact that in a number of detailed respects the law of Northern Ireland will remain less effective in protecting people against racial discrimination than the law applying elsewhere in the United Kingdom and in the Republic of Ireland. The Race Equality Directive of 2000 does not in fact contain much detail on precisely when and how people should be protected against racial discrimination. The Directive states the broad areas within which people must be protected, such as employment and access to goods, facilities and services, but it leaves it to

[19] Resolution CM/ResCMN(2018)1 on the implementation of the Framework Convention for the Protection of National Minorities by the United Kingdom, adopted by the Committee of Ministers on 7 February 2018 at the 1306th meeting of the Ministers' Deputies.

Member States to decide how exactly to do so.[20] By Article 6(1) it also allows Member States to introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in the Directive.

2.6 Fifth, the Equality Commission's work to date on how best to amend the race equality legislation applicable in Northern Ireland remains pertinent and persuasive, especially its 2014 proposals. The analyses conducted by the Commission are legally sound. The current report's recommendations largely endorse the Commission's recommendations. They go further in relation to, for example, the issues of descent, caste and positive action.

2.7 Sixth, the race equality legislation could be amended by passing legislation which alters the wording of various articles in the Race Relations (NI) Order 1997. But that would make the Order even more difficult to read than it is at present. The opportunity should be taken instead to completely replace the 1997 Order with a new Bill which sets out the previous law as amended. The new Bill could also correct some minor drafting errors in the 1997 Order. It is important for all users of the legislation that it be worded in as clear and accessible a way as possible. An appropriate title for the new Bill would be the Race Equality Bill: even though it will contain provisions dealing only with racial discrimination, the underlying purpose of the Bill is to ensure that people of different races are always treated equally. Of course, there should also be laws dealing with other aspects of racial inequality, for example in field of the criminal law. Judge Marrinan's detailed report on hate crime, published in 2020, will no doubt help to guide the Northern Ireland government in that regard.[21]

2.8 Seventh, while race equality legislation applicable in Northern Ireland is certainly in need of amendment, it would be a better use of time and effort if the amendments were to be made in conjunction with amendments to other types of equality law, such as those dealing with discrimination on the basis of

[20] For details of recent case law on this Directive see the European Commission's third report on the application of the Racial Equality Directive (Directive 2000/43/EC) and the Employment Equality Directive (Directive 2000/78/EC) (March 2021).

[21] See n 6 and the text at n 14 above.

gender, sexual orientation, religious belief, political opinion, disability and age. This could be done by an Equality Bill which brings together into one piece of legislation the various strands of equality law, much as was done by the Equality Act 2010 in Great Britain, but which also takes into account the desirability of enhancing protection beyond that provided by the 2010 Act developments. However, whether it is politically realistic to expect sufficient political consensus in Northern Ireland around the need or desirability for such an Equality Bill is a different matter. In the absence of such consensus progress should be made on a piecemeal basis if that is possible.

2.9 Eighth, there is an opportunity to enhance equality more generally if an equality principle were to be included in a Bill of Rights for Northern Ireland. In the absence of such a Bill enacted by Westminster, the Northern Ireland Assembly has the competence to enact its own Bill of Rights limited to matters which, because they are not listed in the Northern Ireland Act 1998 as being either 'excepted' or 'reserved', are 'transferred' matters. Having an equality clause as a fall-back provision in a Bill of Rights could allow progress to be made on 'levelling up' Northern Ireland's society in ways which the current anti-discrimination laws are not managing to achieve.

2.10 Ninth, even if there is insufficient consensus for the enactment of a Single Equality Bill or a Bill of Rights for Northern Ireland, the Assembly should consider enacting a short Bill guaranteeing the principle of equality for every person under the law. As indicated in Chapter 1 above (at para 1.22) such a guarantee is found in Constitutions of states such as Ireland, Canada and the USA. While it is not always applied in a way which protects rights as fully as might have been expected, especially economic and social rights, it is undoubtedly a useful legal tool for judges to resort too when faced with blatant inequalities.

2.11 Tenth, greater equality could also be achieved if Protocol 12 of the European Convention on Human Rights were applicable in Northern Ireland. The Equality Commission should therefore call on the UK government to ratify that Protocol as soon as possible and to include it amongst the Convention rights listed in the Human Rights Act 1998. As noted in Chapter 1 (at para 1.25), the Protocol would enhance equality in the enjoyment of all existing rights and provide better protection against

discrimination by public authorities even in fields where there are no existing rights in play. The Netherlands, Portugal and Spain are among the 20 European countries which have already ratified Protocol 12.

2.12 Eleventh, even if race equality law is amended to bring it into line with that applicable in Great Britain and/or the Republic of Ireland, and even if an equality clause were to be enacted in a Bill of Rights for Northern Ireland, legitimate questions could still be asked about whether such laws are an effective enough mechanism to ensure that structural and systemic inequalities are removed from society. Many of those inequalities are so deep-rooted that much more fundamental legal changes would be required. While this might be particularly the case in relation to gender and disability inequalities, it is also the case in relation to race inequality. A lot more needs to be done at the policy-making and decision-making levels to allow racial characteristics to be taken into account in a way which allows the interests and views of members of different racial groups to be fully considered and respected.

3 Chapter 3: Recommendations for Reform

3.1 This chapter presents a suite of recommendations on how race equality legislation in Northern Ireland should be amended. The order in which they are presented is similar but not identical to the lists produced by the Equality Commission to date.

3.2 For each recommendation there is:

(a) a **rationale** to underpin the recommendation,
(b) a statement as to whether the recommendation is already one which the **Equality Commission** has supported,
(c) a suggestion as to how the recommendation could best be **implemented**,
(d) a statement on how the recommendation relates to the position under **other types of equality law applying in Northern Ireland**,
(e) a statement on whether the recommendation would make the law in Northern Ireland consistent with **the law applying in England, Wales and Scotland**,[22]
(f) a statement on whether the recommendation would make the law in Northern Ireland consistent with **the law applying in the Republic of Ireland**,[23] and
(g) a statement on how the recommendation relates to **international human rights law**.

3.3 One asterisk against a recommendation indicates that its implementation would bring the law of Northern Ireland into line with that which already applies in England, Wales and Scotland. Two asterisks indicate that its implementation would move the law of Northern Ireland beyond that of England, Wales and Scotland, making it more protective of the right to racial equality

3.4 On several other issues careful consideration was given as to whether the race equality legislation in Northern Ireland was in

[22] On the relevant law in England, Scotland and Wales see the European Equality Law Network's 'Country Report on Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78'authored by Prof Lucy Vickers in 2020 and available at https://www.equalitylaw.eu/country/united-kingdom.
[23] On the relevant law in the Republic of Ireland see the Country Report on Ireland authored by Prof Judy Walsh, n 8 above

need of amendment but the conclusion was reached that it was not. This was because the current legislation was found to be as protective as the law applying in England, Wales, Scotland and the Republic of Ireland. It was also found not to be in breach of international human rights law. Two examples are the liability of local councils when they are providing recreational facilities and the liability of employees and agents.

**Recommendation 1 – Colour and nationality*

The legislation on race equality in Northern Ireland should be amended to ensure that people in the jurisdiction are protected against discrimination (and harassment) on the basis of their colour or nationality to the same extent as they are protected on the basis of their race, ethnic origin or national origin, unless there are justifiable reasons for not doing so or some statutory exception to protection.

(a) There is a five-fold **rationale** for this recommendation. First, differentiating between people purely on the basis of the colour of their skin or their nationality is just as offensive and unjustifiable as doing so on the basis of their race, ethnic origin or national origin. Second, omitting colour and nationality as protected characteristics leaves the door open to individuals and organisations to discriminate with impunity against people whom they presume to be of a different race, ethnic origin or national origin under the guise of focusing instead only on their colour or nationality rather than on their race or where they come from. Third, it seems self-evident that many people are in fact discriminated against primarily on the basis of their colour or their actual or perceived nationality, if only because those features are usually more immediately apparent than their race.

Fourth, the reform would make the law of Northern Ireland internally consistent because at present colour and nationality are unlawful grounds of discrimination in some contexts (such as the provision of services by private companies) but not in others (such as the performance of functions by public bodies). The anomaly in question arises from the fact that paragraphs 1A to 1C were clumsily inserted into article 3 of the Race Relations (NI) Order 1997 in 2003 in order to ensure that the requirements of the 2000 Race Equality Directive were fully implemented in Northern Ireland. That is what also occurred in Great Britain. But in both jurisdictions the existing law (article 3(1) of the 1997 Order in Northern Ireland) already went some way towards ensuring that discrimination because of colour and nationality was outlawed. This is because it referred to ‘racial grounds’ and ‘racial group’, two expressions which are defined by article 5 of the 1997 Order in terms of ‘colour, race, nationality or ethnic or national origins’.

Moreover, in so far as article 3(1A) of the 1997 Order is targeted at so-called indirect discrimination (not a phrase which is commonly used in

EU law, nor in the law of the USA for that matter), it overlaps with article 3(1)(b), which already outlaws indirect discrimination to some degree. In Great Britain that overlap was eliminated when the GB equivalent to article 3(1)(b) [section 1(1) of the Race Relations Act 1976] was repealed by the Equality Act 2010. Article 3(1)(b) of the 1997 Order should also be repealed in Northern Ireland if this recommendation is implemented.

Fifth, the Racial Equality Strategy 2015-25, agreed by the Executive Office's predecessor department (the Office of the First Minister and Deputy First Minister) commits the Executive to review the law's protection against colour and nationality discrimination (para 5.13(i)).

It is worth adding that, in *Abbey National PLC v Chagger*, the Employment Appeal Tribunal in Great Britain stated that the Race Equality Directive was intended to apply to discrimination on the ground of colour.[24] The Tribunal said: 'We have no doubt that the European Court of Justice would not give even the time of day to a submission that a claim of "colour discrimination" did not attract the operation of the Directive'.[25] That statement, however, is not binding on tribunals or courts in Northern Ireland and so, if only for the avoidance of doubt and confusion, it makes sense to amend the legislation applying in Northern Ireland to make it crystal clear that discrimination because of colour is unlawful to the same extent as is discrimination because of race.

For related recommendations relating to nationality discrimination, see Recommendations 9 and 19 below.

(b) The **Equality Commission** has supported this recommendation since at least 2009, when it described the change as 'urgently required'.[26] In 2014 it considered it to be a 'priority area of reform'.[27]

(c) This recommendation could be **implemented** by altering the wording of a number of provisions in the Race Relations (NI) Order 1997 before re-enacting them in the proposed new Race Equality Bill. This would ensure that provisions of the Order which currently provide protection

[24] [2009] ICR 624, also available at https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKEAT/2008/0606_07_1610.html.

[25] Ibid, para 35. The EAT accepted, however, that its reasoning was to some extent inconsistent with that adopted by the EAT in the earlier case of *Okonu v G4S Security Services (UK) Ltd* [2008] ICR 598.

[26] *ECNI Proposals for Legislative Reform,* n 2 above, Proposal 2, p 9.

[27] *Strengthening Protection Against Racial Discrimination*, n 3 above, para 3.2.

against discrimination on the basis of race or ethnic or national origins are changed so that they also apply to discrimination on the basis of colour and nationality. The provisions in question are (excluding those on topics outside the terms of reference of this report):

- articles 3(1A) (indirect discrimination)
- article 4A (harassment)
- articles 6(3), 6(4A), 6(5), 7A, 9(4) and 10(1A) (discrimination and harassment by employers)
- article 12(1A) and 12(5) (discrimination by partnerships)
- article 20A (discrimination by public authorities)
- article 27A (relationships which have come to an end)
- article 28 (definition of 'discriminatory practice')
- article 34(3A) (discrimination by charities)
- article 36 (provision of education or training for persons not ordinarily resident in Northern Ireland)
- article 40(1A) (acts done under statutory authority etc)
- article 72ZA (appointment of other office-holders).

(d) The recommendation does not lead to any additional asymmetry in the **equality laws applying in Northern Ireland** since it merely extends the meaning of one protected characteristic, that of 'race'. It has no read across implications to other types of equality law.

(e) The recommendation would make race equality law in Northern Ireland consistent with **the law applying in England, Wales and Scotland**.

(f) The recommendation would also bring race equality law in Northern Ireland into line with **the law applying in the Republic of Ireland**.

(g) The recommendation is one which has been called for by the UN Committee on the Elimination of Racial Discrimination. This was in 2003 in its Concluding Observations on the UK's 16th and 17th periodic reports.[28] The UN Convention on the Elimination of All Forms of Racial Discrimination 1965 defines 'racial discrimination' as meaning 'any distinction, exclusion, restriction or preference based on race, *colour*, descent, or national or ethnic origin' (emphasis added).

[28] CERD/C/63/CO/11 (10 December 2003), para 15. Strangely this recommendation was not made in CERD's subsequent concluding observations on the UK in 2011 (CERD/C/GBR/CO/18-20) and 2016 (CERD/C/GBR/CO/21-23), even though the 2003 recommendation remained unimplemented in Northern Ireland.

***Recommendation 2 – Descent, caste and other aspects of race**

The legislation on race equality in Northern Ireland should be amended to ensure that 'race' and 'racial grounds' are defined in a more expansive and non-exhaustive way. It should say that 'race' and 'racial grounds' 'includes' race, colour, nationality, ethnic or national origins, descent and caste' (emphasis added).

(a) The **rationale** for this recommendation is that 'race' is increasingly seen as a rather fluid concept. Article 1 of the UN Convention on the Elimination of All Forms of Racial Discrimination, which was agreed as far back as 1965, already recognised this by defining racial discrimination as 'including' any distinction, exclusion, restriction or preference based on 'descent' (emphasis added). At present there is no mention of 'descent' in the legislation of Northern Ireland, Great Britain or the Republic of Ireland, the thinking being, presumably, that 'national or ethnic origin' covers everything which 'descent' covers.

That may not be the case, however, and the UN Committee on the Elimination of Racial Discrimination (CERD) often upbraids states for not doing enough to protect people against discrimination based on their descent. It said so regarding the Republic of Ireland in 2020.[29] While no such comment was made in CERD's most recent concluding observations regarding the UK in 2016, CERD did express concern that section 9(5)(a) of the Equality Act 2010, which allows for 'caste' to be a protected characteristic in England, Wales and Scotland, had not yet been brought into force.[30] At the time of writing, it is still not in force, even though the legislation says that 'A Minister of the Crown must by order… provide for caste to be an aspect of race' (emphasis added). It also allows for exceptions to be set out in specified circumstances.

Broadening the definition of racial discrimination in this manner would help to ensure that racial discrimination is not disguised as descent or caste discrimination in an attempt to avoid civil liability. The reform would be particularly welcome to people in Northern Ireland who are of African descent or (as regards caste) are from India, Pakistan or Sri Lanka. We are living in the UN's International Decade for People of

[29] CERD/C/IRL/CO/5-9 (23 January 2020), paras 15, 23-25, 27-28, 47.

[30] CERD/C/GBR/CO/21-23 (3 October 2016).

African Descent 2015–2024 and the promotion and protection of human rights of people of African descent is a UN priority. The relevant page of the UN's website notes that '[s]tudies and findings by international and national bodies demonstrate that people of African descent still have limited access to quality education, health services, housing and social security… They all too often experience discrimination in their access to justice, and face alarmingly high rates of police violence, together with racial profiling. Furthermore, their degree of political participation is often low, both in voting and in occupying political positions. In addition, people of African descent can suffer from multiple, aggravated or intersecting forms of discrimination based on other related grounds…'.[31] In 2011 the UN Committee on the Elimination of Racial Discrimination issued a General Recommendation (No 34) on racial discrimination against people of African descent. This calls on all states that have ratified the 1965 Convention to '[r]eview and enact or amend legislation, as appropriate, in order to eliminate, in line with the Convention, all forms of racial discrimination against people of African descent'.

Moreover, it is important to define 'race' or 'racial grounds' in a non-exhaustive way. In other words, the legislation should not say what race or racial grounds 'means' but rather what it 'includes'. Although this definitional approach may already be justified under the principles laid out in *Mandla v Dowell Lee* (see next paragraph), the proposed change would put matters beyond doubt. It would allow for other aspects of race (such as physical features, hairstyle, cultural practices, food choices or language usage) to be considered as part of the definition in particular instances even though those aspects are not explicitly mentioned in the legislation. A good 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.[32]

[31] https://www.un.org/en/observances/decade-people-african-descent/background.

[32] *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. See too https://www.bbc.co.uk/news/uk-england-coventry-warwickshire-57516612.

In *Mandla v Dowell Lee*, the seminal case on the meaning of 'ethnic origin' in the context of discrimination law, Lord Fraser famously said:

> For a group to constitute an ethnic group in the sense of the [Race Relations Act 1976], it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long, shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.[33]

This phraseology suggests that claims based on descent or caste might already fall within the protected characteristic of 'ethnic origin'. Likewise, in the much more recent case of *Chandhok v Tirkey* a High Court judge, sitting as the President of the Employment Appeal Tribunal in England, suggested that many of the facts relevant in considering caste might be capable of constituting 'ethnic origin' for the purposes of the Equality Act 2010 because that term had 'a wide and flexible ambit, including characteristics determined by "descent"'.[34]

[33] *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. This case has also been frequently relied upon in Irish case law on race discrimination.

[34] *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.

However, for the avoidance of doubt, and to cater for situations which may be more obviously based on descent or caste alone, it is better for those terms to be expressly mentioned in the proposed new Race Equality Bill for Northern Ireland.

(b) This broader definition of 'race' or 'racial grounds' has not been recommended by the **Equality Commission**. The Commission has received very few complaints alleging discrimination on the bases of descent or caste.

(c) This recommendation could be **implemented** by changing the wording of article 5(1) of the Race Relations (NI) Order 1997, which defines 'racial grounds' and 'racial group', before re-enacting it as part of a new Race Equality Bill.

(d) The recommendation does not lead to any additional asymmetry in the **equality laws applying in Northern Ireland** since it merely extends the meaning of one protected characteristic, that of 'race'. It has no read across implications to other types of equality law.

(e) The recommendation would mean that race equality law in Northern Ireland provides better protection against discrimination on racial grounds than **the law applying in England, Wales and Scotland**. Race is defined more inclusively in Great Britain's Equality Act 2010, section 9(1), than it is in Northern Ireland's 1997 Order, but it could go further. At present it reads 'Race includes (a) colour; (b) nationality; (c) ethnic or national origins'. There is no mention of descent or caste.

(f) This recommendation would mean that race equality law in Northern Ireland provides better protection against discrimination on racial grounds than does **the law applying in the Republic of Ireland**. The way race is defined in the Republic of Ireland's law is similar to the limited definition in Northern Ireland's law: the ground of racial discrimination 'is' that as between any two persons 'they are of different race, colour, nationality or ethnic or national origins' (Employment Equality Act 1998, section (6)(2)(h); Equal Status Act 2000, section 3(2)(h)). In both Northern Ireland and the Republic of Ireland the legislation explicitly applies to members of the Irish Traveller community (article 5(2) of the 1997 Order; section 6(2) of the Employment Equality Act 1998 and section 3(2) of the Equal Status Act 2000). That is not the case under Great Britain's Equality Act 2010, although case law has made it clear that the Act does indeed protect

Irish Travellers, Scottish Travellers, Romany Gypsies and Sinti.[35] But it does not protect 'New Age Travellers' because they do not have sufficiently distinctive racial or ethnic origins.

(g) This recommendation is in line with the UN Convention on the Elimination of All Forms of Racial Discrimination, which is binding on the UK (and Ireland) under **international human rights law**. As mentioned in relation to Recommendation 1, the Convention defines 'racial discrimination' as meaning 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin'. In its General Recommendation No 29 (2002) CERD condemned descent-based discrimination, such as discrimination on the basis of caste and analogous systems of inherited status, as a violation of the 1965 UN Convention and recommended that a prohibition against such discrimination be included in domestic legislation. It noted as much in its Concluding Observations on the UK as far back as 2003.[36]

In its Concluding Observations on the UK in both 2011 and 2016, CERD recommended that the UK should invoke section 9(5)(a) of the Equality Act 2010, mentioned at '(a)' above, without further delay to ensure that caste-based discrimination is explicitly prohibited under the law (in Great Britain) and that victims of this form of discrimination have access to effective remedies.[37] It is reasonable to assume that CERD would wish the same reform to occur in Northern Ireland. Finally, 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.[38]

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[35] See *CRE v Dutton* [1983] 2 AC 548; *P O'Leary v Allied Domecq*, unreported, Central London County Court, 29 August 2000; *McClellan v Gypsy Traveller Education Information Project*, unreported, case no S/132721/07, 23 June 2008; *Moore v Secretary of State for Communities and Local Government* [2015] EWHC 44. See also, more generally, Hannah Cromarty, *Gypsies and Travellers*, House of Commons Library Briefing Paper, No 08083 (9 May 2019), available at https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/360/full-report.html.

[36] CERD/C/63/11 (10 December 2003), para 25.

[37] CERD/C/GBR/CO/18-20 (14 September 2011), para 30; CERD/C/GBR/CO/21-23 (3 October 2016), para 8(a).

[38] Fourth Opinion on the United Kingdom adopted on 25 May 2016, para 32, available at https://www.coe.int/en/web/minorities/united-kingdom.

***Recommendation 3 – Combined discrimination

The legislation on race equality in Northern Ireland should be amended to include a provision expressly permitting allegations of racial discrimination to be combined with allegations of other types of discrimination and this should be referred to as combined discrimination. The legislation should also permit tribunals and courts, when applying the race equality legislation, to take into account 'the effect of the combination of racial discrimination with other types of discrimination'.

(a) At present, if a person wishes to allege racial discrimination as well as one or more other types of discrimination, he or she can do so in an application lodged with the relevant tribunal (in employment cases) or county court (in other cases). To that extent, therefore, claims of dual or multiple discrimination are already permissible. But the proposed new Bill should make it explicit that a complaint of racial discrimination can be combined with a complaint of one or more other types of discrimination. The **first rationale** for this recommendation is that victims of discrimination cannot always be sure why they are being discriminated against and so it ought to be made clear to them on the face of legislation that they can allege more than one type of discrimination in the same complaint. Needless to say, the complainant should still be required to adduce evidence for each type of discrimination in order to have a chance of succeeding in relation to that type. **The second rationale** is that in some instances the combination of two forms of discrimination may give rise to disadvantages that would not have existed if only one of the forms of discrimination had occurred.

In Great Britain the original version of the Equality Act 2010 (in section 14) allowed for 'a combination of two relevant protected characteristics' and stated that a complainant need not show that the way he or she was treated was direct discrimination because of each of the characteristics in the combination. The implication was that somehow the combination of two relevant characteristics might mean that some additional disadvantage was suffered, over and beyond the disadvantage suffered because of each characteristic separately. On the other hand, the respondent would not be found to have contravened section 14 if he or she was able to show that the treatment of the complainant was not direct discrimination because of at least one

of the characteristics in the combination. However, section 14 has not yet been brought into force because the UK government believes (without detailing the evidence to support its belief) that it would place too much of a burden on businesses. Yet if claimants can already cite more than one ground of discrimination when lodging separate claims, it is hard to see what additional resources a respondent would need to allocate in order to defend an allegation in one claim that dual discrimination has occurred. The onus would still rest on the claimant to submit prima facie evidence of precisely what form the alleged type of discrimination took before it would need to be rebutted by the defendant.

Sometimes combined discrimination is referred to either as multiple discrimination (implying that more than two protected characteristics can be combined) or as intersectional discrimination, but as the Fundamental Rights Agency's *Handbook on European Non-Discrimination Law* points out, it is better to distinguish between those terms:[39] '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.[40]

A recent report by the European Network Against Racism (ENAR), *Intersectionality Discrimination in Europe: Relevance, Challenges and Ways Forward* (2020), explains that the term intersectional discrimination describes a variety of discrimination which can be suffered by a claimant who is discriminated against on two or more grounds. For example, a female Muslim, perhaps because she may be wearing a hijab or a niqab, may suffer more discrimination than a male Muslim or a female non-Muslim. While it may be difficult to quantify the additional discrimination, it is supposedly of a discrete type: the prejudice in question may be difficult to prove if it is claimed to be

[39] The term 'intersectionality' was allegedly coined by Kimberlé Crenshaw, a US law professor who is also known for her early advocacy of critical race theory. One of her seminal publications in the field is 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1 *University of Chicago Legal Forum* 139-167 (available online).

[40] Available at https://fra.europa.eu/en/publication/2018/handbook-european-non-discrimination-law-2018-edition, p 59.

because of only gender or religion, but easier to prove if it is because of gender and religion combined.

Likewise, the EU sometimes talks of intersectional discrimination. As recently as March 2021, in its proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay between men and women through pay transparency and enforcement mechanisms, the European Commission explained that the Directive will 'ensure that the courts or other competent authorities take due account of any situation of disadvantage arising from intersectional discrimination, in particular for substantive and procedural purposes, including to recognise the existence of discrimination, to decide on the appropriate comparator, to assess the proportionality, and to determine, where relevant, the level of compensation awarded or penalties imposed'.[41]

But in the draft Directive itself the word intersectional is not used. The relevant provision (Article 3(3)) reads: 'Pay discrimination under this Directive includes discrimination based on a combination of sex and any other ground or grounds of discrimination protected under Directive 2000/43/EC [the Race Equality Directive] or Directive 2000/78/EC [the Framework Directive on Equal Treatment in Employment and Occupation]'.

Given the difficulty in specifying the exact nature of intersectional discrimination (if it is meant to refer to a distinct variety of discrimination), this author is reluctant to recommend that the term be used in new legislation for Northern Ireland. It could lead to uncertainty for all who are involved in the application and enforcement of the law. The conjunction of different types of discrimination is best described as simply 'combined discrimination'. This 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.

To cover such situations the legislation could add a clause referring to 'the effect of a combination of prohibited grounds'. This is how the Canadian Human Rights Act 1985, in section 3.1 (which is headed 'Multiple grounds of discrimination') deals with the issue: 'For greater certainty, a discriminatory practice includes a practice based on one or

[41] Brussels, 4.3.2021; COM(2021) 93 final, at p 10.

more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds' (emphasis added). It is a clearer way of allowing for intersectional discrimination than is provided for by the (uncommenced) section 14 of the Equality Act 2010.

In so far as intersectional discrimination may designate some additional form of discrimination, the harm suffered may in any event be addressed by Recommendations 1 and 2 above. If, for example, a white woman of Chinese descent feels that she has been discriminated against on the basis of her gender but also because of her facial appearance or even her name, she ought to be able to cite any information which is supportive of this as evidence of combined gender and racial discrimination. Similarly, if a disabled man feels he has been discriminated against not just because of his disability but because he has been overheard conversing with a friend in a foreign language, he should be allowed to allege combined disability and racial discrimination.

It is sometimes suggested that the decision of the Court of Appeal of England and Wales in *Bahl v The Law Society* illustrates the difficulties faced by individuals claiming intersectional discrimination,[42] although it is not clear from the report of the case whether the Court was specifically asked to consider if Dr Bahl was discriminated against because of the effect of the combination of her gender and her race. The Court said that 'it was necessary for the Employment Tribunal to find the primary facts in relation to each type of discrimination against each alleged discriminator and then to explain why it was making the inference which it did in favour of Dr Bahl on whom lay the burden of proving her case'.[43] It did not expressly say that, when intersectional discrimination is alleged, each ground has to be considered and ruled on separately, even if the claimant experiences them as inextricably linked. The proposed change being suggested in this paper is intended to reflect the approach of the Court of Appeal in the *Bahl* case.

Moreover, as pointed out in the 2020 Country Report submitted to the European Commission by the European Network of Legal Experts in Gender Equality and Non-Discrimination,[44] in *Hewage v Grampian Health Board* the UK Supreme Court had no problem with the fact that

[42] [2004] IRLR 799, available at https://www.bailii.org/ew/cases/EWCA/Civ/2004/1070.html.
[43] Ibid, para 137.
[44] See n 22 above.

in that case the tribunal had found both race discrimination and sex discrimination even though it had not identified separate facts to support those findings.[45] In Lord Hope's words, the tribunal 'expressed its findings… in a way that made it plain that it felt itself entitled in these circumstances to draw a prima facie inference of sex and race discrimination in Mrs Hewage's favour, which it was for the Board to rebut and it failed to do'. The proposed change being suggested in this paper would allow such inferences to be drawn.

Even though the focus in this report is on racial discrimination and not other types of discrimination, the reality is that racial discrimination is one of the commonest grounds for a discrimination claim and in practice is often conjoined with additional allegations whereby the race dimension to the claim is exacerbated by other forms of prejudice. The new legislation on racial discrimination should acknowledge that reality. Ideally the provision would be contained in a Single Equality Bill for Northern Ireland, thereby allowing each of the protected characteristics to be combined with one or more of the others, but in the absence of any such Bill it is appropriate to begin the reform process by including a provision on combined discrimination in a new Race Equality Bill.

Making this change would be consistent with what has been suggested by Judge Marrinan in his 2020 report resulting from his Independent Review of Hate Crime Legislation in Northern Ireland.[46] In Recommendation 11 he proposed that 'Any new legislation should provide appropriate recognition of the importance of intersectionality and be reflected in the drafting of the statutory aggravations to existing offences'.[47] His recommendation is based on the approach of the Law Commission of England and Wales, which favoured a provision allowing for the recognition of hostility based on 'one or more characteristics'.[48] Judge Marrinan notes that 'intersectionality is an important lens through which we need to understand the nature, dynamics and experiences of some people who are victims of hate crime. It allows us to more fully comprehend how offenders can be directed towards people because of their multiple identities, and it

[45] *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] IRLR 870, available at https://www.bailii.org/uk/cases/UKSC/2012/37.html.

[46] See n 6 above.

[47] Ibid, para 7.280.

[48] Ibid, para 7.310.

enables responders to identify those people who might be particularly vulnerable to targeted abuse'.[49] In a similar fashion, allowing for the effect of combined discrimination to be taken into account in a claim for racial discrimination would be likely to respond to the lived experiences of victims of racial discrimination.

(b) In its 2014 report the **Equality Commission** called for 'the introduction of protection against intersectional multiple discrimination so that there is legal protection for individuals who experience discrimination or harassment because of a combination of equality grounds, including racial grounds'.[50] The report showed that there was clear evidence from within Northern Ireland and also at the EU level of multiple discrimination occurring quite extensively. This author agrees with the substance of the Equality Commission's proposal but recommends that the term combined discrimination be used in place of multiple or intersectional discrimination and that the words 'the effect of the combination of the grounds for discrimination' be included in the legislation. The Equality Commission has already supported moving beyond section 14 of the Equality Act 2010 by allowing more than just two grounds of discrimination to be combined and by not limiting the combination to claims of direct discrimination.[51]

(c) This recommendation could be **implemented** by including a provision in the new Race Equality Bill expressly permitting allegations of racial discrimination to be combined with allegations of other types of discrimination and that the effect of the combination should be taken into account. However, the new provision should avoid three of the features in section 14 of the Equality Act 2010 referred to at '(a)' above.

First, it should not refer to 'a combination of two relevant protected characteristics'. Instead, it should refer to 'a combination of two or more protected characteristics'.

Second, it should not be limited to combined direct discrimination but instead should cover combined indirect discrimination and also

[49] Para 7.280

[50] *Strengthening Protection Against Racial Discrimination*, n 3 above, at paras 3.99 to 3.124. The quotation is from para 3.99.

[51] Ibid, paras 3.119 to 3.121, citing the Commission's responses to the Discrimination Law Review consultation on a Single Equality Bill in 2007 and to the Government Equalities Office consultation on assessing the impact of a multiple discrimination provision in 2009.

combined direct and indirect discrimination (including, in all of these combinations, harassment and victimisation).

Third, it should not include an exemption for situations where the claimant is relying in part on disability discrimination which, if a claim of direct discrimination were to be brought, would be dealt with by a Special Educational Needs Tribunal: it seems unreasonable (although this falls outside the terms of reference of this report) to require, say, the parent of a black disabled child to take two separate claims on the child's behalf in order to vindicate the child's right not to be discriminated against. Addressing this third point would require an amendment to the Special Educational Needs and Disability (NI) Order 2005 allowing for the Special Educational Needs and Disability Tribunal to have the power to consider other types of discrimination as well as disability discrimination, and their combined effect.[52]

(d) The recommendation would add to the asymmetry currently existing within the **equality laws applying in Northern Ireland** since it allows for claims of combined discrimination as long as there is an element of racial discrimination in the claim. Making express provision for claims of combined discrimination has to start somewhere. In the absence of a Single Equality Bill for Northern Ireland provisions on combined discrimination will have to be included in each of the pieces of legislation dealing with the different types of discrimination.

(e) The recommendation would mean that race equality law in Northern Ireland is more protective than **the law applying in England, Wales and Scotland**. Even if section 14 of the Equality Act 2010 were to be brought into force in those jurisdictions it would address only situations where two types of discrimination are combined, not more than two. Moreover, section 14 does not explicitly allow for a tribunal or court to take into account 'the effect of the combination of prohibited grounds'.

(f) The recommendation would mean that race equality law in Northern Ireland provides a higher degree of protection against discrimination on racial grounds than does **the law applying in the Republic of Ireland**. There is no legislative provision in that jurisdiction expressly outlawing combined discrimination. Separate claims for different types of discrimination relating to the same behaviour by a respondent can

[52] The amendment would probably need to be made to article 22 (Jurisdiction and powers of the Tribunal) or to the regulation-making power conferred by article 23 (Procedure of the Tribunal).

already be made in the Republic and can be dealt with together by the Workplace Relations Commission or (for complaints about licensed premises or registered clubs) by a District Court. However, relevant case law suggests that tribunals and courts in the Republic of Ireland are not yet prepared to recognise combined discrimination as a distinct type of discrimination.[53] In a fairly recent Irish case which was referred to the Court of Justice of the EU, *Parris v Trinity College Dublin*, where sexual orientation and age discrimination were claimed together, the Court said that there is 'no new category of discrimination resulting from the combination of more than one of those grounds'.[54] That seems to run counter to what the European Union subsequently said in its proposal for a new Directive on equal pay between men and women referred to at '(a)' above.[55]

(g) As regards **international human rights law**, the European Commission, the EU's Fundamental Rights Agency and UN international human rights monitoring bodies have all recommended that states should adopt laws covering intersectional discrimination.

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 recommended that both states should explicitly provide for the prohibition of intersectional discrimination (though it referred to it as multiple discrimination).[56] 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.[57]

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[53] See the Country Report by Prof Judy Walsh, n 8 above, 18-19.

[54] [2016] EUECJ C-443/15 (judgment of 24 December 2016), at para. 80,

[55] See too Dagmar Schiek, 'On uses, mis-uses and non-uses of intersectionality before the Court of Justice' (2018) *Journal of Discrimination and the Law* 3.

[56] 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. As noted by the Equality Commission in its 2014 proposals regarding racial discrimination (n 3 above, para 1.5), the same call was made by the UN Committee on the Elimination of Discrimination Against Women in 2013 and by the Advisory Committee of the Framework Convention for the Protection of National Minorities in 2011.

[57] 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.

**Recommendation 4 – Direct discrimination*

The legislation on race equality in Northern Ireland 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.

(a) The **rationale** for this recommendation is that the existing law is inadequate to ensure that full protection is given against racial discrimination. In Northern Ireland the Race Relations (NI) Order 1997 does not use the term 'direct discrimination' but it does say, in article 3(1)(a), 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. The difference between discrimination occurring 'because of' certain treatment and 'on grounds of' certain treatment may at first seem a tenuous one, but in reality the former covers more situations than the latter. An action is likely to have many causes but not so many grounds. In addition, 'grounds' tends to be taken as referring to a person's motivation for acting, whereas 'causes' tends to be taken as embracing factors beyond motivation.

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. This is reflected in the rules concerning the burden of proof: while the burden of proving discrimination still rests on the claimant, if the claimant is able to prove facts from which a tribunal could conclude that the respondent had committed a discriminatory act, the tribunal must hold for the claimant unless the respondent can provide an adequate alternative explanation for the act. To bolster that approach it makes sense to define direct discrimination as occurring 'because of' certain treatment rather than 'on grounds of' certain treatment.

The effect of this proposed change will be marginal: the vast majority of instances where treatment can be said to be 'because of' race will also be ones where it can be said to be 'on grounds of' race, but there will be occasional instances where the latter phrase cannot be readily applied to the facts.

(b) The **Equality Commission** did not make this recommendation in its 2014 document entitled *Strengthening Protection Against Racial Discrimination*, although in its 2004 response to the proposal for a Single Equality Bill it wished 'to see a definition which provides that direct discrimination occurs when a disadvantage "is based upon" a prohibited factor'.[58]

(c) The recommendation can be **implemented** by a simple amendment to the wording of article 3(1)(a) of the 1997 Order so that in the proposed new Race Equality Bill it reads in a comparable way to section 13(1) of the Equality Act 2010, e.g.: 'A person discriminates against another in any circumstances relevant for the purposes of any provision of this Order if that person treats another person, because of that person's race, less favourably than he or she would treat others' (emphasis added).

(d) The recommendation, if implemented, would add to the asymmetry currently existing within **the equality laws applying in Northern Ireland** since it broadens the protection against racial discrimination beyond that available against other forms of discrimination. But just because the change may not yet be made in relation to other forms of discrimination it still deserves to be made for racial discrimination: general improvement of the law has to start somewhere. Ideally it will in due course be made for other types of discrimination law too.

(e) This reform would make the race equality law of Northern Ireland consistent with **the law applying in England, Wales and Scotland**. When Great Britain's law was reformed and consolidated in the form of the Equality Act 2010 the opportunity was taken to replace 'on grounds of' in earlier legislation with 'because of': section 13(1) allows a claim of direct racial discrimination to be brought if 'because of a protected characteristic' one person treats another person less favourably than he or she would treat others. It is true that the Explanatory Notes accompanying the 2010 Act state that the change in wording 'does not change the legal meaning of the definition, but rather is designed to make it more accessible to the ordinary user of the Act'. But, as admitted in their opening paragraph, the Explanatory Notes do not form part of the Act and have not been endorsed by Parliament, so it is open to judges to take a different view as to the legal import of any such change of wording.

[58] See n 1 above, para 5.1.1.

(f) This reform would mean that the race equality law of Northern Ireland goes beyond **the law applying in the Republic of Ireland** where, in both the employment and other spheres, claims are brought 'on grounds of' racial discrimination. Canada adopts the same approach as the Republic of Ireland, in the Canadian Human Rights Act 1985, as amended. However, Australian federal law prefers to refer to 'any act based on race' (Racial Discrimination Act 1975, as amended) and US federal law also uses 'based on' (42 US Code, Title 21: Civil Rights). 'Based on' is closer to 'because of' than to 'on grounds of'.

(g) The EU's Race Equality Directive from 2000, in Article 2(a), uses the phrase 'on grounds of'. Likewise, the UN Convention on the Elimination of All Forms of Racial Discrimination, in its Preamble, uses the same phrase. But at two other points in the Preamble the UN Convention refers to doctrines and policies 'based on' racial differentiation or racial superiority, and in Article 1 it defines 'racial discrimination' as meaning 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin…' (emphasis added). 'Based on' or 'on the basis of' are also the preferred phrases used in more recent UN Conventions on discrimination, such as the Convention on the Elimination of All Forms of Discrimination Against Women of 1979 and the Convention on the Rights of Persons with Disabilities of 2006.

International human rights law, therefore, seems to prefer a broader approach than one which refers to 'on grounds of' race and does not see a particular need to use the phrase 'because of'. But it is of course permissible for states to go beyond the degree of protection afforded by international human rights law if they so wish, provided that when they do so they do not unduly interfere with other persons' rights.

**Recommendation 5 – Racial harassment*

The legislation on race equality in Northern Ireland should be amended to ensure that, when outlawing racial harassment, 'related to' [or 'in relation to' or 'relating to'] should be used in place of 'on grounds of'.

(a) As with the rationale for recommendation 4, the **rationale** for this recommendation is that it would enhance the protection of people who are being harassed, since proving that harassment was 'related to' or 'in relation to' race can be easier to do than proving that it was 'on grounds of' race. The reason why the phrase 'on ground(s) of' will sometimes be interpreted in a comparatively narrow fashion has been explored in the discussion of the rationale for recommendation 4.

(b) The **Equality Commission** recommended in 2014 that the statutory provision on racial harassment (article 4A(1) of the Race Relations (NI) Order 1997) should be amended so that it applies not to harassment 'on grounds of' race or ethnic or national origins but instead to harassment 'related to' race, colour, nationality or ethnic or national origins.[59]

(c) This recommendation can be i**mplemented** through a simple change to the wording of article 4A(1) of the 1997 Order before it is re-enacted in the proposed new Race Equality Bill, which would then read: 'where, <u>for a reason which relates to</u> the person's race, colour, nationality, ethnic or national origins, descent and caste [not '<u>on grounds of</u> race or ethnic or national origins'], A engages in unwanted conduct which has the purpose or effect of...' (emphasis added).

(d) The law on harassment in Northern Ireland is already inconsistent with **the other equality laws applying in Northern Ireland**. Thus, this proposed reform would bring the law on racial harassment into line with the law on sexual harassment, as article 6A(1)(a) of the Sex Discrimination (NI) Order 1976 provides that 'a person subjects a woman to harassment if… he engages in unwanted conduct that is <u>related to</u> her sex or that of another person…' (emphasis added). Northern Ireland's law on disability harassment also uses the phrase 'relates to' (section 3B(1) of the Disability Discrimination Act 1995). But Northern Ireland's other types of harassment law (applying to

[59] *Strengthening Protection Against Racial Discrimination*, n 3 above, at paras 3.38 to 3.46.

religious belief, political opinion, age or sexual orientation) retain the phrase 'on the ground of' (e.g. article 3A(1) of the Fair Employment and Treatment (NI) Order 1998 and regulation 3(3) of the Equality Act (Sexual Orientation) Regulations (NI) 2006). The proposed reform would slightly redress the imbalance of the current law but would not remove it.

(e) This reform would make the race equality law of Northern Ireland consistent with **the law applying in England, Wales and Scotland**, as section 26 of the Equality Act 2010 provides that 'A person (A) harasses another (B) if (a) A engages in unwanted conduct related to a relevant protected characteristic…' (emphasis added).

(f) **The law applying in the Republic of Ireland** refers to harassment 'based on' race. As noted in relation to Recommendation 4 above, this is a more comprehensive provision than the 'on grounds of' test but less comprehensive than the 'in relation to' test.

(g) **International human rights law** does not explicitly provide standards in relation to harassment, but Directive 2002/73/EC of the European Parliament and of the Council required EU Member States to prohibit harassment consisting of 'unwanted conduct related to the sex of a person [occurring] with the purpose or effect of violating the dignity of a person' etc (emphasis added).[60] Although that Directive is not one of the Directives listed in Annex 1 to the Ireland / Northern Ireland Protocol to the EU-UK Withdrawal Agreement of 2019, it is appropriate in this context to mirror its phraseology.

[60] That Directive was on the principle of equal treatment of men and women regarding access to employment, vocational training and promotion, and working conditions.

Recommendation 6 – Protection against public authorities

People should be protected against racial discrimination when public authorities are exercising any of their public functions, rather than just in specified areas such as employment, the provision of goods, facilities or services, and the fields of social security, healthcare, social protection and social advantage.

(a) The **rationale** for this recommendation is that the current degree of protection in relation to activities of public authorities is too limited and without any justification. While article 21 of the 1997 Order prohibits race discrimination in the provision of goods, facilities and services to the public or a section of the public, article 20A is more limited as regards the remainder of a public authority's functions because it refers only to the areas of social security, healthcare, social protection and social advantage. Those limits derive from the Race Relations Order (Amendment) Regulations (NI) 2003, which implemented the Race Equality Directive 2000/43 EC of 29 June 2000. While it was right that the law of Northern Ireland should be amended at that time to take account of the requirements of the Directive, the result was to subject only some of public authorities' functions to the duty not to discriminate.

Presumably the reason why the Race Equality Directive specified only four areas in which the duty not to discriminate had to apply was that the Directive could set requirements only for areas which were within the competence of the European Community at the time (even if its competence in the area of healthcare was limited). That of itself, however, is not an adequate reason, all the more so now that Northern Ireland is no longer a part of the EU. The gap in provision means, for example, that public authorities such as the police (e.g. when policing a protest), the Public Prosecution Service (e.g. when considering whether to prosecute alleged offenders) or the Prison Service (e.g. when deciding where to detain suspected defenders who have been remanded in custody) are under no legislative duty not to discriminate on racial grounds.

The anomaly was rectified in England, Wales and Scotland by legislation enacted in the wake of the report of the inquiry into the murder of the black teenager Stephen Lawrence in London in 1993.

The report had found systemic failings on the part of the Metropolitan Police and one of its recommendations was that the Race Relations Act of 1976 should be made fully applicable to all police officers. The resultant legislation, the Race Relations (Amendment) Act 2000, inserted a provision into the Race Relations Act 1976 which imposed a duty on all public authorities, not just the police, not to discriminate on racial grounds when carrying out their public functions. The 1976 Act was replaced by the Equality Act 2010, section 29(6) of which provides, in respect of all protected characteristics, that '[a] person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation'. Some public functions are expressly exempt from this provision (e.g. judicial acts and decisions to institute criminal proceedings: see para 3 of Schedule 3 to the Act) and the Explanatory Notes relating to section 31 (an interpretation section) suggest that '[p]ublic functions not involving the provision of a service include licensing functions; Government and local authority public consultation exercises; the provision of public highways; planning permission decisions; and core functions of the prison service and the probation service'.

(b) In Northern Ireland, the Race Relations (NI) Order 1997 was never amended to provide that all public authorities, when exercising any of their public functions, must not discriminate against any person because of his or her race. This gap in protection has no justification and should be plugged. However not all of the exceptions allowed for in Schedule 3 to the Equality Act 2010 should be replicated in Northern Ireland, since many of them seem to be unjustifiably broad. This applies to paras 3(1)(c) and (d) on decisions relating to commencing or continuing criminal prosecutions, para 20 on insurance or a related financial service provided by an employer (although benefits provided by an employer under group schemes are not within the exception), and para 31 on provision of a content service on television, radio or online broadcasting.

Para 17 should also not be replicated. It exempts race discrimination relating to nationality or to ethnic or national origins by a Minister of the Crown, or by a person acting with authorisation, when exercising functions under the Immigration Acts, the Special Immigration Appeals Commission Act 1997 or (if it relates to immigration or asylum) retained EU law. This is a matter currently dealt with by article 20C of the Race

Relations (NI) Order 1997, in relation to which see Recommendation 17 below. The **Equality Commission** has backed this recommendation since at least 2014.[61] Understandably, it would like the same reform to be made to the legislation governing other types of equality law in Northern Ireland where the same gap exists.

(c) This amendment could be **implemented** by replacing article 20A(1) to (4) of the Race Relations (NI) Order 1997 with a new provision mirroring that in section 29(6) of the Equality Act 2010, namely: 'A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation'. Another model would be section 76(1) of the Northern Ireland Act 1998, which reads: 'It shall be unlawful for a public authority carrying out functions relating to Northern Ireland to discriminate, or to aid or incite another person to discriminate, against a person or class of person on the ground of religious belief or political opinion': the words 'on the ground of religious belief or political opinion' could be replaced with 'because of race, colour, descent, nationality, or national or ethnic origin' and it would need to be made clear that (unlike section 76(1)) the new provision covers indirect discrimination and harassment as well as direct discrimination. A Schedule to the Order could replicate parts of Schedule 3 to the Equality Act 2010, with the exclusion of exemptions included there for which there is no reasonable justification. Only exemptions genuinely linked to security situations should be tolerated.

(d) This recommendation would bring race equality legislation into line with some **other equality laws applying in Northern Ireland**, thereby altering slightly the existing asymmetry between the laws. These other laws include the disability equality laws (see section 21B(1) of the Disability Discrimination Act 1995) and, as noted in (c) above, the laws relating to religious belief and political opinion discrimination. Sexual orientation equality legislation would remain out of step (see the Equality Act (Sexual Orientation) Regulations (NI) 2006, regulation 12(1)). Curiously, there is no legislation of this nature in respect of sex discrimination in Northern Ireland, although under article 26 of the Sex Discrimination (NI) Order 1976 there is a general duty in the public sector of education. Nor is there any such legislation in the field of age discrimination.

[61] *Strengthening Protection Against Racial Discrimination*, n 3 above, paras 3.15 to 3.37.

(e) This recommendation would make the race equality law of Northern Ireland broadly consistent with **the law applying in England, Wales and Scotland**, although it would go slightly beyond it by not replicating some of the exemptions allowed for by Schedule 3 to the Equality Act 2010.

(f) This recommendation would also take the race equality law of Northern Ireland beyond **the law applying in the Republic of Ireland**, since that jurisdiction has also limited the application of its Equal Status Acts. The Republic's legislation does not have an equivalent to section 29(6) of GB's Equality Act 2010, cited at (c) above. The definition of 'service' in the Equal Status Acts is quite limited and case law has confirmed that regulatory and control functions of public bodies do not fall within it. For example, in *Donovan v Donnellan* the Equality Tribunal held that the investigation and prosecution of crime are not 'services… available to the public or a section of the public'.[62] Other decisions of the Equality Tribunal and the Workplace Relations have determined that adjudicatory functions of public bodies are also not 'services'.[63]

(g) **International human rights law does** not envisage any limitations on the duty of public authorities in general not to discriminate against people on the basis of their race.

[62] DEC-S2001-011, 17 October 2001, available at https://www.workplacerelations.ie/en/cases/2001/october/dec-s2001-011.html. See too *Bula v An Garda Síochána*, ADJ-00006590, 19 November 2019, available at https://www.workplacerelations.ie/en/cases/2019/november/adj-00006590.html.

[63] E.g. *O'Neill v Garda Síochána Ombudsman Commission*, DEC-S2010-037, 30 July 2010, available at https://www.workplacerelations.ie/en/cases/2010/july/dec-s2010-037-full-case-report.html; *Niese v An Bord Pleanála*, DEC-S2015-012, 23 July 2015, available at https://www.workplacerelations.ie/en/cases/2015/july/dec-s2015-012.html. In 2015 the Workplace Relations Commission replaced the Equality Tribunal as the main first instance forum for hearing discrimination complaints.

**Recommendation 7 – Victimisation and comparators*

The legislation on race equality in Northern Ireland should be amended to allow a person to complain of victimisation without having to show that he or she was treated differently from some other comparable person, whether actual or hypothetical.

(a) The **rationale** for this reform is that requiring a comparison to be made in such cases is unjustifiable. A person who is victimised for complaining about racial discrimination is at that point complaining about the victimisation itself, not about the original treatment because of the personal characteristic he or she was relying upon when making the original complaint. Comparisons are irrelevant in this context: what matters is only whether the complainant suffered a disadvantage because of his or her original complaint.

(b) The **Equality Commission** supported this recommendation in its report in 2014.[64]

(c) This recommendation could be **implemented** by deleting some of the wording of article 4(1)(a) in the Race Relations (NI) Order 1997 so that the equivalent provision in the new Race Equality Bill reads simply thus: 'A person (A) discriminates against another person (B) in any circumstances relevant for the purposes of any provision of this Order if he treats B less favourably for a reason mentioned in paragraph (2)'.

(d) This recommendation would put race equality legislation out of step with all the **other types of equality law in Northern Ireland**. A comparator is required in, for example, sex discrimination law (article 6(1) of the Sex Discrimination (NI) Order 1976), disability discrimination law (section 55(1) of the Disability Discrimination Act 1995) and religious belief or political opinion discrimination law (article 3(4) of the Fair Employment and Treatment (NI) Order 1998).

(e) This recommendation would make the race equality law of Northern Ireland consistent with **the law applying in England, Wales and Scotland**.

(f) This recommendation would take the race equality law of Northern Ireland beyond what is required by **the law applying in the Republic of Ireland**. Under section 3(2)(j) of the Equal Status Act 2000 there is a requirement for a comparator in victimisation claims. However, under

[64] *Strengthening Protection Against Racial Discrimination*, n 3 above, paras 3.86 to 3.90.

section 74(2) of the Employment Equality Act 1998 there does not appear to be any need for a comparator for a victimisation claim made in an employment context. Ireland's law shows its distaste for victimisation by making it a criminal offence for an employer to dismiss an employee in circumstances amounting to victimisation (Employment Equality Act 1998, section 98(1)).

(g) **International human rights law** does not make specific provision for what needs to be shown before a claim of victimisation can succeed, but at no point does it specify that the complainant has to be able to rely upon a comparator. Nor does EU law have any such requirement in an employment context. Article 11 of the Council Directive 2000/78/EC (the Framework Directive on equal treatment in employment and occupation), headed 'Victimisation', reads simply: 'Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment'.

**Recommendation 8 – Influencing a person to discriminate*

The legislation on race equality in Northern Ireland should be amended to widen the circumstances in which it prohibits a person from influencing another to discriminate against a third person.

(a) The **rationale** for this recommendation is that articles 30 and 31 of the 1997 Order do not go as far as they need to go to prevent a person from influencing another to discriminate against a third person. They cover instructing, procuring, attempting to procure, inducing or attempting to induce a person to so discriminate, whereas the corresponding provision in the Equality Act 2010 (section 111) covers instructing, causing, attempting to cause, inducing or attempting to induce a person so to discriminate. Moreover, the Act expressly says that 'inducement may be direct or indirect', whereas the Order is silent on indirect procurement.

To ensure that improper influencing of another person is caught by the legislation it is appropriate to adopt the phraseology of the 2010 Act. The verb 'procure' is not defined in the 1997 Order, but it is almost certainly embraced by the verb 'cause', which also embraces other types of situations not covered by the Order. The 2010 Act is also stronger than the Order in two further respects.

First, the Order's 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. The only limit stated in the Act is that the relationship between the influencer and the person being influenced is such that the former is in a position to commit against the person being influenced the same kind of discriminatory act as is being advocated.

Second, 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. Amongst the fields covered by the Act but not by the Order are

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

(b) The **Equality Commission** has not to date made a recommendation on this issue.

(c) This recommendation could be **implemented** by, in effect, substituting in the new Race Equality Bill the wording of section 111 of the Equality Act 2010 for that of articles 30 and 31 of the Race Relations (NI) Order 1997.

(d) Race equality law in Northern Ireland is already out of step with **other types of equality law in Northern Ireland** in this respect. This recommendation would confirm, indeed increase, that asymmetry.

(e) This recommendation would make the race equality law in Northern Ireland consistent with **the law applying in England, Wales and Scotland**.

(f) This recommendation would take the race equality law of Northern Ireland beyond what is required by **the law applying in the Republic of Ireland**, at least in the civil law context. The Equal Status Act 2000, section 13, makes it a *criminal* offence to procure or attempt to procure another person to engage in discrimination or harassment. This report is not examining the criminal law in Northern Ireland.

(g) **International human rights law** is not prescriptive in relation to instructing, causing, inducing or procuring discrimination, but the 1965 UN Convention seeks to address <u>all forms</u> of racial discrimination. Article 1(1) states 'the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin <u>which has the purpose or effect</u> of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life' (emphasis added).

Recommendation 9 – Acts done under statutory authority

The legislation on race equality in Northern Ireland should be amended to limit exemptions from the applicability of race equality law in the context of acts done under statutory authority. There should be no exemption for discrimination because of colour and the exemption for discrimination because of nationality should apply only to acts done for the purposes of complying with the law on immigration, to the extent that that law is itself compatible with the European Convention on Human Rights, or if there is otherwise express statutory provision for the discrimination.

(a) At present, article 40(1) of the 1997 Order permits racial discrimination if it is done in pursuance of any statutory provision or in order to comply with any condition or requirement imposed by a Minister of the Crown or government department by virtue of any statutory provision. But article 40(1A) then qualifies this permission by saying that it does not apply to an act which is unlawful by virtue of a provision referred to in Article 3(1B) of the Order (which includes many of the provisions applying in an employment context or a service provision context) if the discrimination is on grounds of race or ethnic or national origins. This means that such discrimination can still be permissible under article 40(1) if it is on grounds of colour or nationality. In practice this means that persons can, at least in theory, be denied employment in some public sector organisations simply on the basis of their colour or nationality.

In relation to colour, as explained in the discussion of Recommendation 1 above, the phrase 'race or ethnic or national origins' does not necessarily protect people against discrimination solely on the basis of their colour. Therefore, to ensure certainty and clarity rather than to plug any clear gap in law, 'colour' should be inserted into the phrase 'on grounds of race or ethnic or national origins' in article 40(1A), as already suggested in paragraph (c) of the discussion of Recommendation 1 above. The primary **rationale** for changing the law is the moral unjustifiability of such discrimination. The current legislation, when it was amended by the Race Relations Order (Amendment) Regulations (NI) 2003, left a gap in protection against racial discrimination for no good reason. The issue was addressed by Parliament's Joint Committee on Human Rights when it was

scrutinising the Equality Bill in 2009[65] and the government amended the Bill to take account of most if not all of the Joint Committee's concerns. However, the Bill and the subsequent Act did not extend to Northern Ireland.

In relation to nationality, article 40(2) of the 1997 Order allows a person to discriminate against another on the basis of that other's nationality or place of ordinary residence or the length of time for which he or she has been present or resident in or outside the UK or an area within the UK, if that act is done (a) in pursuance of any statutory provision, or (b) to comply with any requirement imposed by a Minister of the Crown, a Northern Ireland Minister or government department by virtue of any statutory provision, or (c) in pursuance of any arrangements made by or with the approval of such a Minister or government department, or (d) to comply with any condition imposed by such a Minister or government department.

Although it is comparable to the exemption provided for by paragraph 1 of Schedule 23 to the Equality Act 2010 for England, Wales and Scotland, the wording of article 40(2) is unnecessarily and unacceptably wide. It is not limited to actions taken for the purposes of immigration law (on which see Recommendation 17 below) and it permits racial discrimination even in the absence of any statutory authority if it is in pursuance of any arrangements made by or with the approval of a Minister of the Crown, a Northern Ireland Minister or a government department or in order to comply with any condition imposed by such a Minister or government department (see paras (c) and (d)).

Moreover, it makes no difference under article 40(2) whether the arrangements or condition in question were made or imposed before or after the making of the 1997 Order (see article 40(3)). In order to ensure that, as required by Recommendation 1 above, the protection afforded against nationality discrimination is at the same level as that afforded to discrimination because of race or racial or ethnic origins, paragraphs (c) and (d) of article 40(2) should either be deleted or made conditional upon there being statutory support for the ministerial or departmental actions concerned.

[65] 26th Report of Session 2008-09, HL 169, HC 736 (November 2009) paras 293-8.

(b) In 2009 the **Equality Commission** recommended that the Race Relations (NI) Order 1997 should be amended to ensure that across the Order there is the same level of protection from discrimination and harassment on the grounds of colour and nationality as there is for other racial grounds.[66] The recommendation was reiterated in 2014.[67]

In the particular context of the employment of foreign nationals in the public service the Commission recommended in 2014 that article 40 of the Order should be amended so as to either restrict or remove altogether the exemption which allowed discrimination to occur in that context.[68] It observed that at that time certain posts in the civil service, diplomatic service, armed services, security services and intelligence services were restricted to people of a particular birth, nationality, descent or residence, although the extent to which such restrictions were still being applied anywhere in the United Kingdom after Schedule 23 to the Equality Act came into force in this context for Great Britain on 1 October 2010 remained unclear. The exemption particularly affected non-EU nationals, since fewer restrictions applied to EU nationals due to the European Communities (Employment in the Civil Service) Order 2007. The Commission has not to date called for the more far-reaching changes to article 40(2) of the 1997 Order included in the current recommendation.

(c) As noted in the second paragraph of (a) above, and also in Recommendation 1 above, the prohibition of discrimination because of colour could be **implemented** by inserting the word 'colour' into article 40(1A). The other part of this recommendation, dealing with nationality discrimination, could be implemented, as already alluded to, by deleting paragraphs (c) and (d) from the re-enacted version of article 40(2) or by making the legality of the ministerial or departmental actions described conditional upon there being statutory authority for them.

(d) Reforming article 40 would have minor cross-cutting implications for **other types of equality law in Northern Ireland**. The anomaly in the context of racial discrimination (whereby article 40 exempts discrimination on grounds of colour or nationality) does not arise in other contexts. The wording of the provisions on 'Acts done under statutory authority' in the other types of equality law is rather similar in

[66] *Proposals for Legislative Reform,* 2009, n 2 above, pp 5-9.

[67] *Strengthening Protection Against Racial Discrimination*, n 3 above, paras 3.1 to 3.14.

[68] Ibid, paras 3.154 to 3.157.

each case and refers only to acts done under legislative authority, not executive or departmental authority: see, for example, article 52A of the Sex Discrimination (NI) Order 1976, section 59(1) of the Disability Discrimination Act 1995 (as modified by Schedule 8, paragraph 40) and article 78 of the Fair Employment and Treatment (NI) Order 1998. To that extent the second part of the current recommendation would actually increase the symmetry among the types of equality law in Northern Ireland.

(e) This recommendation, if implemented in the way suggested, would make the race equality law of Northern Ireland slightly more protective of race equality than **the law applying in England, Wales and Scotland** because, as regards nationality discrimination, the new version of article 40 would not be as wide-ranging in its exemptions as is paragraph 1 of Schedule 23 to the Equality Act 2010. As regards colour discrimination, the recommendation would bring the race equality law of Northern Ireland into line with that in England, Wales and Scotland.

(f) This recommendation would make the race equality law of Northern Ireland more protective of race equality than **the law applying in the Republic of Ireland**. There, section 14 of the Equal Status Act 2000, as amended by section 52 of the Equality Act 2004, says: 'Nothing in this Act shall be construed as prohibiting… (a) the taking of any action that is required by or under… any enactment [or] (aa) on the basis of nationality (i) any action taken by a public authority in relation to a non-national (1) who, when the action was taken, was either outside the State or… unlawfully present in it, or (2) in accordance with any provision or condition made by or under any enactment and arising from his or her entry to or residence in the State, or (ii) any action taken by the Minister in relation to a non-national where the action arises from an action referred to in subparagraph (i)'. Although section 14(aa) is less wide than the provision in the Equality Act 2010 in Great Britain or than what is proposed here – because it exempts only acts done on the basis of nationality and not, say, residence – section 14(a) remains in place and allows discrimination if it is required by or under *any* enactment, whether or not on the basis of nationality.

(g) **International human rights law**, through Article 1(3) of the Convention on the Elimination of All Forms of Racial Discrimination, permits states to have legal provisions concerning nationality, citizenship or naturalisation, provided only that such provisions do not discriminate against any particular nationality. However, under Article

31(1) of the Vienna Convention on the Law of Treaties 1979, '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Taken together these provisions mean that exemptions to the obligation not to discriminate against anyone on racial grounds – broadly defined – should be interpreted strictly, in a way that restricts the exemptions to a minimum level consistent with the object and purpose of the obligation.

**Recommendation 10 – Positive action*

The legislation on race equality in Northern Ireland should be amended so as to permit positive action to be taken in a wider range of circumstances with a view to promoting racial equality. The new Bill should permit positive action in situations where it is reasonably necessary for a provider of services to treat persons of a particular racial group differently in respect of services that are provided for the principal purpose of promoting the special needs of persons in that category. In an employment context, promoting integration of the workforce should be listed as a permitted ground for positive action and it should not be unlawful to do any act connected with encouraging members of the black and ethnic minority community in Northern Ireland to consider, or to apply for, a particular employment, training or occupation. This general recommendation on positive action should be supplemented by a more specific recommendation targeted at recruitment and promotion within an employment context (see Recommendation 11 below).

(a) The **rationale** for this recommendation is primarily that, unless positive action is permitted in a wider range of circumstances than currently allowed, forms of discrimination will continue to be very difficult to reduce or eradicate. At present the provisions permitting positive action are contained in Part VI of the 1997 Order (articles 35 to 41A), which also sets out 'exceptions' to the applicability of Parts II to IV of the Order. The provisions permitting positive action are piecemeal and rather wordy, yet they still do not permit positive action to the extent that would be permissible under EU law. In that respect Article 5 of the Race Equality Directive 2000 provides that: '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'.

Article 35 of the 1997 Order states: 'Nothing in Parts II to IV shall render unlawful any act done in affording persons of a particular racial group access to facilities or services to meet the special needs of persons of that group in regard to their education, training or welfare, or any ancillary benefits'. EU law does not suggest that only in those four respects can measures be taken to prevent or compensate for disadvantages linked to race. Moreover, although article 37 goes on to

provide specifically for discriminatory training etc, it does so by imposing conditions which are not prescribed by EU law, such as that, if a person wishes to afford only other persons of a particular racial group access to training which would help to fit them for particular work, it must reasonably appear to that person that at any time within the previous 12 months there were no persons of that group among those doing that work or that the proportion of persons of that group among those doing that work in Northern Ireland was small in comparison with the proportion of persons of that group among the population of Northern Ireland.

For the sake of completeness, it is worth noting that members of ethnic minorities, to the extent that some minorities experience a higher than average rate of unemployment, can benefit more than others from article 36A of the 1997 Order, which allows employers to fill vacancies by making it a requirement that persons applying to fill the vacancy have not been in employment for a specified period of time. This provision is also found in the law governing religious belief and political opinion discrimination (see article 75 of the Fair Employment and Treatment (NI) Order 1998). It should remain in place.

(b) In its 2014 report **the Equality Commission** recommended that the race equality legislation should be amended to expand the scope of voluntary positive action which employers, service providers and public bodies can lawfully take in order to promote racial equality. It suggested that more could be done in this context without breaching EU law. Even after Brexit, EU law is still important in this regard because under the Ireland / Northern Ireland Protocol to the EU-UK Withdrawal Agreement of 2019 the law of Northern Ireland must continue to comply with (amongst others) the Race Equality Directive of 2000. [69] In 2014 the Commission also pointed out how difficult it can be under the current law in Northern Ireland for providers of training to gather statistical information relating to the previous 12 months.[70] It added that the training has to be in relation to 'particular work', whereas training programmes are more often aimed at improving certain skills and competencies rather than at how to carry out particular work.[71]

[69] *Strengthening Protection Against Racial Discrimination*, n 3 above, paras 3.125.

[70] Ibid, paras 3.130–3.131.

[71] Ibid, para 3.132.

(c) This recommendation could be implemented in the new Race Equality Bill by modelling an **amendment** to the wording of article 35 in the 1997 Order on the wording of section 158 of the Equality Act 2010. This would mean that, if a person reasonably thinks that other persons who share a racial characteristic suffer a disadvantage connected to that characteristic, or have needs that are different from the needs of persons who do not share it, or have a disproportionately low rate of participation in an activity, that person may then take any action which is a proportionate means of achieving the aim of enabling other persons who share the characteristic to minimise the disadvantage, meet their needs or participate in the activity. In an employment context a further amendment could regulate recruitment and promotion in an employment context, as provided for by section 159 of the Equality Act 2010 (see Recommendation 11 below).

(d) Race equality law in Northern Ireland is already out of step with **other types of equality law in Northern Ireland** in this respect. The discrete pieces of legislation differ as to the extent to which they permit positive action. This recommendation would confirm, indeed increase, the existing asymmetry. The most far-reaching positive action measures are those contained in the Fair Employment and Treatment (NI) Order 1998, but they are inter-linked with mandatory duties, including monitoring duties, a topic which is beyond the scope of this paper.

(e) This recommendation would make race equality law in Northern Ireland consistent with **the law applying in England, Wales and Scotland**.

(f) This recommendation would also make the race equality law of Northern Ireland more consistent with **the law applying in the Republic of Ireland**, where again it is EU law which places a limit on what kinds of positive action are lawful.

Section 5(2)(h) of the Equal Status Act 2000 allows 'differences in the treatment of persons in a category of persons in respect of services that are provided for the principal purpose of promoting, for a bona fide purpose and in a bona fide manner, the special interests of persons in that category to the extent that the differences in treatment are reasonably necessary to promote those special interests'. This is a somewhat ambiguous and potentially far-reaching provision, as it talks of special 'interests' rather than special 'needs', but the Equality Tribunal is of the view that it normally requires the justification of more

favourable treatment of a particular category of persons, such as members of a particular race or nationality.[72]

This can be difficult to demonstrate, as illustrated by the case of *Keane v World Travel Centre*, where a travel company offered discounted flights only to Filipino nationals. This was found not to be positive action designed to advance the special interests of the Filipino community but rather just an attempt to obtain a competitive advantage over other travel providers.[73] Such a discount would probably also be unlawful under either the existing or the proposed law in Northern Ireland.

Section 6 of the Equal Status Act 2000 provides that it is not unlawful for a housing authority, or a body approved under section 6 of the Housing (Miscellaneous Provisions) Act 1992, when providing housing accommodation, to treat persons differently based on (amongst other things) their membership of the Traveller community. Whether this conduct would also be lawful under the wording of article 35 of the 1997 Order in Northern Ireland would depend on whether the provision of accommodation can be viewed as an aspect of 'welfare'.

Section 14(b) of the Equal Status Act 2000 is similar to section 158 of the Equality Act 2010 in Great Britain in that it allows 'preferential treatment or the taking of positive measures which are *bona fide* intended to (i) promote equality of opportunity for persons who are, in relation to other persons, disadvantaged or who have been or are likely to be unable to avail themselves of the same opportunities as those other persons, or (ii) cater for the special needs of persons, or a category of persons, who, because of their circumstances, may require facilities, arrangements, services or assistance not required by persons who do not have those special needs'. This provision appears to have a very similar if not identical reach to that provided by section 158 of the Equality Act 2010 for England, Wales and Scotland.

Section 33 of the Republic's Employment Equality Act 1998, as amended by the Equality Act 2004, allows measures taken 'with a view to ensuring full equality in practice between employees, being

[72] Equality Tribunal, *Shanahan v One Pico Restaurant*, DEC-S2003-056, 30 June 2003, at para. 7.2, https://www.workplacerelations.ie/en/Cases/2003/June/DEC-S2003-056-Full-Case-Report.html, cited in the Country Report on Ireland, n 8 above, p 74.
[73] Equality Tribunal, DEC-S2011-035, 15 August 2011, https://www.workplacerelations.ie/en/Cases/2011/August/DEC-S2011-035-Full-Case-Report.html.

measures (a) to prevent or compensate for disadvantages linked to any of the discriminatory grounds (other than the gender ground [which is covered by section 24 of the 1998 Act, as amended]), (b) to protect the health or safety at work of persons with a disability, or (c) to create or maintain facilities for safeguarding or promoting the integration of such persons into the working environment'.

This potentially allows for positive measures in more circumstances than would be allowed in England, Wales, Scotland or (at present) Northern Ireland, where 'promoting integration in the working environment' is not expressly mentioned. Although there is not yet any case law to substantiate this, it could mean, for example, that measures could be taken, provided they were proportionate, to allow employees from a BAME background the right to take leave on days which are important to them because of their ethnic background (e.g. Juneteenth or Diwali). Hence the current recommendation in this report proposes that the aim of 'promoting integration in the workforce' be included in the new Race Equality Bill as a permitted ground for positive action in an employment context.

(g) **International human rights law** is not very specific on what positive action can or cannot be taken in the context of racial discrimination. Article 1(4) of the 1965 UN Convention on the Elimination of All Forms of Racial Discrimination provides that: 'Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved'.

Taken literally, this provision seems to allow only special measures that are necessary to ensure the equal enjoyment of human rights and fundamental freedoms, much as Article 14 of the ECHR protects against racial discrimination only as regards the enjoyment of the rights and freedoms set forth in the ECHR itself. That could be problematic, because international human rights law does not explicitly recognise, for instance, the human right to employment. But international treaty-

monitoring bodies, including the UN Committee on the Elimination of Racial Discrimination, have interpreted the 1965 Convention more expansively.

This is clear from the Committee's General Recommendation No 32 (CERD/C/GC/32, 24 September 2009), which explains the Committee's understanding of special measures. It points out, for example, that Article 1(4) is supplementary to Article 2(2) of the 1965 Convention, which imposes an obligation on states in this context that reads: 'States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms'.

Note too that the General Recommendation (in para 17) says that '[a]ppraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions of the various groups in the population and their participation in the social and economic development of the country'. But it does not envisage that such data should be collected by the person(s) wishing to operate special measures, as article 37 of the Race Relations (NI) Order 1997 requires. Rather the data should be collected by the law-maker prior to authorising the taking of special measures in particular contexts.

In its concluding observations concerning the compliance of both the UK and Ireland with the 1965 Convention, CERD has more than once made reference to the positive action allowed under the national law. Thus, in its recommendations relating to the UK in 2016 CERD called on the state to 'adopt and implement targeted measures to address unemployment, occupational segregation, and discriminatory practices with regard to recruitment, salaries, promotions and other conditions of employment'.[74] In its recommendations relating to Ireland in 2020 CERD called on the state to 'adopt effective measures with an

[74] CERD/C/GBR/CO/21-23 (3 October 2016) para 33.

adequate level of resources to improve employment among Travellers and Roma'.[75]

[75] CERD/C/IRL/CO/5-9 (23 January 2020) para 34(a).

**Recommendation 11 – Positive action in recruitment and promotion*

The legislation on race equality in Northern Ireland should be amended to clarify when positive action is lawful in the recruitment and promotion field.

(a) The **rationale** for this proposed amendment is that employers are often uncertain about when exactly they can take positive action when recruiting or promoting employees. Such clarity is currently provided in England, Wales and Scotland by section 159 of the Equality Act 2010. This applies if an employer reasonably thinks that persons who share a protected characteristic (here, race) suffer a disadvantage connected to the characteristic or that participation in an activity by persons with that characteristic is disproportionately low.

In such situations the employer is permitted to take certain action with the aim of enabling or encouraging persons who share the protected characteristic to minimise the disadvantage or participate in the activity. The action in question is treating person A more favourably in connection with recruitment or promotion than person B because A has the protected characteristic and B does not. It can occur lawfully only if A is as qualified as B to be recruited or promoted, the employer does not have a policy of treating persons who share the protected characteristic more favourably in this context and the treatment is a proportionate means of achieving the aim mentioned above. The treatment can include offering A employment.

The type of situation referred to is sometimes called a 'tie-break' situation. It appears to be little used in practice because it can be difficult for an employer to demonstrate that candidate A was 'as qualified as' candidate B unless the job in question was a very low-skilled one. There is little case law on the issue, but in *Furlong v Chief Constable of Cheshire* in 2018, where the Chief Constable relied upon section 159 to defend a claim of discrimination brought by a straight, white, able-bodied male, 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.[76]

Despite the risks involved for employers if they resort to a 'tie-break' approach to recruitment, a provision allowing for the approach should be included in the proposed new Race Equality Bill for Northern Ireland. If the recommendation is implemented there will be a need for guidance to be published for employers on what steps they must take if they want to fall back on the new provision.[77]

(b) The **Equality Commission** has not to date made a separate recommendation on this issue.

(c) This recommendation could be **implemented** by including in the proposed Race Equality Bill a new provision mirroring the wording of section 159 of the Equality Act 2010 for England, Wales and Scotland.

(d) This recommendation would add to the asymmetry currently existing between **types of equality law in Northern Ireland**.

(e) This recommendation would make the law of Northern Ireland consistent with **the law applying in England, Wales and Scotland**.

(f) This recommendation would appear to move the law of Northern Ireland beyond **the law applying in the Republic of Ireland**, which does not contain any 'tie-break' provision, whether in the field of race discrimination or any other field of discrimination. Section 33(a) of the Employment Equality Act 1998, as amended by section 22 of the Equality Act 2004, states that nothing in Parts II or IV of the 1998 Act 'shall render unlawful measures maintained or adopted with a view to ensuring full equality in practice between employees, being measures… (a) to prevent or compensate for disadvantages linked to any of the discriminatory grounds (other than the gender ground)', but to date no tribunal or court has interpreted this provision as permitting the application of a tie-break mechanism comparable to the one contained in section 159 of GB's Equality Act 2010.

[76] A report of the judgment is available at https://www.gov.uk/employment-tribunal-decisions/mr-m-furlong-v-the-chief-constable-of-cheshire-police-2405577-2018; see in particular paras 138–139.

[77] The Equality and Human Rights Commission in GB has included some discussion of what section 159 of the Equality Act 2010 requires in the Supplement to its Code of Practice on Employment (2014) pp 7-9.

(g) The proposed reform would appear to be consistent with **international human rights law**: see the explanation given for this in relation to the positive action covered by Recommendation 10 above.

**Recommendation 12 – Occupational requirements*

The legislation on race equality in Northern Ireland should be amended so as to ensure that any occupational requirement which is put in place by way of an exception to the provisions on race discrimination is always a means of achieving a legitimate aim. Any such exception should also be available regarding persons analogous to employees, such as contract workers, partners and office-holders.

(a) The Race Relations (NI) Order 1997 contains two provisions allowing for exceptions to the provisions on race discrimination in the context of employment. Since the Order was made, article 8 has allowed for exceptions where being of a particular racial group is a genuine occupational qualification for a job only 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.

Then, in 2003, article 7A was inserted into the Order to ensure compliance with the Race Equality Directive of 2000.[78] 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 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 (while not stipulating that the requirement must be a means to achieving a legitimate aim), whereas article 8 is not so limited.

The two articles sit uncomfortably together, although in 2003 article 8 was amended to make it applicable only in situations where article 7A does not apply. It is, however, difficult to imagine situations where the four types of 'qualification' referred to in article 8 would not also constitute a 'requirement' for the purposes of article 7A. Article 8 is therefore to all intents and purposes redundant and this recommendation urges its deletion from the statute book. The

[78] See the Race Relations Order (Amendment) Regulations (NI) 2003.

rationale is that it is out of date, first because it mentions only four contexts where an occupational qualification can be deemed relevant and, second, because it is not limited by the proportionality principle in the way that article 7A is limited. Moreover, if race equality legislation is to be extended to protect a wider range of workers and volunteers (see Recommendations 25 and 26 below), this possible exception to the application of the legislation should be extended to those categories too. Article 9(3) already so provides as regards contract workers.

(b) The **Equality Commission** has not to date suggested this recommendation.

(c) This recommendation could be implemented by not replicating article 8 in the proposed new Race Equality Bill for Northern Ireland and by making it clear that article 7A extends not just to employees but to a wider range of workers and to volunteers. For the avoidance of doubt article 7A should also be amended so that it requires not just that the exception be applied proportionately but also that it be a means of achieving a legitimate aim. These changes would reflect the position under the Equality Act 2010 in Great Britain: see (e) below.

(d) The recommendation would add to the asymmetry in the currently existing asymmetry between **types of equality law in Northern Ireland**, as each of them has a different provision dealing with 'genuine occupational qualifications'. But it would be in line with the approach adopted in the most recent legislation: see the Sex Discrimination (NI) Order 1976, article 10; the Fair Employment and Treatment (NI) Order 1998, article 70(3) [which was inserted in 2015[79] and uses language similar to that in the Equality Act 2010]; and the Employment Equality (Age) Regulations (NI) 2006, regulation 9 [which uses wording similar to that in article 7A of the Race Relations (NI) Order 1997].

(e) This recommendation would make race equality law in Northern Ireland consistent with **the law applying in England, Wales and Scotland**. When the Equality Act 2010 was enacted the opportunity was taken to replace the previous legislative provisions on genuine occupational qualifications with one more general provision on genuine occupational requirements, which is set out in paragraph 1 of Schedule 9 to the Act. It is broader than the exception allowed by article 7A of the 1997 Order in Northern Ireland in that it extends to persons analogous to employees, such as contract workers, partners and holders of personal

[79] By the Fair Employment and Treatment Order (Amendment) Regulations (NI) 2015.

or public offices. It also requires not just that the exception be applied proportionately but also that it be a means of achieving a legitimate aim.

(f) This recommendation would make the law of Northern Ireland more consistent with **the law applying in the Republic of Ireland**. The Employment Equality Act 1998, by article 37(2), provides that a difference of treatment which is based on a characteristic related to any of the discriminatory grounds (except the gender ground) shall not constitute discrimination where, by reason of the particular occupational activities concerned or of the context in which they are carried out (a) the characteristic constitutes a genuine and determining occupational requirement, and (b) the objective is legitimate and the requirement proportionate. It is no accident that the language reflects that used in article 4(1) of the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

(g) This recommendation is consistent with the obligations imposed on the UK by **international human rights law** and also with the requirements of the Council Directive 2000/78/EC which, under the terms of the UK-EU Withdrawal Agreement of 2019, must continue to be complied with in Northern Ireland.

**Recommendation 13 – Premises*

The legislation on race equality in Northern Ireland should be amended to limit the scope of the exemptions from race discrimination law which apply in relation to premises. The exemption for owner-occupiers regarding the disposal of their premises should be deleted, as should the exemption for occupiers of small premises regarding the provision of accommodation in those premises, the disposal of those premises or the withholding of any consent.

(a) The original version of article 22(2) of the Race Relations (NI) Order 1997 said that, notwithstanding any prohibition to the contrary in article 22(1), it is lawful for a person who owns an estate in premises and wholly occupies them to discriminate against another person in the terms on which those premises are offered to that other person, in refusing an application for those premises by that person or in the treatment of that person in relation to a list of persons needing premises of that description. Such conduct becomes unlawful only if the owner-occupier uses the services of an estate agent or publishes an advertisement.

But in 2003, as a result of the Race Equality Directive 2000, article 22(2) was qualified by the insertion of words saying that it did not apply to discrimination on grounds of race or ethnic or national origins.[80] That meant that discrimination on other racial grounds, as defined in article 5(1) of the Order, namely colour or nationality, was still permitted. This is obviously anomalous and unacceptable. No discrimination on any racial grounds (including descent or caste) should be permitted in this context. The **rationale** for this reform is therefore that such discrimination is morally reprehensible even in a 'private' setting and that the state of current law is somewhat ridiculous.

There is a similar anomaly in article 23 of the 1997 Order, which in its original version allowed occupiers of small premises to discriminate in the way that they provide a person with accommodation in those premises, dispose of those premises or withhold any consent or licence. It too was amended in 2003 to make the exemption inapplicable if the discrimination was on the grounds of race or ethnic

[80] Race Relations Order (Amendment) Regulations (NI) 2003, reg 22.

or national origins.[81] As with article 22(2) 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. The **rationale** for this reform is therefore the same as for article 22(2) above. As it stands, incidentally, there is a further anomaly in the way in which a 'near relative' is defined in article 23(7). It includes a 'spouse' and a 'civil partner', but it does not include an 'unmarried partner': in a non-race context the Equality Act 2010 does include 'unmarried partner' in the definition of 'relative': Schedule 5, paragraphs 3(5) and (6).

(b) The **Equality Commission** does not currently have a recommendation on this issue.

(c) The recommendation can be i**mplemented** by simply deleting articles 22(2) and 23 from the existing legislation and not re-enacting them in the proposed new Race Equality Bill.

(d) The recommendation does not greatly affect the asymmetry between **the equality laws of Northern Ireland** because it deals with anomalies which existed only in relation to race equality. But a bigger anomaly remains, namely that in other types of equality law it remains lawful for people to discriminate against other people in the way that they privately dispose of or manage their premises: see, e.g., the Sex Discrimination (NI) Order 1976, articles 31(3) and 33; the Fair Employment and Treatment (NI) Order 1998, article 29(2); the Equality Act (Sexual Orientation) Regulations (NI) 2006, regulation 6(2).

(e) The recommendation, if implemented, would make the race equality law of Northern Ireland consistent with **the law applying in England, Wales and Scotland**, as set out in the Equality Act 2010, Schedule 5. Paragraphs 1 and 2 of that Schedule apply to disposals by owner-occupiers, while paragraph 3 applies to small premises.

(f) The recommendation, if implemented, would make the race equality law of Northern Ireland more protective against race discrimination than **the law applying in the Republic of Ireland**. Section 6(2) of the Equal Status Act 2000 makes lawful any disposal of an estate or interest, or any provision of accommodation, which is not available to the public generally or a section of the public, and the provision of accommodation by a person in a part (other than a self-contained part) of the person's home, or where the provision of the accommodation affects the person's private or family life or that of any other person residing in the home. These exemptions, especially the last, are more

[81] Ibid, reg 23.

widely worded than even the existing provisions in the race equality law of Northern Ireland. They were not amended in the wake of the Race Equality Directive 2000. Section 6(6) and (7) go on to allow for members of the Traveller community, or persons of specific nationalities, to be treated differently.

(g) The recommendation, because it is restricting exemptions to race equality law, is consistent with **international human rights law**, and also with EU law in so far as that remains applicable in Northern Ireland under the Ireland/ Northern Ireland Protocol to the EU-UK Withdrawal Agreement of 2019.

**Recommendation 14 – Political parties*

The legislation on racial equality in Northern Ireland should be amended to allow for positive measures to be taken by political parties regarding the selection of their candidates for elections to the UK Parliament, the Northern Ireland Assembly and the local government bodies.

(a) The Race Relations (NI) Order 1997 contains no provision allowing political parties to take measures relating to the selection of their candidates for elections. This is a regrettable gap because it is important for the health of democracy that the people who are elected to represent the electorate are as representative as possible of the population. It is good if the electorate can be given a broad range of candidates to choose from and one way of helping to achieve that is to permit political parties to adjust their candidate selection procedures to facilitate people from relatively unrepresented parts of the population to put themselves forward for selection. The **rationale** for this recommendation therefore is that allowing for positive measures in this context will enhance the quality of the polity in Northern Ireland.

(b) The **Equality Commission** does not currently have a recommendation on this issue.

(c) This recommendation could be **implemented** by including a provision in the proposed new Race Equality Bill comparable to that which is found in section 104 of the Equality Act 2010, which is summarised at (e) below. The provision should stipulate that it applies to elections to the UK Parliament, the Northern Ireland Assembly and the local government bodies, although any such reference to the UK Parliament may require the consent of the Secretary of State because it relates to a non-transferred matter.

(d) This recommendation affects the asymmetry between **the equality laws of Northern Ireland** in that it would be allowing positive measures to be taken in the context of race equality which are not currently available in the context of most other types of equality law. The exception is sex equality law, where article 34(2) of the Sex Discrimination (NI) Order 1976 permits special provision to be made by a political party for persons of one sex only 'in the constitution, organisation or administration of the party'.

(e) The recommendation, if implemented, would make the race equality law of Northern Ireland consistent with **the law applying in England,**

Wales and Scotland. Section 104 of the Equality Act 2010 applies to all the protected characteristics covered by that Act. It allows a person, without contravening the Act, to act in accordance with selection arrangements which the party makes for regulating the selection of its candidates in a relevant election, provided that the purpose of the arrangements is to reduce inequality in the party's representation in the elected body concerned (the UK Parliament, the Welsh Senedd, the Scottish Parliament and local government bodies) and that they are a proportionate means of achieving that purpose. But, except in the case of gender, the selection arrangements in question cannot include short-listing only persons with a particular protected characteristic (section 104(6) and (7)).

(f) The recommendation would allow for positive measures in Northern Ireland that arguably are already permitted under **the law applying in the Republic of Ireland**. The Equal Status Act 2000 has no specific provision relating to political parties but by section 14(1)(b) it allows the taking of positive measures which are bona fide intended to (i) promote equality of opportunity for persons who are, in relation to other persons, disadvantaged or who have been or are likely to be unable to avail themselves of the same opportunities as those other persons, or (ii) cater for the special needs of persons, or a category of persons, who, because of their circumstances, may require facilities, arrangements, services or assistance not required by persons who do not have those special needs.

(g) The recommendation is consistent with **international human rights law**, since the UN Convention on the Elimination of All Forms of Racial Discrimination permits positive action in certain situations, as explained in the commentary on Recommendation 10 above, at (g).

***Recommendation 15 – Employers' liability for third parties**

The legislation on race equality in Northern Ireland should be amended to make employers liable if they fail to take reasonably practicable steps to prevent racial harassment of an employee by a third party, regardless of whether or not a previous instance of harassment against an employee has already occurred. They should also be liable if, after such harassment has occurred, the employee is treated differently because he or she rejected or accepted the harassment.

(a) The **rationale** for this recommendation is that in situations where an employer is in a position to take reasonably practicable steps to prevent an employee from being harassed by a third party, such as a client, customer or patient, it is justifiable to impose liability. The position is comparable to that under health and safety law, which requires an employer to take reasonable measures to ensure the safety of his or her employees.[82] While victims of breaches of health and safety law are not always able to bring civil claims for any loss or harm suffered, harassment is unwanted conduct which almost always (but not necessarily) has been repeated (and alternative criminal sanctions may be imposed for breaches of health and safety laws).

Harassment is defined in the 1997 Order as 'unwanted conduct which has the purpose or effect of (a) violating [the victim's] dignity, or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for [the victim]' (emphasis added). Besides, the respondent employer would only have to show that he or she has taken 'reasonably practicable steps' to prevent the harassment. This could require, for instance, the posting of notices that harassment of employees will not be tolerated or that harassment will be reported to the police for consideration of whether the crime of harassment or any other crime has been committed. The crime of harassment in Northern Ireland comprises conduct or speech on at least two occasions which

[82] Health and Safety at Work (NI) Order 1978, art 4(1) reads: 'It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees'.

harasses a person, including alarming or causing distress to that person.[83]

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*[84] 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.

While the recognition of indirect racial discrimination is to be welcomed in this case, the fact remains that the indirect discrimination could be remedied by putting a better recording system in place but there would not necessarily be any reduction in the rate of future racist harassment by patients. It is surely unacceptable that employees cannot be better protected, just as it would be unacceptable if an employee's health and safety were continually put at risk.

The recommendation includes post-harassment discriminatory treatment of employee by employers, as provided for in the current law applying in the Republic of Ireland (see section 14A(1)(b) of the Employment Equality Act 1998).

(b) The **Equality Commission** remains of the view that a provision on this issue is required in Northern Ireland. In 2014 it recommended that the provision should either require just one previous incident or be replaced with a provision that employers will be liable when they ought to have been reasonably aware of the risk of third party harassment.[85] Of these options the latter seems by far the preferable, since it should

[83] Protection Mental health groups call for trans conversion therapy ban - BBC News, art 2. In his report on hate crime legislation in Northern Ireland, published in 2020 (see n 6 above), Judge Marrinan did not make any recommendation to change this definition.

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

[85] Equality Commission, *Strengthening Protection Against Racial Discrimination*, 2014, n 3 above, para 3.55.

encourage the employer to take steps to reduce the risk of third party harassment from the start of an person's employment. Employees ought not have to endure even one incident of third party harassment before being entitled to some risk-reducing measures by the employer.

(c) This recommendation could be **implemented** by including in the new Race Equality Bill a provision comparable to (the now repealed) section 40 of the Equality Act 2010 in Great Britain. Another model to follow would be the comparable provision already set out in sections 8(2B)-(2D) of the Sex Discrimination (NI) Order 1976, inserted in 2008.[86] However, both of these models are flawed in that they impose liability on an employer only if he or she knew that the employee had been harassed in the course of his or her employment by a third party on at least two other occasions. That is an even stricter condition than that set by the criminal law, where only one other incident is required to have occurred. The Joint Parliamentary Committee on Human Rights has said that it gives 'excessive leeway' to employers.[87] As under the health and safety laws, one incident should be enough to give rise to liability.

(d) This recommendation would add to the asymmetry between **the equality laws of Northern Ireland** in that such liability on employers would then be imposed only in relation to racial and sexual harassment, not other types of harassment. But racial harassment is nevertheless a clear manifestation of racism and needs to be prevented by law so far as is reasonably possible.

(e) This recommendation would move the law on race equality in Northern Ireland ahead of **the law applying in England, Wales and Scotland**. There section 40 of the 2010 Act was repealed by section 65 of the Enterprise and Regulatory Reform Act 2013. That Act's explanatory notes say that, following a review of the legislation and after a consultation process, the government considered that the measure imposed an unnecessary burden on business. No-one knows if any such burden would fall on employers in Northern Ireland if the current recommendation were to be implemented. Given the reasonable steps defence, it seems possible that any such burden would not be

[86] By the Sex Discrimination Order 1976 (Amendment) Regulations (NI) 2008, reg 4. The amendment was made in order to comply with Directive (2002/73/EC), which amended the original Equal Treatment Directive (76/207/EEC).

[87] Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill*, 26th Report of Session 2008-09, HL Paper 169, HC 736 (12 November 2009), para 119.

significant. The goal of preventing harassment is one that deserves legal backing.

In response to a recent consultation on sexual harassment in the workplace, the UK government has announced that it will impose a mandatory duty on employers to take all reasonable steps to prevent sexual harassment in the workplace.[88] A statutory code of conduct and accessible guidance for employers are planned too. But it is not yet clear what sanctions will be available if the statutory duty or the statutory code are breached. The government will also introduce explicit protections from third-party sexual harassment but will work with stakeholders to determine what shape these should take and whether they should apply only apply when an incident of harassment has already occurred.

It is too soon to know whether the introduction of these proposed forms – if also applied to racial harassment – would provide better protection than is recommended here to employees who are harassed in the course of their employment by someone other than their employer. In the meantime, the present recommendation should be vigorously supported.

(f) This recommendation would make the law of Northern Ireland consistent with **the law applying in the Republic of Ireland**, where section 14A of the Employment Equality Act 1998, inserted by section 8 of the Equality Act 2004, imposes liability on employers for failing to prevent harassment of their employees if reasonable steps to prevent it have not been taken.[89] This applies whether or not there have been any other instances of harassment. Section 14A also protects harassed employees from being treated differently in the workplace or otherwise in the course of his or her employment by reason of rejecting or accepting the harassment or it could reasonably be anticipated that he or she would be so treated.[90] It would be appropriate, for the avoidance

[88] The response is available at https://www.gov.uk/government/consultations/consultation-on-sexual-harassment-in-the-workplace/outcome/consultation-on-sexual-harassment-in-the-workplace-government-response (21 July 2021).

[89] See e.g. *Rusu v Senture Security Ltd*, Workplace Relations Commission, DEC-E2017-056, 24 July 2017, available at https://www.workplacerelations.ie/en/Cases/2017/July/DEC-E2017-056.html.

[90] See too the related code of practice issued on the harassment of employees: Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012, SI 208/2012, available at http://www.irishstatutebook.ie/eli/2012/si/208/made/en/print.

of doubt, to include that further protection in the reform law of Northern Ireland, which in any event is mandated by Article 2(3) of the Equal Treatment Directive of 1976, as amended by Directive 2002/73/EC, article 2.[91]

(g) The proposed reform would be consistent with **international human rights law**. Neither the UN Convention of 1965 nor the International Labour Organisation's Discrimination (Employment and Occupation) Convention of 1958 makes any specific reference to employers' liability for the actions of non-employees.

[91] See n 86 above.

**Recommendation 16 – Protection for office-holders*

The legislation on race equality in Northern Ireland should be amended, for the avoidance of doubt, to clarify that office-holders are protected against victimisation.

(a) At present the law in Northern Ireland concerning discrimination against office-holders is confusing and needs to be made more certain. 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.

The protection afforded by Article 72ZA is both broader and narrower than that afforded by sections 49 and 50 of the Equality Act 2010 in Great Britain, which deal with personal offices and public offices respectively. Thus, article 72ZA(3)(d) protects the holder of any public office against having his or her appointment terminated on grounds of race or ethnic or national origins, while section 50(7)(c) excludes such protection if the office in question is one to which appointment is made on the recommendation of, or subject to the approval of, the House of Commons, the House of Lords, the Welsh Senedd or the Scottish Parliament.[92] Moreover, article 72ZA(4)(c) provides protection against harassment of an office-holder by any person or body on whose recommendation or subject to whose approval appointments are made to that office, while section 52 of the 2010 Act does not include such persons or bodies in the definition of 'relevant person' in this context.

[92] It would appear that this wording does not cover offices appointment to which is subject to pre-confirmation 'scrutiny' by Parliament since, even if this scrutiny leads the relevant parliamentary committee to advise against the appointment, the government can nevertheless proceed with it. See *Guidance: Pre-Appointment Scrutiny by House of Commons Select Committees* (Cabinet Office, 2019). The offices subject to this kind of scrutiny are listed in Annex D of that Guidance. They include the office of chair of the Equality and Human Rights Commission.

On the other hand, article 72ZA makes no explicit mention of the right of office-holders not to be victimised, while sections 49(8), 50(9) and 50(10) do provide such protection in this context. This seems a strange omission, although it is possible that an office-holder in Northern Ireland who believes that he or she has been victimised could still call in aid article 4 of the 1997 Order, which contains a general prohibition against victimisation and is not limited to any particular context (employment, access to goods or services, etc). It applies 'in any circumstances relevant for the purposes of any provision of this Order' and victimisation is referred to at no other point in 1997 Order, though article 2(4) makes it clear that 'In this Order… (a) references to discrimination are to any discrimination falling within Article 3 or 4'. The Equality Act 2010 refers to victimisation at several points, despite also having a general provision outlawing victimisation (section 27).

The **rationale** for this recommendation, therefore, is that it would remove any doubt that victimisation of office-holders is not legally permitted. But a new Race Equality Bill should preserve the provisions which currently protect office-holders more strongly than do the provisions in the Equality Act 2010.

(b) The **Equality Commission** does not at present have a separate recommendation on this issue.

(c) This recommendation could be **implemented** by inserting into the new Race Equality Bill a sub-section in the section or sections that will be dealing with office-holders to make it explicit that victimisation of office-holders is not legally permitted.

(d) This recommendation would add to the asymmetry currently existing between **types of equality law in Northern Ireland** if the view is taken that those laws do not currently protect against the victimisation of office-holders. For example, articles 6 and 13B of the Sex Discrimination (NI) Order 1976[93] and articles 3(4)-(6) and 20A of the Fair Employment and Treatment (NI) Order 1998,[94] are worded in an analogous way to articles 4 and 72ZA of the Race Relations (NI) Order

[93] Art 13B was inserted by the Employment Equality (Sex Discrimination) Regulations (NI) 2005, in implementation of Council Directive 2002/73/EC of 23 September 2002 on the principle of equal treatment of men and women regarding access to employment, vocational training and promotion, and working conditions.

[94] Art 20A was inserted by the Fair Employment and Treatment Order (Amendment) Regulations (NI) 2003, in implementation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

1997: they may or may not protect office-holders against victimisation depending on the interpretation of the general provisions on victimisation in the respective Orders.[95]

(e) This recommendation would make the law of Northern Ireland consistent with **the law currently applying in England, Wales and Scotland** on the specific point of victimisation of office-holders.

(f) This recommendation would appear to equate the law of Northern Ireland with **the law applying in the Republic of Ireland**. Under section 2(3)(a) of the Employment Equality Act 1998, 'a person holding office under, or in the service of, the State (including a member of the Garda Síochána or the Defence Forces) or otherwise as a civil servant, within the meaning of the Civil Service Regulation Act, 1956, shall be deemed to be an employee employed by the State or Government, as the case may be, under a contract of service'. As an employee, such an office-holder would be eligible to claim for victimisation where appropriate.

(g) The proposed reform would be consistent with **international human rights law**. Although the 1965 Convention does not specifically mention victimisation, the concept is now accepted as a form of discrimination which requires to be made legally impermissible. The thrust of EU law is also very much in favour of outlawing the victimisation of any person who makes allegations of racial discrimination (unless they are not made in good faith). Article 11 of the Framework Directive of 2000 has already been cited in relation to Recommendation 7 above.

[95] See too the Employment Equality (Sexual Orientation) Regulations (NI) 2003, regs 4 and 12.

**Recommendation 17 – Protection for local councillors*

The legislation on race equality in Northern Ireland should be amended to extend the protection afforded to local councillors against racial discrimination by their local councils when they are carrying out their councillor functions.

(a) The **rationale** for this proposed amendment is that the omission of local councillors from protection against discrimination by their own local council is anomalous and unfair. Were those individuals employees or office-holders they would be protected and, since they effectively 'work' on behalf of the residents of the council area they represent, they deserve the protection of the laws on discrimination. There can be no justification for continuing to exclude such protection. Article 67 of the 1997 Order already requires a local council 'to make appropriate arrangements with a view to securing that its various functions are carried out with due regard to the need (a) to eliminate unlawful racial discrimination and (b) to promote equality of opportunity, and good relations, between persons of different racial groups'. It is wholly appropriate, therefore, that this be supplemented by a legislative provision entitling a local councillor to make a complaint of discrimination (including victimisation and harassment) against his or her council.

(b) The **Equality Commission** supported this recommendation in its 2014 proposals for reform.[96]

(c) This recommendation could be **implemented** by including in the proposed Race Equality Bill a provision mirroring the wording of section 58 of the Equality Act 2010 for England, Wales and Scotland. This would make it clear that in this context a local councillor would not be taken as suffering a 'detriment' merely because he or she was not appointed or elected to an office of the council or to a committee or sub-committee of the council.

(d) This recommendation would add to the asymmetry currently existing between **types of equality law in Northern Ireland**, since councillors are not currently protected under all of those laws. They are, however, protected against disability discrimination: Disability Discrimination Act 1995, ss 15A-15C.

[96] *Strengthening Protection Against Racial Discrimination*, n 3 above, paras 3.81 to 3.85.

(e) This recommendation would make the law of Northern Ireland consistent with **the law applying in England, Wales and Scotland**.

(f) This recommendation would grant greater protection against racial discrimination than is provided by **the law applying in the Republic of Ireland**. Local councillors there do not qualify as holders of an office for the purposes of section 2(3)(a) of the Employment Equality Act 1998.

(g) The proposed reform is consistent with **international human rights law**, which requires states to prevent and protect people against racial discrimination in all its forms. Article 2(d) provides that each state is required to 'prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation' (emphasis added).

**Recommendation 18 – Protection for law enforcement officers*

The legislation on race equality in Northern Ireland should be amended to ensure that all law enforcement officers – not just those in the Police Service of Northern Ireland – should be treated as employees for the purposes of the legislation. Police cadets should be covered too, just as police trainees are currently covered.

(a) The **rationale** for this recommendation is 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. Police officers from other forces who are in Northern Ireland to give assistance to the PSNI are usually considered to be, in effect, 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. The new race equality legislation should make it clear that such officers, as well as those in other law enforcement services, such as the Belfast Harbour Police,[97] the Belfast International Airport Constabulary[98] and the National Crime Agency,[99] are all protected by the race equality laws while serving in Northern Ireland. Article 72B of the 1997 Order may already provide for that, but it does so in an opaque way.

It should be noted, moreover, that under article 10(1) of the 1997 Order 'employment is to be regarded as being at an establishment in Northern Ireland if the employee… does his [or her] work wholly or partly in Northern Ireland'. That means that police officers from Great Britain who are temporarily serving in Northern Ireland in order to give 'mutual aid' to the PSNI (under section 24 of the Police Act 1996) would be protected by the race equality law here if it clearly applied to police officers other than PSNI officers.

Police trainees and police reserve trainees in Northern Ireland are currently protected against discrimination by section 41(2) of the Police (NI) Act 2000, which provides that '[a]ny statutory provision… which for

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

[98] Established under the Airports (NI) Order 1994, article 19.

[99] 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).

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'. However, if police cadets were to be appointed in Northern Ireland under section 42 of the Police (NI) Act 2000 (none has been to date), they would not currently be protected against discrimination because there is no provision for them comparable to section 41(2) for police trainees. Although section 42 says that police cadets will 'undergo training with a view to becoming police officers' they are a different category from those persons appointed as police trainees under section 39 of the 2000 Act. The proposed new Race Equality Bill should therefore make provision for such cadets to be protected by its employment provisions if and when they are appointed.

(b) The **Equality Commission** does not at present have a separate recommendation on this issue.
(c) This recommendation could be **implemented** by amending the provision which allows PSNI officers to be considered employees for the purposes of the Race Relations (NI) Order 1997 (article 72A) so that it embraces other law enforcement officers. and police cadets
(d) This recommendation would add to the asymmetry currently existing between **types of equality law in Northern Ireland**, since law enforcement officers who are not PSNI officers (and police cadets) are not currently protected under any of those laws.
(e) This recommendation would make the law of Northern Ireland more consistent with **the law applying in England, Wales and Scotland**, where provision is made for National Crime Agency officers to be regarded as employed by the Agency (section 42(5) of the Equality Act 2010).
(f) This recommendation would appear to grant slightly greater protection against racial discrimination than is provided by **the law applying in the Republic of Ireland** when law enforcement officers other than members of the Garda Síochána or Defence Forces are operating in that jurisdiction. Section 2(3)(a) of the Employment Equality Act 1998 makes it clear that members of the Garda Síochána or Defence Forces are to be treated as employees.
(g) The proposed reform is consistent with **international human rights law**, which requires states to prevent and protect people against racial discrimination in all its forms. The ILO's Discrimination (Employment

and Occupation) Convention 1958 also anticipates law-enforcement officers being protected against discrimination.

***Recommendation 19 – Exemption for immigration law**

The legislation on race equality in Northern Ireland should be amended to make it clear that there is no blanket exemption for actions taken in the implementation of immigration law. Exemption should apply only in relation to actions taken because of a person's nationality (not his or her ethnic or national origins), only when there is ministerial authorisation for it and only when the exemption is consistent with the person's rights under the European Convention on Human Rights. Any such exemption should require to be justified as seeking to achieve a legitimate aim by proportionate means.

(a) The 1997 Order, in article 20C, allows discrimination in the carrying out of immigration functions. However, it does so not on the grounds of a person's nationality but on the grounds of a person's ethnic or national origins. In practice, therefore, immigration officials can carry out their functions by openly discriminating against people on the basis of their general appearance where it might indicate a person's ethnic or national origin. This can have a discriminatory and disproportionate impact on minority groups. It can lead, for example, to colour profiling at ports, airports and on cross-border railways. The **rationale** for this recommendation is that it is offensive for such profiling to take place and one way of reducing, if not eliminating, it is to limit the exemption for immigration law which currently exists in the 1997 Order. To the extent that the new legislation would continue to permit nationality discrimination in the context of immigration law, it is important to also continue to require ministerial authorisation for any such discrimination and to ensure, as in other contexts (such as extradition), that the discrimination does not breach the European Convention on Human Rights and is being applied in pursuance of a legitimate aim and by proportionate means.

(b) In 2014 the **Equality Commission** recommended the removal of the immigration exception in so far as it allowed discrimination on the grounds of ethnic or national origins.[100] It did so in full awareness of the fact that immigration is a reserved matter and therefore the responsibility of the UK Parliament rather than the Northern Ireland

[100] *Strengthening Protection Against Racial Discrimination*, 2014, n 3 above, paras 3.139 to 3.153.

Assembly, but of course the Commission is entitled to act as an advocate to the UK Parliament and government in relation to reserved matters. The Commission pointed to research commissioned by the Northern Ireland Human Rights Commission which identified what appeared to be racial profiling by officers of the UK Border Agency.[101] The research suggested that people of particular nationalities and/or visibly from a minority ethnic background were being singled out for questioning.

The Commission, in its 2014 report, noted CERD's view, expressed in 2011, that public officials should not be allowed to discriminate on grounds of nationality if it is authorised by a Minister.[102] But the Commission did not at that time make a recommendation to the same effect. Nor, it should be noted, did the Joint Parliamentary Committee on Human Rights.[103]

(c) The recommendation could be **implemented** by altering the wording of the exception so that it applies only to actions taken because of nationality. In an era when colour and appearance are no longer a reliable indicator of a person's nationality, it is unacceptable to allow immigration laws to be enforced in any proxy way rather than through checking a person's nationality. But to ensure that the exemption based on nationality is relied upon only when strictly necessary, the legislation should specify that any such exemption must be compatible with Convention rights.

Although that requirement is already implicit, since under the Human Rights Act 1998 all legislation has to be compatible with Convention rights, it would be useful to make express reference to the compatibility point in whatever new legislation is made to limit the current exemption. It would need to be legislation made at Westminster, as immigration is a reserved matter, but a model to follow might be that used in section 8B(5A) of the Immigration Act 1971, which provides that, while an excluded person must be refused leave to enter or remain in the United

[101] *Our Hidden Borders: The UK Border Agency's Powers of Detention* (2009).

[102] *Strengthening Protection Against Racial Discrimination*, 2014, n 3 above, paras 3.148 to 3.150.

[103] Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill*, n 82 above, para 152.

Kingdom, this does not apply if refusing leave would be contrary to the United Kingdom's obligations under the ECHR.[104]

(d) This recommendation would not add to the asymmetry currently existing between **types of equality law in Northern Ireland**, since no such exception for immigration exists in the other laws.

(e) This recommendation would move the law beyond **the law applying in England, Wales and Scotland**. There, under paragraph 17 of Schedule 3 to the Equality Act 2010, a Minister of the Crown acting personally, or a person acting in accordance with a relevant authorisation, when either such person is exercising functions under the Immigration Acts, is not liable for discrimination on the grounds of nationality or ethnic or national origins. The current recommendation would remove the immunity from suit as far as discrimination because of ethnic or national origins is concerned and would restrict the immunity as far as discrimination because of nationality is concerned to situations where the discrimination is compatible with the ECHR.

(f) It would appear that this recommendation would grant greater protection against racial discrimination than is provided by **the law applying in the Republic of Ireland**. The Equal Status Act 2000, section 14, states that 'Nothing in this Act shall be construed as prohibiting (a) the taking of any action that is required by (i) any enactment…' So any legislative provision dealing with immigration and which appears to breach the Equal Status Act would nevertheless be lawful, unless it were adjudged to be in breach of the equality provision in the country's Constitution (Article 40.1).[105]

(g) In **international human rights law** the UN Convention on the Elimination of All Forms of Racial Discrimination 1965 makes it clear in Article 1 that it does not apply to distinctions, exclusions, restrictions or preferences made by a state between citizens and non-citizens. Nor is it to be interpreted as affecting in any way the legal provisions of states concerning nationality, citizenship or naturalisation, 'provided that such provisions do not discriminate against any particular nationality'. Whatever the original intent behind this wording, however, it is clear that in the intervening period the UN Committee on the Elimination of Racial Discrimination has reacted strongly against allowing it to be a green light for racial profiling. Indeed the Committee's most recent

[104] See too the Extradition Act 2003, sections 21(1) and 21A(1): judges in extradition cases must decide whether the person's extradition would be compatible with Convention rights.
[105] See para 1.22 above.

General Recommendation (No 36), issued on 17 December 2020, is on 'preventing and combating racial profiling by law enforcement officials'. It mentions that in 2009 the UN's Human Rights Committee became the first treaty-monitoring body to directly acknowledge racial profiling as unlawful discrimination.[106]

Moreover, as pointed out by the Equality Commission in 2014,[107] both the UN Committee on the Elimination of Racial Discrimination (CERD) and the Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities have called for reforms in this area.

In 2003 CERD recommended that the UK consider re-formulating or repealing the immigration exception in order to ensure full compliance with the 1965 Convention and in 2011 it expressed deep concern that the Equality Act 2010 still permitted public officials to discriminate on grounds of nationality, ethnic origin or national origin, provided it has been authorised by a Minister. Although it did not repeat this recommendation in its 2016 Concluding Observations, it did recommend that the UK government should evaluate the impact of counter-terrorism measures, especially the 'prevent duty' imposed by the Counter-Terrorism and Security Act 2015, to ensure that they are implemented in a manner that does not constitute profiling and discrimination on the grounds of race, colour, descent, or national or ethnic origin, in purpose or effect.[108]

In 2011 the Advisory Committee on the Protection of National Minorities referred to its 'serious concerns' about racial profiling at Northern Ireland ports and airports, saying that they 'have a disproportionate and discriminatory impact on persons belonging to minority ethnic communities'. The Committee did not address the issue in its fourth opinion on the UK published in 2017.[109]

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[106] In *Williams Lecraft v Spain* CCPR/C/96/D/1493/2006.

[107] *Strengthening Protection Against Racial Discrimination*, 2014, n 3 above, paras 3.144 to 3.150.

[108] CERD/C/GBR/CO/21-23 (3 October 2016), para 19.

[109] ACFC/OP/IV(2016)005 (27 February 2017).

**Recommendation 20 – Protection for applications to educational establishments*

The legislation on race equality in Northern Ireland should be amended to extend the prohibition of discrimination relating to the arrangements made for deciding who is to be offered admission to educational establishments.

(a) Currently article 18(1) of the 1997 Order makes it unlawful for those who are running a school, college or university to discriminate against a person (a) in the terms on which they offer to admit that person to the establishment or (b) by refusing to accept an application for admission from that person. This is not quite as extensive as the protection afforded in Great Britain by the Equality Act 2010, where section 85(1) in relation to schools and section 91(1) in relation to further and higher education establishments also confer protection against discrimination in the arrangements made for deciding who is to be offered admission. The **rationale** for the recommendation is that this gap needs to be plugged. Otherwise a school, college or university could potentially avoid liability for racial discrimination by making its admissions criteria discriminatory rather than by making its offer or rejection decisions discriminatory.

(b) The **Equality Commission** does not at present have a separate recommendation on this issue.

(c) This recommendation could be **implemented** by ensuring that when the current article 18 is re-enacted in the new Race Equality Bill a paragraph is added referring to discrimination in the arrangements made for deciding who is to be offered admission.

(d) This recommendation would add to the asymmetry currently existing between **types of equality law in Northern Ireland**, since the other equality laws also have a gap in protection such as is found in article 18 of the 1997 Order.

(e) This recommendation would make the race equality law of Northern Ireland consistent with **the law applying in England, Wales and Scotland**.

(f) This recommendation would grant greater protection against racial discrimination than is provided by **the law applying in the Republic of Ireland**, where section 7 of the Equal Status Act 2000 (on

educational establishments) makes no mention of the arrangements made for deciding who should be offered admission. Moreover article 18(1)(c)(ii) of the 1997 Order already protects school, college and university students against suffering 'any other detriment', a catch-all provision not contained in the Republic's law.

(g) In **international human rights law** the UN Convention on the Elimination of All Forms of Racial Discrimination 1965 makes it clear in Article 2(d) that each state is required to 'prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation' (emphasis added).

**Recommendation 21 – Protection against discrimination within educational establishments*

The legislation on race equality in Northern Ireland should be amended to extend the protection against racial discrimination to the way an educational establishment provides, or does not provide, education for a student.

(a) This kind of discrimination is not currently mentioned in article 18(1)(c) of the 1997 Order, whereas it is mentioned in sections 85(2) and 91(2) of the Equality Act 2010 in Great Britain. It may already be covered by the protection against suffering 'any other detriment' referred to in article 18(1)(c), but for the avoidance of doubt it is sensible to mention it explicitly. The **rationale** for extending protection in the way indicated is that it will make it abundantly clear to educational establishments, especially schools, that they cannot use race as a reason for distinguishing between students either in the way that they are taught or in the way that they are excluded from being taught. Students from the Traveller community, for instance, may benefit from such an explicit provision.

(b) The **Equality Commission** made no recommendation on this topic in its 2014 report on recommendations for law reform in the field of racial discrimination.

(c) This recommendation could be i**mplemented** by ensuring that when the current article 18 is re-enacted in the new Race Equality Bill a paragraph is added referring to discrimination in the way education is provided, or not provided, to a student.

(d) This recommendation would add to the asymmetry currently existing between **types of equality law in Northern Ireland**, since the other equality laws also have a gap in protection such as is found in article 18(1)(c) of the 1997 Order.

(e) This recommendation would make the race equality law of Northern Ireland consistent with **the law applying in England, Wales and Scotland**.

(f) This recommendation would grant greater protection against racial discrimination than is provided by **the law applying in the Republic of Ireland**, where section 7 of the Equal Status Act 2000 (on educational establishments) makes no specific mention of discrimination in the way education is provided or not provided. Section

7 may cover much of the same ground by mentioning 'access of a student to any course, facility or benefit provided by the establishment' and 'any other term or condition of participation in the establishment by a student', but it does not have the 'any other detriment' phrase such as is already contained in the 1997 Order.

(g) In **international human rights law** the UN Convention on the Elimination of All Forms of Racial Discrimination 1965 makes it clear in Article 2(d), as previously cited, that each state is required to 'prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation' (emphasis added).

**Recommendation 22 – Protection against the victimisation of school pupils*

The legislation on race equality in Northern Ireland should be amended to 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.

(a) The 1997 Order does not explicitly prohibit the victimisation of school children following the making of an allegation of discrimination, whether by the child him- or herself or by the child's parent or sibling. As already stated,[110] the only references to victimisation throughout the whole Order are in articles 2(4) and 4. These may be enough to allow a child to claim victimisation, but it would be preferable if the possibility was put beyond doubt. In Great Britain the Equality Act 2010 makes express provision both for victimisation of school children after they themselves have raised an allegation of discrimination (section 84(4) and (5)) and for victimisation of school children after an allegation of discrimination has been raised by the child's parent or sibling (section 86(2)). There is also a general prohibition on victimisation imposed by section 27 of the Equality Act 2010. The **rationale** for this recommendation, therefore, is to ensure that, if there is a gap in Northern Ireland's law, it is closed.

(b) The **Equality Commission** stated in its 2014 report on law reform proposals that the law of Northern Ireland already protects school children from being victimised if they make a discrimination or harassment complaint, but it recommended that protection be extended to situations where the 'protected act' (e.g. the making or supporting of a complaint of discrimination) was carried out by the child's parent or sibling.[111]

(c) This recommendation could be **implemented** by inserting a new clause to that effect in the proposed Race Equality Bill. It could be modelled on section 86(2) of the Equality Act 2010.

(d) This recommendation would add to the asymmetry currently existing between **types of equality law in Northern Ireland**, since the other equality laws also have a similar gap in the protection they afford to

[110] See Recommendation 16 above, p 83.

[111] *Strengthening Protection Against Racial Discrimination*, 2014, n 3 above, paras 3.91 to 3.98.

school children against victimisation in schools, unless the general prohibition against victimisation in those pieces of legislation is deemed to plug that gap (e.g. regulation 4 of the Equality Act (Sexual Orientation) Regulations (NI) 2006).

(e) This recommendation would make the race equality law of Northern Ireland consistent with **the law applying in England, Wales and Scotland**.

(f) This recommendation would grant greater protection against racial discrimination than is provided by **the law applying in the Republic of Ireland**, where section 3(2)(j) of the Equal Status Act 2000 allows for claims of victimisation but only by the person who has, for example, applied in good faith 'for any determination or redress' under the Act. If this refers to a determination or redress relating to the original allegation of discrimination it would exclude children on whose behalf the allegation was made by a sibling or parent.

(g) In **international human rights law** the UN Convention on the Elimination of All Forms of Racial Discrimination 1965 does not explicitly mention victimisation but it makes it clear in Article 2(d) that each state is required to 'prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation' (emphasis added). Victimisation can be just as pernicious in a non-employment context as in an employment context and children, in particular, deserve to the beneficiary of protection against this species of discrimination in an education setting.

**Recommendation 23 – Protection against qualification bodies*

The legislation on race equality in Northern Ireland should be amended to 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'.

(a) The **rationale** for this recommendation is that article 14 of the 1997 Order is not as protective in this field as section 53 of the Equality Act 2010. Article 14(1) applies to qualification bodies, that is, bodies which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade. It makes three types of discrimination by such bodies unlawful: (a) in the terms on which they are prepared to confer the qualification, (b) when they refuse to grant an application for the qualification and (c) when they withdraw the qualification or vary the terms on which it is held. Section 53 of the Act applying in Great Britain adds two further types of unlawful discrimination: (d) in the arrangements made for deciding upon whom to confer a relevant qualification and (e) by subjecting to any other detriment a person who has been conferred with the qualification.

An example of this last kind of discrimination may have occurred in *Uddin v General Medical Council* in 2013, where a doctor claimed racial discrimination but the report does not provide the details of the allegations made by the doctor.[112] 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. This report has already suggested adding provisions comparable to those in (d) and (e) to the law on racial discrimination in the context of applications to schools (see Recommendation 18).

(b) The **Equality Commission** does not currently have a recommendation on this issue. Qualification bodies were not mentioned in its 2014 report on law reform proposals.

[112] UKEAT/0078/12/BA (14 February 2013, Slade J); the difference between s 53(2) of the Equality Act 2010 and s 12(1) of the (now repealed) Race Relations Act 1976 (comparable to article 14 of the 1997 Order) was pointed out at para 27.

(c) This recommendation could be **implemented** by altering the current wording of article 14 when it is re-enacted in the proposed Race Equality Bill.

(d) This recommendation would add to the asymmetry currently existing between **types of equality law in Northern Ireland**, since the other equality laws also have a similar gap in protection with regard to discrimination by qualification bodies: see, for example, article 16 of the Sex Discrimination (NI) Order 1976, section 14A of the Disability Discrimination Act 1995 [which includes the first additional kind of discrimination referred to in section 53 of the Equality Act, but not the second], article 25 of the Fair Employment and Treatment (NI) Order 1998 and regulation 18 of the Employment Equality (Sexual Orientation) Regulations (NI) 2003).

(e) This recommendation would make the race equality law of Northern Ireland consistent with **the law applying in England, Wales and Scotland**.

(f) This recommendation would seem to make the law of Northern Ireland more protective against racial discrimination than **the law applying in the Republic of Ireland**. There, section 13 of the Employment Equality Act 1998 provides that 'A body which… (b) is a professional or trade organisation, or (c) controls entry to, or the carrying on of, a profession, vocation or occupation, shall not discriminate against a person in relation to membership of that body or any benefits, other than pension rights, provided by it or in relation to entry to, or the carrying on of, that profession, vocation or occupation'. Section 13 does not refer, for example, to 'the arrangements made for deciding upon whom to confer a qualification' or to subjecting a qualified person to 'any other detriment'.

(g) In **international human rights law** the UN Convention on the Elimination of All Forms of Racial Discrimination 1965 does not explicitly mention qualification bodies but it makes it clear in Article 2(d) that each state is required to 'prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by <u>any persons, group or organisation</u>' (emphasis added).

**Recommendation 24 – Protection against providers of employment services*

The legislation on race equality in Northern Ireland should be amended to (i) extend the definition of the 'providers of employment services' to whom the legislation applies and (ii) extend the type of discrimination by such providers which is made unlawful.

(a) Article 15 of the 1997 Order addresses discrimination by 'any person who provides, or makes arrangements for the provision of, facilities for' vocational training and article 16 addresses discrimination by employment agencies. Great Britain's Equality Act 2010 is structured differently. It first of all sets out what kind of discrimination is prohibited by providers of employment services (section 55) and then it defines what is meant by employment services (section 56).

Section 56 is wider in scope than articles 15 and 16 combined in that it also addresses discrimination by persons who provide or make arrangements for providing vocational guidance and those who provide an assessment related to the conferment of a qualification which is needed for, or facilitates, engagement in a particular profession or trade. Section 56 also refers to training which can be undertaken under certain Acts of Parliament applying only in England and Wales or Scotland.

The relevant legislation applying in Northern Ireland is the Employment and Training Act (NI) 1950, which by section 1(1) requires a government department to 'make such arrangements as it considers appropriate for the purpose of assisting persons to select, train for, obtain and retain employment suitable for their ages and capacities or of assisting persons to obtain suitable employees (including partners and other business associates)'. The **rationale** for the first part of this recommendation, therefore, is 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.

Section 55 is also wider than articles 15 and 16 combined in that it prohibits three additional types of discrimination, namely, (1) discrimination in the arrangements made for selecting persons to whom to provide, or to whom to offer to provide, an employment service, (2) discrimination as to the terms on which such a service is

provided and (3) discrimination in subjecting a person for whom such a service is provided 'to any other detriment' (sections 54(1)(a), 54(2)(a) and 55(2)(d) respectively). The 1997 Order contains the 'any other detriment' provision in article 15 (provision of vocational training) but not in article 16 (employment agencies). The **rationale** for the second part of this recommendation, therefore, is that there are gaps in the current degree of protection against discrimination which need to be filled. If they are not, some discriminatory practices could fall through a gap.

(b) The **Equality Commission** does not at present have a recommendation on this topic.

(c) The recommendation could be **implemented** by ensuring that the relevant clauses in the new Race Equality Bill provide a broader definition of 'providers of employment services' and a wider description of the types of discriminatory behaviour that is made unlawful by the legislation. Sections 55 and 56 of the Equality Act 2010 would be suitable legislative models to follow.

(d) This recommendation would add to the asymmetry currently existing between **types of equality law in Northern Ireland**, since the other equality laws sometimes define 'providers of employment services' and the types of prohibited behaviour in this context in a more limited way than the Equality Act. See, for example, articles 17 and 18 of the Sex Discrimination (NI) Order 1976 (although article 17 does protect against discrimination in the arrangements made for selecting people to receive vocational training), articles 22 and 24 of the Fair Employment and Treatment (NI) Order 1998 (although article 22 defines employment agencies as including the giving of career guidance) and regulations 19 to 21 of the Employment Equality (Sexual Orientation) Regulations (NI) 2003. Section 21A of the Disability Discrimination Act 1995 defines 'employment services' as including 'vocational guidance' as well as vocational training.

(e) This recommendation would make the race equality law of Northern Ireland consistent line with **the law applying in England, Wales and Scotland**.

(f) This recommendation would make the law of Northern Ireland more protective against racial discrimination than **the law applying in the Republic of Ireland**. The Republic's Employment Equality Act 1998 makes provision for addressing discrimination by employment agencies and providers of vocational training and by employment

agencies (sections 11 and 12 respectively) but it does not make provision for the other types of service referred to in section 56(2) of the Equality Act 2010. Also, section 11 is unspecific as to the types of discriminatory conduct which is prohibited; section 12 is more specific but it still limits protection to where there has been discrimination in the terms on which a vocational course or related facility is offered, in refusing or omitting to afford access to any such course and in the manner in which the course or facility is provided.

(g) In **international human rights law** the UN Convention on the Elimination of All Forms of Racial Discrimination 1965 does not explicitly mention providers of employment services but it makes it clear in Article 2(d) that each state is required to 'prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by <u>any persons, group or organisation</u>' (emphasis added). Article 1(3) of the ILO's Discrimination (Employment and Occupation) Convention 1958 provides that 'For the purpose of this Convention the terms "employment" and "occupation" include <u>access to vocational training, access to employment and to particular occupations</u>, and terms and conditions of employment' (emphasis added).

***Recommendation 25 – Protection for contract workers and other workers**

The legislation on race equality in Northern Ireland should be amended to extend protection against victimisation to contract workers and to extend protection against discrimination and victimisation to workers, and those who apply for work, who are not contract workers or agency workers.

(a) Contract workers are persons who work for another person (the 'principal') even though they are employed by another person who supplies them under a contract made with the principal. An example would be where a builder (the supplier) who has a contract with a house-owner (the principal) to build a kitchen supplies one of his or her employees who is an electrician (the contract worker) to do some separate electrical work for the house-owner. At present article 9 of the 1997 Order protects such a contract worker from being discriminated against because of race, as does section 41 of the Equality Act 2010. But section 41 also gives protection against victimisation to such workers while article 9 does not. The primary **rationale** for extending protection against victimisation is that victimisation itself is offensive but, in addition, if there is no protection against it there is a likelihood that victims of discrimination will be more reluctant to raise their concerns about discrimination in the first place.

As already discussed in relation to previous recommendations,[113] it may be that the general prohibition on victimisation imposed by article 4 of the 1997 Order, coupled with the requirement in article 2(4)(a) that references to discrimination in the Order must be interpreted as including references to victimisation, mean that contract workers are already protected against victimisation. But for the avoidance of doubt – as is often the approach adopted in the Equality Act 2010 – it is better to make the protection more explicit.

Agency workers are defined in the law of Northern Ireland, as they are in Great Britain, as individuals who (a) are supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer and (b) have a contract with the temporary work agency which is either a contract of employment with the agency or

[113] See Recommendation 16, p 83 and Recommendation 22, p 97.

any other contract to perform work and services personally for the agency.[114] As a corollary to this definition, agency workers do not include those workers who, even though they may have found work through an agency, are available to work for a hirer and have a contract under which the hirer is in effect a client of a profession or business carried on by those individuals. Agency workers are protected against racial discrimination, but workers who are not employees, contract workers or agency workers are not.

This gap in protection was highlighted in *Bohill v Police Service of Northern Ireland* in 2011,[115] where the Court of Appeal suggested it should be plugged. It also came to light in the English case of *Muschett v HM Prison Service*.[116] Even after the introduction of the Agency Workers Regulations (NI) 2011 there is still a gap because 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.

Most people can see the unfairness in denying protection against racial discrimination to some workers just because they are not, in the eyes of the law, employees, contract workers or agency workers, yet to extend the law on racial discrimination to such workers, including people who are self-employed, would be to make a large distinction between race equality laws and other types of equality laws. Nevertheless, reform has to start somewhere and it is unacceptable to do nothing to fill any part of the gap in the law until the whole of the gap can be filled. The **rationale** for this recommendation, therefore, is that racial discrimination is so offensive that it requires to be made unlawful wherever it occurs in the workplace, regardless of the status of the worker and for whom the work is being done.

(b) The **Equality Commission** does not currently have a recommendation on the need to protect contract workers against victimisation but it does see that there is a need to strengthen protection for certain categories of agency workers, as it explained in its 2014 report on *Strengthening Protection Against Racial Discrimination*.[117] There it highlighted the

[114] Agency Workers Regulations (NI) 2011, reg 3(1), implementing Council Directive 2008/104/EC of 19 November 2008 on temporary agency work.
[115] [2011] NICA 2.
[116] [2010] EWCA Civ 25, [2010] IRLR 451.
[117] See n 3 above, paras 3.62 to 3.80.

gaps in protection which arose in the Northern Ireland case of *Bohill v Police Service of Northern Ireland*[118] and in the English case of *Muschett v HM Prison Service*.[119] The Commission observed that the gaps had the potential to impact in particular on migrant workers in Northern Ireland.

(c) The recommendation could be **implemented** by inserting a clause in the proposed Race Equality Bill which confers protection against racial discrimination to all persons who carry out work for others or who apply to do so.

(d) This recommendation would add to the asymmetry in **the other equality laws of Northern Ireland** because the wording of article 9 of the 1997 Order is replicated in most of those other equality laws: see (for instance) article 12 of the Sex Discrimination (NI) Order 1976, article 20 of the Fair Employment and Treatment (NI) Order 1998, and regulation 9 of the Employment Equality (Sexual Orientation) Regulations (NI) 2003.

(e) This recommendation would make the race equality law of Northern Ireland consistent with **the law applying in England, Wales and Scotland** as contract workers but would go beyond it as regards other workers.

(f) This recommendation, in both its aspects, would make the law of Northern Ireland more protective against racial discrimination than **the law applying in the Republic of Ireland**, although it should be noted that section 2(3)(c) of the Employment Equality Act 1998 simplifies matters by providing that 'in relation to an agency worker, the person who is liable for the pay of the agency worker shall be deemed to be the employer'.

(g) As regards **international human rights law** the UN Convention on the Elimination of All Forms of Racial Discrimination 1965 says in Article 2(d) that 'Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances,

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[118] [2011] NICA 2, http://www.bailii.org/nie/cases/NICA/2011/2.html. In this case Mr Bohill was unable to claim a remedy for alleged discrimination because he had no contract of employment either with the recruitment agency in question or with the organisation to which the agency submitted his name as a potential worker. The Court of Appeal said this was an area of law likely to benefit from reform.

[119] [2010] EWCA Civ 25, http://www.bailii.org/ew/cases/EWCA/Civ/2010/25.html. In this case Mr Muschett, like Mr Bohill, had no contract of employment with either the employment agency or with the organisation within which that agency placed him as a worker.

racial discrimination by any persons, group or organisation' (emphasis added).

***Recommendation 26 – Volunteers

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 against racial discrimination, harassment and victimisation by their employer.

(a) People who do unpaid voluntary work for an organisation are not usually covered by anti-discrimination law anywhere in the United Kingdom or Ireland, unless they have responded to an offer from the organisation which is providing volunteering 'services' to members of the public. In its recent response to the consultation on sexual harassment in the workplace, the UK government was cautious about taking legal steps to protect 'pure' volunteers (i.e. not interns or people 'working for free') against sexual harassment, relying on concerns that small, volunteer-led organisations, could be exposed to a disproportionate level of liability and difficulties which could outweigh the services they provide.[120]

However, this reasoning seems hard to substantiate. One might as well say that organisations who take on volunteers bear no responsibility for their health, safety and welfare, which is not the case under the health and safety laws. Moreover it would be difficult in practice to distinguish between, on the one hand, interns and people 'working for free' and, on the other 'pure' volunteers. All of these people deserve to be protected against racial discrimination. Racial discrimination is an odious phenomenon and the law should combat it in as many different walks of life as it can. In addition, many volunteers perform tasks similar or identical to those performed by employees with whom they work alongside and it is invidious that the latter are protected against discrimination but the former are not. The indistinguishability of their role is the **rationale** for recommending that volunteers be granted protection against discrimination.

(b) The Equality Commission's position regarding the protection of volunteers was set out in its response to the consultation paper on a

[120] The response is available at https://www.gov.uk/government/consultations/consultation-on-sexual-harassment-in-the-workplace/outcome/consultation-on-sexual-harassment-in-the-workplace-government-response (21 July 2021).

Single Equality Bill in 2004. It said then that 'While not wishing to see occasional, transient voluntary work covered by the full ambit of the [Single Equality Bill], the Commission would wish 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'.[121] This recommendation would go beyond that proposal, but it would build on the Commission's support at that time for one of the definitions of 'employment' suggested by the consultation paper, namely: 'employment under a contract of service or of apprenticeship or a contract or other agreement or arrangement to do any work, including voluntary work, where the work is predominantly performed in person'.

(c) This recommendation could be implemented by including a provision in the proposed Race Equality Bill to the effect that anyone doing work for someone else on a voluntary basis must not be discriminated against because of 'racial grounds', including race, colour, nationality, ethnic or national origins, descent and caste.

(d) This recommendation would add to the asymmetry in **the other equality laws of Northern Ireland** because none of those other laws protect volunteers against discrimination.

(e) This recommendation would make the race equality law of Northern Ireland more protective of volunteers than **the law applying in England, Wales and Scotland**, where no protection against race discrimination exists for that category of person.

(f) This recommendation would make the race equality law of Northern Ireland more protective of volunteers than **the law applying in the Republic of Ireland**, where no protection against race discrimination exists for that category of person.

(g) This recommendation is consistent with the UN Convention on the Elimination of All Forms of Racial Discrimination 1965, which says in Article 2(d) that 'Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation' (emphasis added).

[121] Equality Commission, *Response to OFMDFM Consultation Paper 'A Single Equality Bill for Northern Ireland*, 2004, n 1 above, para 4.6.2.

**Recommendation 27 – Protection relating to competitive activities*

The legislation on race equality in Northern Ireland should be amended to make it more permissive of exceptions to race equality law in the context of competitive activities.

(a) At present, article 38 of the 1997 Order (headed 'Sports and Competitions') provides that nothing in Parts II, III or IV of the Order renders unlawful any act whereby a person discriminates against another on the basis of that other's nationality or place of birth or the length of time for which he or she has been resident in a particular area or place, if the act is done in selecting one or more persons to represent a country, place or area, or any related association, in any sport or game, or in pursuance of the rules of any competition so far as they relate to eligibility to compete in any sport or game.

This provision is largely mirrored by section 195(5) of Great Britain's Equality Act 2010, but section 195(6) goes on to say that the previous sub-section applies to the selection of persons for, and to the rules of, 'a sport or game or other activity of a competitive nature' (emphasis added). This obviously extends the reach of the provision quite a bit further than that of article 38. It would embrace, for example, computer gaming, music and talent competitions, and even perhaps 'fun runs'. The **rationale** for the recommendation is that it is unjustifiable to leave participants in activities which are so analogous to the traditional definition of 'sport or game' unable to benefit from the exemption relating to the selection of persons to represent an area or to the determination of eligibility to compete in a sport or game.

(b) The **Equality Commission** does not currently have a recommendation on this topic.

(c) This recommendation could be **implemented** by a simple amendment to the wording in article 38 of the 1997 Order when it is re-enacted in the proposed new Race Equality Bill.

(d) This recommendation would add to the asymmetry in **the other equality laws of Northern Ireland**, where no such exemption applies.

(e) This recommendation would make the race equality law of Northern Ireland consistent with **the law applying in England, Wales and Scotland**.

(f) This recommendation would leave the exemption from race discrimination law in Northern Ireland less wide than the exemption which is allowed under **the law applying in the Republic of Ireland**. There the Equal Status Act 2000 allows discrimination on the basis of nationality or national origin 'in relation to the provision or organisation of a sporting facility or sporting event to the extent that the differences are reasonably necessary having regard to the nature of the facility or event and are relevant to the purpose of the facility or event' (section 5(2)(f)). This more general wording exempts more than just the selection of persons to represent an area or the eligibility to compete in a sport or game.

(g) In **international human rights law** the UN Convention on the Elimination of All Forms of Racial Discrimination 1965 does not explicitly mention competitive activities but it makes it clear in Article 2(d) that each state is required to 'prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation' (emphasis added). CERD was very prominent in condemning the practice of apartheid in South Africa but otherwise does not seem to have raised any objection to exemptions from race discrimination laws if they are strictly for the purpose of selecting persons to represent an area or determining who is eligible to compete in a sport or game. In any event, such discrimination would always need to be accompanied by a convincing justification, especially if it relates to eligibility to compete.

**Recommendation 28 – Protection after relationships have come to an end*

The legislation on race equality in Northern Ireland should be amended to ensure that former members of associations are able to bring claims for discrimination or harassment because of race.

(a) Article 27A of the 1997 Order provides that where 'a relevant relationship' has come to an end it is unlawful for 'a relevant party' (a) to discriminate against another party, on grounds of race by subjecting him or her to a detriment, or (b) to subject another party to harassment, provided that the discrimination or harassment 'arises out of and is closely connected to that relationship'. 'A relevant relationship' is defined as 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.

A typical situation covered by this provision would be a racially discriminatory reference written by an employer in respect of a former employee. But the introductory words of article 27A(1) 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. Thus, anomalously, persons who are formerly members of a club (provided it had 25 or more members[122]) cannot rely on article 27A to found a claim of discrimination, only one of harassment.

The provision in the Equality Act 2010 dealing with relationships that have ended (section 108) is not limited in its application to discrimination covered by a list of provisions in the Act: it applies more generally. It therefore protects former members of associations (which are dealt with by sections 100 to 107 of the Act). The **rationale** for this recommendation, therefore, is that it removes an anomaly in the current law on race equality in Northern Ireland. There is no justification for denying former members of associations the right to claim discrimination after the relationship has ended while granting the right

[122] As specified in article 25(1)(a).

to those who were formerly in an employment relationship, an educational relationship or a business-customer relationship, etc.

(b) The **Equality Commission** does not currently have a recommendation on this topic.

(c) This recommendation could be i**mplemented** by ensuring that in the new Race Equality Bill the wording of section 108 of the Equality Act 2010 (in so far as it applies to racial discrimination) is preferred over the wording in article 27A of the 1997 Order.

(d) This recommendation would add to the asymmetry in **the other equality laws of Northern Ireland**. The Sex Discrimination (NI) Order 1976 has two provisions dealing with relationships which have come to an end (articles 22A and 36A) but neither of them applies to former members of associations. The Fair Employment and Treatment (NI) Order 1998 also has such a provision (article 33A) but it too does not apply to former members of associations. However, the Equality Act (Sexual Orientation) Regulations (NI) 2006 do extend protection against all forms of discrimination and harassment to former members of associations (regulations 17 and 18).

(e) This recommendation would make the race equality law of Northern Ireland consistent with **the law applying in England, Wales and Scotland**.

(f) This recommendation would make the law of Northern Ireland more protective against racial discrimination than **the law applying in the Republic of Ireland**. There the Employment Equality Acts do apply to former employees in some situations, but the Equal Status Acts do not appear to provide remedies to victims of discrimination after any other kind of relationship has come to an end.

(g) In **international human rights law** the UN Convention on the Elimination of All Forms of Racial Discrimination 1965 does not explicitly mention discrimination against members, let alone former members, of associations, but it makes it clear in Article 2(d) that each state is required to 'prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation' (emphasis added).

Recommendation 29 – Exemptions based on public safety and national security

The legislation on race equality in Northern Ireland should be amended to remove the exemption to race equality law based on public order and to place limits on the exemptions based on national security and public safety. These limits should require the use of an exemption to be justified in terms of the legitimacy of the aim it is pursuing, the necessity for the exemption in a democratic society at the time, the unavailability of alternative effective measures that could be taken without having resort to the exemption and the proportionality of the exemption to the alleged risks that need to be confronted.

(a) The right to be free from race discrimination is such a fundamental value that it is difficult to envisage situations in which it may be necessary for the right to be suspended. Yet article 41 of the 1997 Order provides that 'No act done by any person shall be treated for the purposes of any provision of Parts II to IV as unlawfully discriminating if (a) the act is done for the purpose of safeguarding national security or protecting public safety or public order and (b) the doing of that act is justified by that purpose'.

In contrast, section 192 of Great Britain's Equality Act 2010 merely says 'A person does not contravene this Act only by doing, for the purpose of safeguarding national security, anything it is proportionate to do for that purpose'. The law in Northern Ireland is therefore much more permissive of exemptions that the law applying in England, Wales and Scotland.

Protecting national security is clearly the most vital interest that deserves to be prioritised, certainly if 'national security' is taken to refer to the nation's sovereignty and independence. However, the phrase is a notoriously slippery one and no government in the UK has ever been willing to define it in legislative terms. 'Public safety' and 'public order' are also difficult to define; they overlap and each may at times come close to what is covered by 'national security'.

What is most important in this context, therefore, is not so much the label that is relied upon for an exemption but the justification that is put forward for its application at a particular time. The **rationale** for the current recommendation is that it provides guidance on how to assess

any proposed justification. The justification must show that the exemption is pursuing a legitimate aim, that it is necessary in a democratic society at the time it is applied, that there are no other effective measures that could be taken without having to resort to the exemption and that the nature of the exemption is proportionate to the alleged risks in question.

As 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, this recommendation proposes that public order be dropped from the provision on exemptions. Given recent experience gained from the Covid-19 pandemic it is reasonable to retain the 'public safety' basis, even though it is not contained in the Equality Act 2010. But exemptions claimed for on the basis of public safety or national security should be permitted only if they are fully justified in accordance with the criteria set out in the previous paragraph.

(b) The **Equality Commission** does not currently have a recommendation on this topic.

(c) This recommendation could be **implemented** by ensuring that when article 41 is replicated in the new Race Equality Bill it is worded partly in the manner of section 192 in the 2010 Act, but with modifications: ''A person does not contravene this Act only by doing, for the purpose of safeguarding national security or protecting public safety, anything that has been justified in accordance with the following criteria [i.e. those set out in the penultimate paragraph of section (a) above]'.

(d) This recommendation would add to the asymmetry in **the other equality laws of Northern Ireland** because the wording of article 41 of the 1997 Order is replicated in most of those other equality laws: see (for instance) article 53 of the Sex Discrimination (NI) Order 1976, article 79 of the Fair Employment and Treatment (NI) Order 1998, and regulation 50 of the Equality Act (Sexual Orientation) Regulations (NI) 2006. An exception is section 59 of the Disability Discrimination Act 1995, which, like section 192 of the Equality Act 2010, refers only to acts justified by the purpose of safeguarding national security.

(e) This recommendation would make the race equality law of Northern Ireland more protective against race discrimination than is **the law applying in England, Wales and Scotland**.

(f) This recommendation would appear to make the law of Northern Ireland less protective against racial discrimination than **the law applying in the Republic of Ireland** because the latter's law makes no provision for exemptions from race equality on grounds of national security, public order or public safety. There are certain exemptions based on provisions in other statutes but nothing of a general nature. There is still the general exemption allowed for by section 14(a) of the Equal Status Act 2000, which makes discrimination permissible if it is 'required by or under any enactment'.

(g) As regards **international human rights law** the UN Convention on the Elimination of All Forms of Racial Discrimination 1965 does not suggest that any exemptions can be made to national legislation on race equality based on the need to protect national security, public order or public safety. The ECHR, in Article 14, protects people against discrimination in the enjoyment of their rights and freedoms as set forth in the Convention on the basis of (for example) race, colour, language, national origin or association with a national minority.

Article 15 then allows a state to derogate from this provision '[i]n time of war or other public emergency threatening the life of the nation', provided that it does so only 'to the extent strictly required by the exigencies of the situation' and that the measures it takes 'are not inconsistent with its other obligations under international law'. When citing national security or public safety in order to justify not applying race equality law in Northern Ireland, the UK government would need to comply with the requirements of Article 15 (unless the exemption occurs in relation to a right or freedom which is not set forth in the ECHR).

It is worth remembering that it was challenges in the European Court of Human Rights which ultimately led the UK government to amend fair employment legislation in Northern Ireland so as not to allow 'national security' to provide blanket immunity against any claim for discrimination because of religious belief or political opinion.[123]

[123] *Tinnelly & Sons Ltd and McElduff v UK* (1999) 27 EHRR 249; *Devlin v UK* (2002) 34 EHRR 43; *Devenney v UK* (2002) 35 EHRR 24. See now sections 90 to 92 of the Northern Ireland Act 1998.