

Equality Commission

FOR NORTHERN IRELAND

Strengthening protection against racial discrimination

Recommendations for law reform

FULL REPORT

August 2014



1	Executive Summary	1
	Introduction	1
	Our recommendations	2
	Wider benefits of reform	4
	Conclusions and next steps	5
2	Introduction	7
	Context	7
3	Our recommendations	11
	Race equality legislation	
	<i>Forms of discrimination:</i>	11
	Increased protection on grounds of colour and nationality	11
	Broader protection against discrimination in the exercise of public functions	15
	Stronger protection against racial harassment	20
	Increased protection for agency workers	25
	New protection for councillors	29
	Increased protection against victimisation	30
	New protection against multiple discrimination	33
	Expand the scope of positive action	39
	<i>Exceptions:</i>	
	Removal of immigration exception	42
	Narrowing of employment exception on foreign nationals in public service	45
	<i>Enforcement and remedies:</i>	
	Increased powers for the Equality Commission	47
	Increased powers for tribunals	52
	Harmonise enforcement mechanism for education complaints	54
	Fair employment legislation	
	Improving workforce monitoring on racial grounds	57
4	Wider benefits of reform	64
	Introduction	64
	Help address key racial inequalities in Northern Ireland	64
	Harmonise, simplify and clarify	66
	Keep pace with legislative developments in Great Britain	66
	Further the aims of the race equality strategy	68
	Consistent with international human rights obligations	68
5	Conclusions and next steps	71

1. Executive Summary

Introduction

- 1.1 The Equality Commission for Northern Ireland ('the Equality Commission') is an independent public body established under the Northern Ireland Act 1998. It is responsible for implementing the legislation on fair employment, sex discrimination and equal pay, race relations, sexual orientation, disability and age.
- 1.2 We believe that urgent changes are required to **strengthen the race equality legislation** in Northern Ireland. This legislation protects individuals in Northern Ireland from being subjected to unlawful discrimination because of their race. The changes are aimed at **strengthening, simplifying and harmonising** the race equality legislation.
- 1.3 Our recommendations relate to a **wide range of areas** covered by the race equality legislation and therefore strengthen the rights of individuals as employees, customers, pupils in schools, tenants, as members of private clubs and as students in further and higher education.
- 1.4 We also recommend changes to the **fair employment legislation**. This legislation protects individuals from being subjected to unlawful discrimination because of their religious belief or political opinion. In particular, our recommendations are aimed at improving **workforce monitoring on racial grounds** by registered employers.
- 1.5 The **need for reform** of the race equality legislation in Northern Ireland **has been recognised at a number of levels; both locally and internationally**. Most recently, both the *Advisory Committee on the Framework Convention for the Protection of National Minorities*¹ and the *UN Committee on the Convention for the Elimination of all forms of Racial Discrimination* (CERD) has urged the NI Executive to take proactive steps to address

¹ See [*Third Opinion on the United Kingdom*](#) of the Advisory Committee on the Framework Convention for the Protection of National Minorities, June 2011

legislative shortcomings within the race equality legislation.² Research by the Joseph Rowntree Foundation in 2013³, also concluded that “*there is a case for embedding equality principles in society by strengthening equality legislation to make it more difficult for employers and organisations to act with impunity.*”

Our recommendations

Race equality legislation

1.6 In summary, we **recommend** that the **race equality legislation** is strengthened to:-

Forms of discrimination

- provide increased protection against discrimination and harassment on the grounds of **colour** and **nationality**. We are clear that this is a **priority area** for reform⁴.
- ensure broader protection against racial discrimination and harassment by **public bodies when carrying out their public functions**. Currently, protection against discrimination by public authorities when exercising their public functions is **limited to four areas**; namely, social security, health care, social protection and social advantage.
- give stronger protection against **racial harassment**, including greater protection for employees against racial harassment by customers or clients;
- increase protection for certain categories of **agency workers** against racial discrimination and harassment;
- introduce new protection for **Councillors** against racial discrimination and harassment by local councils;

² [Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK \(2011\)](#) and [Concluding observations of the Committee on the Elimination of Racial Discrimination: United Kingdom, \(2003\)](#).

³ Poverty and Ethnicity in Northern Ireland, Joseph Rowntree (2013)
<http://www.jrf.org.uk/sites/files/jrf/poverty-ethnicity-northern-ireland-full.pdf>

⁴ See [ECNI Proposals for Legislative Reform](#), 2009

- increase protection against **victimisation**; including, changes designed to make it easier for individuals who have been subjected to unfair treatment because, for example, they have made a complaint of racial discrimination, to bring a victimisation complaint.
- introduce new protection against **multiple discrimination**; so that individuals have protection if they experience discrimination or harassment because of a combination of equality grounds; for example, due to a combination of being both black and female.
- expand the scope of voluntary **positive action**; so as to enable employers and service providers to lawfully take a wider range of steps to promote racial equality;

Exceptions

- remove the **exception** which permits discrimination on the grounds of ethnic or national origins in relation to **immigration**;
- narrow the **exception** that restricts the employment of foreign nationals in the civil, diplomatic, armed or security and intelligence services and by certain public bodies;

Enforcement and remedies

- increase the **powers of the Equality Commission** to issue additional Race Codes of Practice and to effectively carry out formal investigations;
- strengthen **tribunal powers** to ensure effective remedies for individuals bringing race discrimination complaints;
- harmonise and simplify the **enforcement mechanism for education complaints**; so as to remove unnecessary procedural barriers to pupils in schools making complaints relating to racial discrimination in education.

Fair employment legislation

1.7 In summary, we **recommend** that the **fair employment legislation** is strengthened to:-

- amend the fair employment legislation so as **require** registered employers in Northern Ireland, in addition to monitoring the community background and sex of their employees and job applicants, to collect **monitoring information** as regards **nationality** and **ethnic origin**.

The primary reason for this change is to ensure the continuing usefulness of the fair employment Monitoring Regulations, and in particular, to enable employers to make a more accurate and meaningful assessment of fair participation in employment in their organisation. We are clear that this is also a **priority area** for reform⁵.

Wider benefits of reform

Race equality legislation

1.8 We consider that there are **cogent** and **robust** reasons why the **race equality legislation** should be amended. In particular, we believe the recommended changes will:

- help **address key racial inequalities** in Northern Ireland. They will, for example, provide greater protection for individuals against racial discrimination and harassment who currently have no or limited protection under the race equality law. They will also result in the removal of unjustifiable exceptions which limit the scope of the race equality legislation.
- **harmonise, simplify and clarify** the race equality legislation. The changes will remove unjustifiable inconsistencies within the race equality legislation, as well as removing unnecessary barriers experienced by individuals who wish to complain of unfair treatment under the race legislation. Further, they will ensure greater **legal certainty** and **clarity** in areas where the

⁵See [ECNI Proposals for Legislative Reform](#), 2009

scope of legislation is unclear. The changes will make it easier for individuals to understand what their rights are and for employers, service providers and others to understand what their responsibilities are under the legislation. They will **help improve consistency** between the race equality legislation and other equality legislation in Northern Ireland.

- help ensure that Northern Ireland race equality legislation **keeps pace with legislative developments in Great Britain**. In particular, many of the changes we advocate have already been implemented in other parts of the United Kingdom. It is, however, important to stress that, as regards certain areas of reform, we recommend that the Northern Ireland Executive introduce changes that **go beyond** the level of protection against racial discrimination currently set out in equality legislation in Great Britain.
- further the **overarching aims and objectives of the Executive's current Racial Equality Strategy**⁶. One of the aims of the current Racial Equality Strategy is to eliminate racism, racial inequality and unlawful racial discrimination and promote equality of opportunity in all aspects of life.
- ensure that the race equality legislation is in line with the **UK Government's international obligations** relating to the promotion of human rights for racial minorities and with the recommendations of international human rights monitoring bodies.

Conclusions and next steps

- 1.9 It is clear that there is a **robust case** for addressing significant gaps and weaknesses within the race equality legislation in Northern Ireland.
- 1.10 We welcome the Executive's commitment to bring forward a revised *Racial Equality Strategy*. We **recommend**, in light of the clear need for reform, that there is a **commitment** in the revised

⁶ A *Racial Equality Strategy for Northern Ireland 2005-2010*, OFMDFM, www.ofmdfmi.gov.uk This strategy is currently being revised.

Racial Equality Strategy to address legislative gaps in the **race equality legislation** so that individuals in Northern Ireland have effective protection against racial discrimination and harassment.

- 1.11 We further **recommend** steps are taken to amend the **fair employment legislation** in order to require registered employers in Northern Ireland to collect **monitoring information** as regards **nationality** and **ethnic origin**.
- 1.12 We will continue to proactively engage with a wide range of key stakeholders, including MLAs, Assembly Committees, and representatives from the race sector, in order to inform the case for change.

2. Introduction

- 2.1 The Equality Commission is calling on the Northern Ireland Executive to make urgent changes to the **race equality legislation** in Northern Ireland.
- 2.2 These changes are aimed at **strengthening, simplifying and harmonising** the race equality legislation so that individuals in Northern Ireland have robust and effective protection against unlawful racial discrimination and harassment.
- 2.3 The changes relate to a **wide range of areas** covered by the race equality legislation and therefore strengthen the rights of individuals as employees, customers, pupils in schools, tenants, as members of private clubs and as students in further and higher education.
- 2.4 We also recommend changes to the **fair employment legislation** aimed at improving **workforce monitoring on racial grounds** by registered employers.

Context

- 2.5 Individuals in Northern Ireland currently have protection against unlawful racial discrimination under the **Race Relations (NI) Order 1997**, as amended (RRO 1997). This legislation prohibits discrimination on racial grounds in employment and vocational training, and when accessing goods, facilities and services. It also gives protection against unlawful racial discrimination when accessing private clubs (such as golf clubs), buying or renting premises, when in education (including education in schools), and when subject to the functions of public bodies, such as the police.
- 2.6 Whilst the race equality legislation currently provides Black Minority Ethnic (BME) individuals with significant rights against racial discrimination and harassment, these rights are not comprehensive and **gaps in protection** still exist.
- 2.7 Pursuant to our duty under the race equality legislation to keep this legislation under review and to make recommendations for

change, where necessary, we carried out a **comprehensive review** of the race equality legislation in 2000 and recommended a number of changes to the legislation.⁷ A number of key recommendations highlighted in that review **remain outstanding** and are therefore included in our recommendations for change highlighted below.

- 2.8 Since this comprehensive review of the race equality legislation in 2000, we have consistently called for these and other changes to the equality legislation to be addressed.
- 2.9 This has included proactively engaging with the Office of the First and Deputy First Minister (OFMDFM) in 2004 as regards the development of robust and comprehensive single equality legislation. However, despite a commitment in the St Andrews Agreement⁸ in 2006 to ‘work rapidly’ towards the development of single equality legislation, this legislation has not been progressed by the Northern Ireland Executive.
- 2.10 In the absence of progress on single equality legislation, in February 2009, we submitted our Proposals for legislative reform to Junior Ministers in OFMDFM outlining a number of areas in Northern Ireland equality law which required urgent amendment; including the harmonisation and strengthening of the race equality legislation⁹.
- 2.11 In particular, in our Proposals for Legislative Reform, we made it clear that a priority area for reform of the race equality legislation was increased protection from discrimination and harassment on the grounds of colour and nationality across the scope of the race equality legislation.
- 2.12 More recently, we have recommended increased protection for certain categories of **agency workers** against racial discrimination and harassment; as highlighted by the Northern Ireland Court of Appeal’s decision in *Bohill v Police Service of*

⁷ *Recommendations for Changes to the Race Relations (NI) Order 1997*, ECNI, 2000

⁸ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136651/st_andrews_agreement-2.pdf

⁹ *ECNI Proposals for Legislative Reform*, 2009

*Northern Ireland*¹⁰ and the case in Great Britain of *Muschett v HM Prison Service (HMPS)*.¹¹

2.13 The need for reform of the race equality legislation in Northern Ireland has been recognised at a number of levels; both locally and internationally. For example:

- in its consultation on a NI Single Equality Bill in 2004, OFMDFM recognised the need to increase protection from discrimination and harassment on the grounds of **colour** and **nationality** and indicated its intention to rectify this gap in the race equality legislation;¹²
- an Assembly debate in May 2009 has shown clear support for the reform of the race equality legislation across the political spectrum, aimed at strengthening protection against discrimination for BME people in Northern Ireland;¹³
- more recently, both the *Advisory Committee on the Framework Convention for the Protection of National Minorities*¹⁴ and the *UN Committee on the Convention for the Elimination of all forms of Racial Discrimination (CERD)* has urged the NI Executive to take proactive steps to address legislative shortcomings within the race equality legislation.¹⁵

2.14 Further, recent independent research into poverty and different ethnic minority communities in Northern Ireland has also highlighted the need for the race equality legislation to be strengthened.¹⁶

¹⁰ [2011] NICA 2, <http://www.bailii.org/nie/cases/NICA/2011/2.html>

¹¹ [2010] EWCA Civ 25, <http://www.bailii.org/ew/cases/EWCA/Civ/2010/25.html>. The Equality Commission raised in January 2012 with both OFMDFM and DEL the need for increased protection for certain categories of agency workers against racial discrimination and harassment.

¹² *A Single Equality Bill for Northern Ireland: Discussion Paper*, OFMDFM, 2004

¹³ See NI Assembly debate on 26 May 2009. <http://www.theyworkforyou.com/ni/?id=2009-05-26.12.1>

¹⁴ See *Third Opinion on the United Kingdom*, of the *Advisory Committee on the Framework Convention for the Protection of National Minorities*, June 2011

¹⁵ [Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK \(2011\)](#) and [Concluding observations of the Committee on the Elimination of Racial Discrimination: United Kingdom, \(2003\)](#).

¹⁶ In particular, research by the Joseph Rowntree Foundation (2013), *Poverty and Ethnicity in Northern Ireland*, has concluded that “there is a case for embedding equality principles in society by strengthening equality legislation to make it more difficult for employers and organisations to act with impunity.” *Poverty and Ethnicity in Northern Ireland*, Joseph Rowntree (2013) <http://www.jrf.org.uk/sites/files/jrf/poverty-ethnicity-northern-ireland-full.pdf>

- 2.15 The need for reform of the race equality legislation in Northern Ireland has been heightened by **developments in Great Britain**. In particular, the introduction of the Equality Act 2010 in Great Britain in October 2010 has addressed a number of our recommendations, and, as a result, individuals in Northern Ireland have **less protection** against racial harassment and discrimination than people in other parts of the United Kingdom (UK).
- 2.16 It is important to note that in some areas we are of the view that the Equality Act 2010 has not gone far enough and have set out recommendations which **go beyond** the level of protection against racial discrimination and harassment currently set out in equality legislation in Great Britain.
- 2.17 Whilst a number of our recommendations call for specific changes to the race equality legislation, some of our recommendations **apply equally to other equality grounds**; for example, protection against intersectional multiple discrimination, increased protection against discrimination by public bodies when carrying out their public functions, an increase in tribunal powers, and the strengthening of our enforcement powers.
- 2.18 In considering our recommendations on race law reform, there is also the opportunity to advance and harmonise protection against discrimination across a number of equality grounds. We therefore recommend **action to address similar legislative gaps** that exist under **other areas of equality law** in order to ensure a consistent and best practice approach is adopted across the equality legislative framework.

3. Our Recommendations

Race equality legislation

- 3.1 Our recommendations for change to the **race equality legislation** cover three broad areas; forms of discrimination; exceptions; and enforcement and remedies.

Forms of discrimination

Increased protection on grounds of colour and nationality

Key points

- A **priority area** for reform is increased protection from discrimination and harassment on the grounds of **colour and nationality** across the scope of the race equality legislation.
- This change will help to clarify, strengthen, harmonise and simplify the legislation. Our recommendation is in line with changes already implemented in other parts of the United Kingdom, as well as the recommendations of international human rights monitoring bodies.

Our recommendation

- 3.2 We **recommend** increased protection from discrimination and harassment on the grounds of **colour and nationality** across the scope of the race equality legislation. As made clear in our 2009 *Proposals for Legislative Reform*¹⁷, we consider that this is a **priority area** for reform of the race equality legislation.

¹⁷ See [ECNI Proposals for Legislative Reform](#) 2009

Rationale

- 3.3 This change will help to **clarify, strengthen, harmonise** and **simplify** the legislation.
- 3.4 Currently there are ‘two tier’ levels of protection against discrimination and harassment within the race equality legislation. In particular, there is **less protection** against discrimination and harassment on the grounds of **colour and nationality** than on the other racial grounds protected under the legislation; namely race, ethnic or national origins.
- 3.5 This ‘two tier’ level of protection came about following the introduction in Northern Ireland of legislation to implement the Race Directive¹⁸ in 2003.¹⁹ As the Race Directive only applied to the grounds of race, ethnic and national origin, the Regulations introduced in order to give effect to the Race Directive, did not amend the provisions in the Race Relations (NI) Order 1997 as regards the grounds of colour and nationality.
- 3.6 The **main impact** of this ‘two tier’ level of protection is summarised below.
- The statutory definition of **harassment** which applies to the grounds of race, ethnic or national origins, in a wide range of areas (including employment and the provision of goods and services), **does not** extend to the grounds of colour and nationality. As a result, it is **more difficult** for individuals to bring complaints if they are subjected to offensive or degrading comments on the grounds of their colour or nationality.
 - Whilst the race legislation prohibits **public bodies** from discriminating on the grounds of race, ethnic or national origins when exercising their public functions, this prohibition **does not extend** to the grounds of colour or nationality.
 - Although the race legislation prohibits discrimination against **office holders**, such as chairpersons or board members of non-

¹⁸ [Race Directive](#), Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

¹⁹ Namely, the Race Relations Order (Amendment) Regulations (NI) 2003

departmental public bodies, this prohibition **does not exist** on the grounds of colour and nationality.

- A more **restrictive definition** of **indirect discrimination** applies to the grounds of colour and nationality than on the other racial grounds. This means it is more difficult for claimants alleging unlawful discrimination on the grounds of colour and nationality to successfully prove their case. Effective protection against indirect discrimination is particularly important in challenging systemic or institutional racism; where policies and practices of an employer, service provider or public authority may, without justification, have a particular adverse impact on BME individuals.
- There are also differences in relation to the **exceptions** under the race equality legislation, depending on the racial ground in question. For example, the exceptions relating to employment for the purposes of a private household and genuine occupational requirement only apply to the grounds of colour and nationality; and not the grounds of race, ethnic or national origins.

3.7 These anomalies have led to **difficulties and confusion** for those seeking to understand their responsibilities and to exercise their rights under the legislation, as well as resulting in reduced protection on the grounds of colour and nationality.

3.8 Further, our recommendation is in line with changes already implemented in other parts of the United Kingdom, as well as the recommendations of international human rights monitoring bodies.

3.9 In particular, changes to address this gap in protection have already been implemented in Great Britain under the Equality Act 2010²⁰.

3.10 It is of note that, in the case of *Abbey National PLC v Chagger*²¹, the Employment Appeal Tribunal in Great Britain was of the view that the Race Directive was intended to apply to discrimination on the ground of colour, as such discrimination is in practice

²⁰ <http://www.legislation.gov.uk/ukpga/2010/15/contents>

²¹ UK EAT/0606/07/RN

necessarily an aspect or manifestation of discrimination based on racial or ethnic origins.

- 3.11 Although this is a welcome clarification as regards protection on the ground of colour, there is still a need to amend the race equality legislation in order to ensure equal levels of protection against discrimination and harassment across **all** racial grounds. As noted above, following the case of *Abbey National PLC v Chagger*, the legislation in Great Britain was changed to clarify the law in this area.
- 3.12 Further, our recommendation is in line with the recommendation of the *UN Committee on the Elimination of Racial Discrimination*. In particular, in 2003, it recommended that the UK Government extend the amending Regulations that implemented the Race Directive to cover discrimination on the grounds of colour and nationality. It was concerned that a failure to do so would result in inconsistencies in discrimination laws and differential levels of protection and create difficulties for the general public as well as law enforcement agencies.²²
- 3.13 Finally, this legislative gap and the need for action to address this, has already been recognised by OFMDFM. In particular, in its consultation on single equality legislation in 2004²³, OFMDFM indicated that it 'intended to rectify this gap' in the race equality legislation.
- 3.14 In addition, in OFMDFM's *Racial Equality Strategy for Northern Ireland 2005-2010*²⁴ it was recognised that the Regulations introduced to give effect to the EU Race Directive did not extend to all racial categories; specifically, they did not cover colour and nationality. There was a commitment by the Government to 'explore legislative options to rectify this anomaly as soon as possible'.²⁵ However, to date no further action has been taken to address this anomaly.

²² [Concluding observations of the Committee on the Elimination of Racial Discrimination: United Kingdom, \(2003\).](#)

²³ [A Single Equality Bill for Northern Ireland: Discussion Paper](#), OFMDFM, 2004

²⁴ *A Racial Equality Strategy for Northern Ireland 2005-2010*, OFMDFM, www.ofmdfmi.gov.uk.

This strategy is currently being revised.

²⁵ Ditto

Broader protection against discrimination in the exercise of public functions

Key points

- This change will afford increased protection for individuals against racial discrimination and harassment by **public bodies** when carrying out their **public functions**.
- This change will help to clarify, strengthen, harmonise and simplify the legislation. Our recommendation is in line with changes that have already taken place under the disability equality legislation in Northern Ireland, changes implemented in Great Britain, and with the recommendations of international human rights monitoring bodies.

Our recommendation

3.15 We **recommend** that the race equality legislation is strengthened to afford increased protection for individuals against racial discrimination and harassment by public bodies **when carrying out their public functions**.

3.16 We further **recommend** that this prohibition should apply as regards **all public functions**, except in some clearly defined limited areas,²⁶ and to **all** racial grounds; currently protection only exists on the grounds of race, ethnic or national origins and **not** on the grounds of **colour or nationality**. The approach adopted should reflect the standard adopted in the disability legislation.

Background

3.17 Currently, protection in Northern Ireland against racial discrimination by public authorities when exercising public functions is **limited to four areas**; namely, social security, health care, social protection or social advantage.

²⁶ There are, for example, some limited exceptions relating to judicial acts, decisions to institute criminal proceedings and the making, confirming or approving of legislation. There are also some public authorities that are excluded, such as the Security Service and Houses of Parliament.

- 3.18 The legislation was limited to these four areas to reflect the scope of the Race Directive²⁷ which prohibited discrimination by public bodies in the areas of social protection, including social security and healthcare, and social advantage. This means that individuals who consider that they have been subjected to less favourable treatment, including harassment, on racial grounds by a public body carrying out public functions, **do not have protection** under the race equality legislation if the public function in question falls **outside one of these four areas**.
- 3.19 'Public functions' cover a wide range of functions including arrests, detention and restraint by the police, the charging and prosecution of alleged offenders, the regulatory and law enforcement functions of bodies such as HM Revenue and Customs, the formulating or carrying out of public policy (such as devising policies and priorities in health, education or transport), planning control, licensing and investigation of complaints.²⁸
- 3.20 In terms of what constitutes a public function, it is important to note that public functions are not only carried out by public bodies but may also be carried out by **private or voluntary organisations**; for example, a private company managing a prison or a voluntary organisation taking on responsibilities for child protection.
- 3.21 Many activities carried out by public bodies will amount to the provision of goods, facilities and services to the public; for example, the provision of library or leisure services.
- 3.22 In those circumstances, the provisions under the race equality legislation relating to the provision of goods, facilities and services²⁹ will apply. Such activities will therefore **not be covered** by the provisions relating to the exercise of public functions.
- 3.23 In general, the public functions provisions apply in relation to a **function of a public nature** exercised by a public authority or on behalf of a public authority, and where the function is **not** covered by the other provisions in the race equality legislation; for

²⁷ [Race Directive](#) Council Directive 2000/43/EC of 29 June 2000.

²⁸ See for examples list in *EHRC Code of Practice on Services, Public functions and associations*. EHRC, 2011 http://www.equalityhumanrights.com/uploaded_files/EqualityAct/servicescode.pdf

²⁹ Article 21 of the Race Relations (NI) Order 1997

example, the provisions relating to accessing goods and services, premises, work or education.

- 3.24 Cases brought before the courts in Great Britain revealed gaps in protection under the equality legislation; as well as highlighting that it was not always clear whether an act of a public body was a service to the public or constituted carrying out a public function.
- 3.25 For example, police duties involving the provision of assistance to, or protection of, members of the public were deemed to be providing services to the public; whereas police duties relating to controlling those responsible for crime were considered **not** to be covered by the provisions relating to goods and services under the race equality legislation.³⁰ Further, the application of immigration controls was considered **not** to be covered by the provisions in the race equality legislation relating to the provision of goods and services.³¹

Rationale

- 3.26 This change will help to **clarify, strengthen, harmonise** and **simplify** the legislation. Our recommendation is also in line with changes implemented in Great Britain, already taken place under the disability equality legislation in Northern Ireland and with the recommendations of international human rights monitoring bodies.
- 3.27 In particular, a number of steps have been taken in Great Britain as regards the race equality legislation in this area in order to **strengthen, harmonise and clarify** the legislation, address gaps in protection and ensure **legal uncertainty**.
- 3.28 For example, in Great Britain the race equality legislation was **strengthened and clarified** in 2000, following the outcome of the Macpherson report into the police investigation of the murder of Stephen Lawrence.³² These changes to the law meant that, for the first time, the police and many other public bodies could not

³⁰ See the race discrimination case of *Farah v Commissioner of Police of the Metropolis*³⁰, the Court of Appeal in England, [1997] 2 WLR 824.

³¹ See decision of the majority of the House of Lords of landmark case of *R v Entry Clearance Officer, Bombay Ex parte Amin*, [1983] 2 AC 818. It was considered that these provisions did not apply to acts done on behalf of the Crown which were of an entirely different kind of act than could be done by a private person.

³² Changes were introduced via the Race Relations (Amendment) Act 2000 following the [Macpherson report](#) into the murder of Stephen Lawrence.

discriminate on racial grounds when carrying out their public functions.

- 3.29 In addition, the race and other equality legislation was **harmonised and strengthened** in this area following the enactment of the Equality Act 2010 in Great Britain. In particular, public bodies were prohibited from discriminating when carrying out public functions across **all racial grounds** and as regards **all functions**; except in some clearly defined limited areas.³³
- 3.30 Whilst the race equality law in Northern Ireland was strengthened in 2003³⁴, the provisions prohibiting racial discrimination by public authorities when exercising public functions were, in contrast to the current position in Great Britain, **limited to four areas**; namely, social security, health care, social protection or social advantage.
- 3.31 We are of the view that there is the potential for some public functions, such as certain policing and law enforcement functions, including search and arrest functions, **to fall outside the scope of the racial equality legislation in Northern Ireland**. These activities would **not be covered** by the provisions relating to goods and services in the race equality legislation.
- 3.32 Further, the extension of the race legislation to **all** public functions, unless specifically falling within an exception, will **ensure clarity** both for those with rights under the legislation and those public bodies with responsibilities under the law.
- 3.33 The **potential for legal uncertainty** in this area was recognised by OFMDFM in its consultation on a Single Equality Bill for Northern Ireland in 2004. In particular, it indicated that “if the Race Directive approach is taken, there will nevertheless be room for dispute and technical distinctions on the question of whether a function falls within the definition of social security, social protection, social advantage or healthcare.”³⁵

³³ There are some limited exceptions relating to judicial acts, decisions to institute criminal proceedings and the making, confirming or approving of legislation. There are also some public authorities that are excluded, such as the Security Service and Houses of Parliament.

³⁴ By the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003

³⁵ [A Single Equality Bill for Northern Ireland: Discussion Paper](#), OFMDFM, 2004

- 3.34 Our recommendation is not only in line changes implemented in Great Britain, but also with changes that have already taken place **under the disability equality legislation**, and with the recommendations of **international human rights monitoring bodies**.
- 3.35 For example, this limitation to four areas **does not exist** under the disability legislation in Northern Ireland. In particular, public authorities are prohibited from discriminating on the grounds of disability when carrying out public functions across **all** their functions; except in some clearly defined limited areas.³⁶
- 3.36 Further, our recommendation is in line with the recommendations of the *Advisory Committee on the Framework Convention for the Protection of National Minorities*. In particular, the Committee in its *Second Opinion* on the UK in 2007, urged authorities ‘to introduce a more extensive prohibition of discrimination in Northern Ireland’s race equality legislation in relation to public functions.’³⁷
- 3.37 Finally, as set out in more detail above³⁸, we **recommend** that protection against discrimination or harassment by public bodies when exercising their public functions should apply to **all** racial grounds; currently protection only exists on the grounds of race, ethnic or national origins and **not** on the grounds of **colour or nationality**.

³⁶ There are, for example, some limited exceptions relating to judicial acts, decisions to institute criminal proceedings and the making, confirming or approving of legislation. There are also some public authorities that are excluded, such as the Security Service and Houses of Parliament.

³⁷ [*Second Opinion on the UK, the Advisory Committee on the Framework Convention for the Protection of National Minorities*](#), June 2007

³⁸ See section on ‘Increased protection on grounds of colour and nationality’.

Stronger protection against racial harassment

Key points

- These two changes will provide increased protection for individuals against **racial harassment**.
- The first change will widen the **definition of racial harassment**. This change is consistent with the definition of racial harassment within the Race Directive³⁹. It is also in line with the definition of harassment under the sex equality legislation in Northern Ireland, as well as changes implemented in Great Britain under the Equality Act 2010.
- The second change will ensure greater protection for employees against **third party racial harassment**. It reflects the need for stronger duties on employers to take action in light of the clear evidence that black minority ethnic employees are being subjected to racial harassment by customers/clients.

Our recommendations

Wider definition of 'racial harassment'

3.38 We **recommend** that the **definition of racial harassment** under the race equality legislation is amended to prohibit unwanted conduct '**related to**' racial grounds which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. We also **recommend** that this definition of harassment applies to **all** racial grounds; namely, race, ethnic or national origins, colour and nationality.

Rationale

3.39 Currently, harassment under the race equality legislation is defined as unwanted conduct '**on the grounds of**' race or ethnic or national origins which has the purpose or effect of violating a

³⁹ [Race Directive](#) EC Council Directive 2000/43/EC of 29 June 2000.

person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment .⁴⁰

- 3.40 Our recommendation **is in line** with the definition of harassment under the **Race Directive**⁴¹ which refers to an unwanted conduct “**related to**” racial or ethnic origin.
- 3.41 It is of note that in the sex discrimination case of *R (Equal Opportunities Commission) v Secretary of State for Trade and Industry*⁴², the court held that the definition of harassment under the sex equality legislation, which defined harassment as unwanted conduct ‘on grounds of’ a woman’s sex, did not accord with the requirements of the amended Equal Treatment Directive⁴³.
- 3.42 The amended Equal Treatment Directive defines harassment as unwanted conduct ‘related to the sex of a person’. It will be noted that the Race Directive prohibits racial harassment in substantially the same terms as the amended Equal Treatment Directive.
- 3.43 Importantly, the court was of the view that effect of the wording of the definition of harassment within the amended Equal Treatment Directive meant that an employer could be held liable on appropriate facts for the conduct of third parties, for example, suppliers or customers. In particular, it considered that an employer could be held liable for failing to take action where there is a continuing course of offensive conduct, which the employer knows of but does nothing to safeguard against.
- 3.44 As a result of this decision, the definition of harassment under the sex equality legislation in Northern Ireland was amended to prohibit unwanted conduct that is ‘related to’ a woman’s sex or that of another person.
- 3.45 Further, our recommendation **is in line** with the definition of harassment under the **sex equality legislation** in Northern Ireland, **as well as those changes implemented in Great Britain** under the Equality Act 2010.

⁴⁰ See Article 4A of the Race Relations (NI) Order 1997 as amended.

⁴¹ See Article 3 of [Race Directive](#)

⁴² [\[2007\] ICR 1234](#)

⁴³ [EU Directive \(2002/73/EC\)](#) which amended the original Equal Treatment Directive (76/2007/EEC)).

3.46 As highlighted above, we also **recommend** that this revised definition applies to **all racial grounds**; so that it applies not just to race, ethnic or national origins, but also on the grounds of colour and nationality; as the statutory definition of harassment does not apply to these grounds.

Greater protection for employees against third party racial harassment

3.47 We **recommend** that the race equality legislation is strengthened so that there is greater protection for employees against **racial harassment by a third party**, such as, by a customer or client of an employer.

Rationale

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

3.49 For example, *BAYANIHAN! The Filipino Community in Northern Ireland*, a report produced by the Northern Ireland Council for Ethnic Minorities (NICEM) in 2012, reports that 44.4% of Filipino healthcare workers surveyed had been racially harassed by customers/service users.⁴⁴

3.50 In addition, as highlighted in the NICEM report, Filipinos on a Work Permit/Tier Two find it particularly difficult to challenge harassment experienced in the workplace because their right to work and reside in Northern Ireland is dependent upon employment.

3.51 In particular, the report argues that “they cannot move to another firm, nor are they likely to be in a position to take a case against their employer”. This highlights the vulnerability of particular BME employees and the need for the race equality legislation to effectively protect them against harassment.

⁴⁴ A survey of 231 Filipino healthcare workers in Northern Ireland, [Bayanihan! The Filipino community in NI](#), January 2012, NICEM

- 3.52 We **recommend** that employers are liable if they **fail to take reasonably practicable steps** to prevent the racial harassment of an employee by a third party. We further **recommend** that employers are liable if they know that the employee has been subjected to third party harassment on **one previous occasion**, or in circumstances that they **ought to have been reasonably aware** of the risk of third party harassment.
- 3.53 Whilst we supported the introduction in the sex equality legislation of a clear duty on employers to take reasonably practicable steps to prevent employees being subjected to third party harassment, we do not agree that the employee should have to wait until the third incident of harassment before an employer is required to take action.⁴⁵
- 3.54 We support the views of the Joint Committee on Human Rights that the threshold requirement, which provides that employer liability only applies where the employer knows that the same employee has been harassed on two prior occasions, “could be seen as permitting employers excessive leeway before they are required to respond to third party harassment”⁴⁶.
- 3.55 We **recommend** that this requirement should either be **reduced to one previous incident** or replaced with a provision that an employer will be liable when they **ought to have been reasonably aware** of the risk of third party harassment.
- 3.56 Whilst this increased protection against harassment by third parties had been included in Great Britain under the Equality Act 2010, the UK Government has recently repealed this provision⁴⁷. Its reasons for repealing this provision include the fact that very few cases of third party harassment have been taken to an employment tribunal since the protection was introduced in April 2008 under the sex equality legislation.

⁴⁵ The sex equality legislation in Northern Ireland was amended in 2008 so that employers are liable if they fail to take reasonably practicable steps to prevent repeated harassment of an employee by third parties (such as clients or customers). However, the employer is not liable for the failure to take such steps unless the employer knows that the employee has been subjected to harassment during the course of his or her employment **on at least two occasions** by one or more third parties.

⁴⁶ [Joint Committee on Human Rights, Legislative Scrutiny: Equality Bill](#), 26th Report of Session 2008-09, 2009

⁴⁷ These provisions were repealed on 1 October 2013 by virtue of Section 65 of the Enterprise and Regulatory Reform Act 2013.

- 3.57 It contends further there are other means of redress available to employees subjected to third party harassment; such as the ability to bring proceedings against his/her employer for breach of contract, or against the harasser under the Protection from Harassment Act 1997. The UK Government has indicated that the policy objective behind repealing this provision is to reduce any regulatory burden on employers that the third party harassment provisions may impose.
- 3.58 It is of note that a report by the Liberal Democrat Task Force on Race Equality in 2013 criticised the repeal of this provision and made it clear that the Task Force was ‘well aware of the need for ethnic minority workers particularly in public facing roles to have this protection’ and that “employers looking after their staff properly should have no reason to oppose this protection”⁴⁸.
- 3.59 As set out above, we believe that there is evidence of third party racial harassment of employees. In addition, while the *Protection from Harassment Act 1997* enables an employee to bring a claim of harassment against a customer of their employer, the employer is not liable for the harassment under this Act.
- 3.60 Finally, it will be noted that the *UN Committee on CERD* expressed concern about the UK Government’s *Red Tape challenge*⁴⁹. The *Red Tape Challenge* included scrutiny of measures envisaged under the Equality Act 2010 designed to prune those legislative provisions deemed as “bureaucratic or burdensome”.
- 3.61 The Committee indicated that it threatened “to dilute or reverse the State Party’s achievements in the fight against racial discrimination and inequality”. It recommended that the UK Government implemented all of the provisions of the Equality Act and ensure there is no regression from the current levels of protection⁵⁰.

⁴⁸ [First report of the Liberal Democrat Task Force on Race Equality](#), June 2013

⁴⁹ <http://www.redtapechallenge.cabinetoffice.gov.uk/home/index/>

⁵⁰ [Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK \(2011\)](#)

Increased protection for Agency Workers

Key points

- This change will result in increased protection against racial harassment and discrimination for **certain categories of agency workers** who currently fall outside the scope of the race equality legislation.
- The need for reform in this area has been highlighted by the court decisions in the Northern Ireland case of *Bohill v Police Service of Northern Ireland*⁵¹ and the case in Great Britain of *Muschett v-HM Prison Service (HMPS)*⁵². Our recommendation is in line with the views of the NI Court of Appeal in the *Bohill* case who considered that this was an area of law likely to benefit from law reform.

Our recommendation

3.62 We **recommend** increased protection against racial discrimination and harassment for **certain categories of agency workers** who currently fall outside the scope of the race equality legislation.

Rationale

3.63 The need for reform in this area has been highlighted by the Northern Ireland case of *Bohill v Police Service of Northern Ireland*⁵³ and the case in Great Britain of *Muschett v-HM Prison Service (HMPS)*⁵⁴. These gaps in protection have the potential to have a particular impact on **migrant workers** working in Northern Ireland; many of whom may have entered into arrangements with agencies similar to Mr Bohill or Mr Muschett.

⁵¹ [2011] NICA 2, <http://www.bailii.org/nie/cases/NICA/2011/2.html>

⁵² [2010] EWCA Civ 25, <http://www.bailii.org/ew/cases/EWCA/Civ/2010/25.html>

⁵³ [2011] NICA 2, <http://www.bailii.org/nie/cases/NICA/2011/2.html>

⁵⁴ [2010] EWCA Civ 25, <http://www.bailii.org/ew/cases/EWCA/Civ/2010/25.html>

- 3.64 In particular, in the Northern Ireland case of *Bohill –v- Police Service of Northern Ireland* (PSNI), the NI Court of Appeal raised concerns that potential employees who seek work through an agency, due to type of arrangements that they have an agency, can be **deprived of important protections under the equality legislation**. Importantly, the NI Court of Appeal also highlighted this **was an area of law likely to benefit from law reform**.
- 3.65 In that case, Mr Bohill was a former police officer who applied to Grafton Recruitment Services (Grafton) to work as an investigator with the PSNI. Mr Bohill’s name was included in lists of potential temporary workers compiled by Grafton and forwarded to the PSNI on some 13 occasions, but upon none of these occasions was Mr Bohill recruited as a temporary worker.
- 3.66 Mr Bohill lodged a discrimination complaint against the PSNI alleging that his failure to secure such employment was as a result of unlawful discrimination on the grounds of religious belief/perceived political opinion, contrary to the Fair Employment and Treatment (NI) Order 1998 (FETO 1998). The tribunal was of the view that it did not have the jurisdiction to hear his substantive claim. Mr Bohill appealed this decision to the Court of Appeal in Northern Ireland.
- 3.67 The Court of Appeal confirmed that, in the absence of a contract with either Grafton or the PSNI, the Tribunal did not have the jurisdiction to hear his case. It stated that ‘in our view the inability of the appellant to establish that he is seeking an employment relationship with PSNI or that he is in such a relationship with Grafton and to bring himself within the definition ‘employee’ contained within Article 2 of the 1998 Order is fatal to this appeal’.
- 3.68 The Court of Appeal further stated that “we have arrived at this conclusion with some degree of anxiety since, in doing so, the apprehension expressed by Smith LJ⁵⁵ that a gap might exist in the remedies available to workers in the appellant’s position would appear to be confirmed”.
- 3.69 Importantly, the Court of Appeal concluded that the case “does seem to illustrate how an agency arrangement may deprive

⁵⁵ In the case of *Muschett v HM Prison Service*, [2010] EWCA Civ 25

potential employees of important protections against discrimination.”

- 3.70 It also indicated that “Northern Ireland enjoys a well deserved reputation for the early development and quality of its anti-discrimination laws and this is an area that might well benefit from the attention of the section of the office of OFMDFM concerned with legislative reform.”
- 3.71 It is also of note that the NI Court of Appeal indicated that “there is no doubt that this type of agency arrangement has become much more prevalent over recent years and it would appear that the UK economy uses agency provided workers to a much greater extent than those of most other EU States.”
- 3.72 Importantly, whilst Mr Bohill’s case concerned an allegation of unlawful discrimination on the grounds of religious belief and/or perceived political opinion, such gaps in protection similarly exist in relation to **race and other equality grounds**.
- 3.73 Of further note is the Court of Appeal in Great Britain’s decision in the case of *Muschett v HM Prison Service (HMPS)* in 2010⁵⁶. This case also highlighted a situation where an agency worker, due to the type of arrangements that he had with an agency, was deprived of protection under the equality legislation.
- 3.74 In that case, Mr Muschett had signed a contract with the Brook Street Employment Agency who had placed him as an agency worker with HMPS. Mr Muschett claimed compensation from HMPS for unfair dismissal, wrongful dismissal, as well as sex, racial and religious discrimination.
- 3.75 The Employment Appeal Tribunal (EAT) agreed with the employment judge’s finding that he was **not a contract worker** as he was not employed by the agency; and therefore was not covered by the race equality legislation and similar provisions in the other discrimination legislation.

⁵⁶ [2010] EWCA Civ 25, <http://www.bailii.org/ew/cases/EWCA/Civ/2010/25.html>

- 3.76 Mr Muschett was not given leave to appeal to the Court of Appeal on the EAT's finding that he was not employed by the agency. He was, however, given leave to appeal to the Court of Appeal on whether a contract of employment could be implied between Mr Muschett and HMPS or whether he was employed under a contract for services with HMPS. The Court of Appeal held that, as he was not an employee under a contract of service nor was he under a contract for services with HMPS, he had **no protection** under the equality legislation.
- 3.77 In addition, whilst the Muschett case concerned sex, race and religious discrimination, it is clear that, like the *Bohill* case, gaps in legislative protection exist for temporary agency workers alleging discrimination **across all equality grounds**.⁵⁷
- 3.78 It is important to stress that agency workers **who are contract workers** and are employed by agencies **will have protection** under equality legislation. In the particular circumstances of their cases, neither Mr Bohill or Mr Muschett were deemed by the courts to be contract workers and therefore fell outside the scope of the equality legislation.
- 3.79 It is also of note that whilst the Agency Workers Regulations (NI) 2011⁵⁸ have resulted in additional equal treatment protection for agency workers, we are of the view that they **do not** address the gaps in legislative protection as highlighted in the *Bohill* and *Muschett* cases.
- 3.80 We further **recommend** that the Department for Employment and Learning also considers these issues when reviewing the impact of the Agency Workers Regulations (NI) 2011. We also **recommend** steps are taken to address similar gaps in protection relating to other equality grounds.

⁵⁷ The Northern Ireland Council for Ethnic Minorities (NICEM) has also raised similar concerns in its response in April 2011 to the Department for Employment and Learning's (DEL) consultation on the draft Agency Workers Regulations (NI) 2011; www.nicem.org.uk

⁵⁸ Agency Workers Regulations (NI) 2011 came into force in Northern Ireland on 5 December 2011. <http://www.legislation.gov.uk/nisr/2011/350/made>

New protection for Councillors

Key points

- This change will introduce new **protection for Councillors** against racial discrimination and harassment by **local councils**. Our recommendation is in line with changes that have already taken place under the equality legislation in Great Britain.

Our recommendation

3.81 We **recommend** increased protection for **Councillors** against racial discrimination and harassment by local councils.

Rationale

3.82 Currently there is **no protection** for Councillors in local councils against racial harassment or discrimination by local councils. This change to the race equality legislation would mean that it would be unlawful for a local council to harass a Councillor because of his or her race or to discriminate or victimise a Councillor on racial grounds, when carrying out his/her official duties.

3.83 It would, for example, enable a Councillor to bring a racial discrimination complaint if they were denied access to facilities or training on racial grounds, or subjected to offensive or degrading racial comments by council staff. This provision would not apply to the election or appointment to posts within the local council.

3.84 Further, our recommendation is **in line** with changes to the equality legislation that have **already been implemented in Great Britain** under the Equality Act 2010. This legislation prohibits local councils from subjecting a Councillor, when carrying out his/her official duties, to discrimination or harassment on racial or other equality grounds.

3.85 Further, as this legislative gap exists under other equality grounds, we recommend increased protection for Councillors against discrimination and harassment **across all equality grounds** including race.

Increased protection against victimisation

Key points

- These two changes will mean that individuals will have increased protection against **victimisation** under the race equality legislation.
- The first change will **amend the definition of victimisation**; thereby making it easier for individuals to show that they have been subjected to victimisation. The second change will increase protection against victimisation for **pupils in schools**. Both our recommendations are in line with changes that have already been implemented in Great Britain.

Our recommendations

Wider definition of 'victimisation'

- 3.86 We **recommend** changes designed to amend the overall **definition of victimisation**. In particular, we **recommend** that there is no longer a requirement for the person alleging victimisation to compare his or her treatment with that of a person who has not made a complaint of discrimination or supported a complaint under the race equality legislation.

Rationale

- 3.87 This change will **make it easier for individuals** to show that they have been subjected to victimisation.
- 3.88 Take, for example, a situation where a BME employee makes a race discrimination complaint against his employer and as a result is denied promotion. This change to the race equality law will mean that the employee, when bringing a complaint of victimisation, would not have to compare his treatment with that of another employee who did not make a race discrimination complaint against his employer.
- 3.89 Our recommendation is in line with changes that have already been implemented in Great Britain under the Equality Act 2010.

Under the Equality Act 2010 there is no longer a need to compare the treatment of an alleged victim with that of a person who has not or made or supported a complaint under the Equality Act 2010.

- 3.90 As this legislative gap exists under other equality grounds, we **recommend** changes designed to widen the overall definition of ‘victimisation’ across all equality grounds, including race.

Greater protection for pupils against victimisation

- 3.91 We **recommend** that there is greater protection for **pupils in schools** under the race equality legislation from being **victimised** as a result of a protected act (such as the making or supporting a complaint of discrimination) carried out by **their parents or siblings**.

Rationale

- 3.92 This change will **increase protection** for pupils in schools from being victimised, for example, by a school, because their **parents or siblings** have brought a racial discrimination complaint against the school.
- 3.93 Pupils in schools currently have protection from being victimised if they make a discrimination or harassment complaint; for example, a complaint that they have been racially harassed by a teacher.
- 3.94 This change will mean, for example, that if a parent complains to the school that their child is suffering racial discrimination or harassment at school, the child is protected from being victimised by the school because of the parent’s complaint.
- 3.95 Our recommendation is also **in line** with changes that have already been implemented in Great Britain under the Equality Act 2010; where such conduct has been prohibited under the Equality Act 2010, across all equality grounds.
- 3.96 Under the Equality Act 2010, children in schools are protected from being victimised as a result of a protected act (such as making or supporting a complaint of discrimination) carried out by their parent or sibling. This protection was introduced in order to

prevent parents being discouraged from raising an issue of discrimination within a school, for example, because of a worry that their child may suffer less favourable treatment as a result.

- 3.97 In line with provisions in Great Britain, we **recommend** that where a parent or sibling maliciously makes or supports an untrue complaint, the child is still protected from victimisation, as long as the child has acted in good faith. However, we **recommend** that where a child has acted in bad faith, he or she is not protected, even where a parent or sibling makes or supports an untrue complaint in good faith.
- 3.98 As this legislative gap exists under all other equality grounds, we **recommend** changes designed to strengthen protection for pupils in schools against victimisation **across all equality grounds**, including race.

New protection against multiple discrimination

Key points

- This change will introduce new protection for individuals who experience discrimination or harassment **because of a combination of equality grounds**; for example, black women may experience discrimination due to a combination of being both black and female.
- This change will remove unjustifiable legal barriers that individuals face when trying to prove discrimination on multiple equality grounds. It will provide legal certainty and our recommendation is in line with the recommendations of international human rights monitoring bodies, and the approach embraced by other jurisdictions; including six EU Member States, Canada and South Africa.

Our recommendation

3.99 We **recommend** 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.

Rationale

3.100 This change will **remove unjustifiable legal barriers** that individuals face when trying to prove discrimination on multiple equality grounds.

3.101 Individuals experiencing intersectional multiple discrimination face a number of difficulties in seeking legal redress; this is primarily due to the fact that current legal processes solely focus on one prohibited factor at a time and are unable to adequately address in tandem discrimination complaints on more than one ground.

3.102 For example, complainants subjected to multiple discrimination may face **difficulties in identifying an actual or hypothetical**

comparator with the same characteristics, as required when proving direct discrimination.

- 3.103 This change to the law, would, for example, allow an older Asian woman, who is not appointed to a job, to seek redress in circumstances where she believes that she has been subjected to discrimination due to a **combination** of her **age and race**. In these circumstances, she would be able to allege that a younger Asian woman or an older Asian man was/would have been appointed to the job.
- 3.104 The difficulties faced by individuals claiming intersectional multiple discrimination is clear from the Court of Appeal decision in the case of *Bahl*⁵⁹. In this case, an Asian woman claimed that she had been subjected to discriminatory treatment on the grounds that she was Asian and on the grounds that she was a woman. The judgment made clear that, in cases of intersectional discrimination, each ground had to be considered and ruled on separately, even if the claimant experiences them as inextricably linked.
- 3.105 Whilst recent tribunal decisions in Great Britain⁶⁰ have shown an increased willingness on the part of tribunals to consider whether a particular equality characteristic was *part* of the reason for the treatment received, the introduction of express and specific legislative provisions prohibiting intersectional multiple discrimination would **provide clarity and certainty** for individuals that this legislative gap had been addressed.
- 3.106 The legal difficulties facing individuals with multiple identities in obtaining legal redress under equality law were also recognised by the UK Government, prior to its decision to repeal the provisions in the Equality Act 2010 relating to dual discrimination.
- 3.107 In particular, it indicated that ‘a black woman or man of a particular religion may face discrimination because of stereotyped attitudes to that combination’ and that ‘it is difficult, complicated and sometimes impossible to get a legal remedy in those cases

⁵⁹ *Bahl v. The Law Society* [2004] IRLR 799, 30 July 2004.

⁶⁰ See for example, tribunal decision in *Miriam O'Reilly v BBC*, January 2011, Employment Tribunal Case no.2200423/10.

because the law requires them to separate out their different characteristics and bring separate claims'.⁶¹

Evidence of multiple discrimination

- 3.108 Our recommendation also reflects the need for stronger legal protection in light of the **clear evidence** that individuals experience discrimination because of a combination of equality grounds.
- 3.109 For example, a recent NICEM research report (2013) on the experiences of ethnic minority women in Northern Ireland⁶² has highlighted the particular barriers that minority ethnic women face. It is of note that 10% of respondents who believed that they had been discriminated against in the workplace, considered that it was due to a **combination** of being an ethnic minority and a woman. Further, 12.3% of respondents who believed that they had been discriminated against when seeking a job, felt that it was due to a combination of being both a woman and an ethnic minority or migrant.
- 3.110 Further, an EU report (2010) has found that people belonging to ethnic minorities are almost five times more likely to experience multiple discrimination than members of the majority population⁶³. Research in Great Britain (2012)⁶⁴ concerning the experiences of black and minority ethnic gay people has revealed that public sector organisations rarely consider multiple identity issues resulting in a reluctance by individuals to access services.
- 3.111 In addition, statistics collected by the Equality Commission also highlight that in many instances, individuals believe that they are discriminated against **on more than one equality ground**. For example, over a twelve month period (1 April 2013 - 31 March 2014), we received 113 hybrid race discrimination enquiries /applications. These represented complaints where individuals

⁶¹ Solicitor General, PBC Deb, 2 July 2009 cols 681-686 as referred to in [Joint Committee on Human Rights, Legislative Scrutiny: Equality Bill](#),

⁶² NICEM report on the [Experiences of Ethnic Minority women in Northern Ireland, NICEM, 2013](#),

⁶³ European Union (2010): European Union Minorities and Discrimination Survey.

http://fra.europa.eu/sites/default/files/fra_uploads/1454-EU_MIDIS_DiF5-multiple-discrimination_EN.pdf Twice as many ethnic minority/immigrant women compared with ethnic minority/immigrant men indicated that they experienced discrimination on the basis of gender.

⁶⁴ Runnymede Trust (Aug 2012) *One Minority at a time: Being black and gay*. Available at: <http://www.runnymedetrust.org/uploads/publications/pdfs/OneMinorityAtATime-2012.pdf>

were alleging discrimination due to a combination of equality grounds including race.⁶⁵

International recommendations and approaches

- 3.112 Our recommendation is also **in line with** the recommendations of international human rights monitoring bodies, and the approach embraced by other jurisdictions.
- 3.113 In particular, the need for multiple discrimination provisions to be included in equality legislation has been highlighted by **international human rights monitoring bodies**, including the *Committee on the UN Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW Committee) and the *Advisory Committee on the Framework Convention for the Protection of National Minorities*.⁶⁶
- 3.114 For example, the failure of the current UK Government to introduce protection against multiple discrimination was criticised by the *CEDAW Committee* in 2013. It was particularly concerned that the legislative framework in Northern Ireland did not provide for multiple discrimination and recommended a revision of the legislation to provide for multiple discrimination.⁶⁷
- 3.115 In addition, the *European Commission* in 2010 recommended that Member States include protection against discrimination on two or more grounds in their domestic equality legislation.⁶⁸
- 3.116 The extension of protection against multiple discrimination on more than two grounds has already been **embraced by other jurisdictions**; including six EU Member States, Canada and South Africa⁶⁹.

⁶⁵ This represented 28% of the overall number of enquiries/applications on race (namely 406 enquiries).

⁶⁶ See [Third Opinion on the United Kingdom](#), of Advisory Committee on the Framework Convention for the Protection of National Minorities (June 2011)

⁶⁷ [Concluding Observations on UK, CEDAW Committee](#), 26 July 2013,

⁶⁸ See [Strategy for equality between women and men-2010-2015](#), 2010, European Commission

⁶⁹ For example, Section 3(1) of the Canadian Human Rights Act expressly provides for multiple discrimination and states that: 'For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of grounds'. According to the FRA Annual Report, in 2011, six (Austria, Bulgaria, Germany, Greece, Italy and Romania) EU Member States covered 'multiple discrimination' or 'discrimination on more than one ground' in their legislation. See: [Inequalities and multiple discrimination in access to and quality of healthcare](#), FRA, 2013

3.117 More recently the *EU Agency for Fundamental Rights (FRA)* has recommended that EU Member States, do not wait for harmonisation at EU level “but should instead tackle multiple discrimination, including multiple discrimination involving sex, at national level in an efficient and encompassing way.”⁷⁰

Developments in Great Britain

3.118 The Equality Act 2010 originally contained a **dual discrimination** provision, designed to enable people to bring claims where they have experienced less favourable treatment because of a combination of two protected characteristics. The provisions for dual discrimination in the Equality Act 2010 were limited to claims of direct discrimination only and to a combination of only **two** relevant protected characteristics. The provisions did not extend to indirect discrimination or harassment.

3.119 In our response to the Discrimination Law Review consultation on a Single Equality Bill in 2007⁷¹, we made it clear that we recommended an adaptation of the definition of direct discrimination to provide for disadvantage on any combination of grounds.

3.120 Further, in our response to the Government Equalities Office (‘GEO’) consultation on ‘assessing the impact of a multiple discrimination provision’⁷² in 2009, we raised concerns in relation to the proposal to restrict claims to a combination of no more than two protected characteristics and recommended that the GEO monitor the impact of such a restriction.⁷³

3.121 We also expressed concern in relation to the proposal to limit multiple discrimination claims to direct discrimination only and not to enable claims of harassment to be brought on a combined basis.

3.122 It is of note that the Joint Committee on Human Rights, whilst welcoming the UK Government’s original proposal to widen protection to cover discrimination on a combination of two grounds, expressed concern that this protection was to be limited

⁷⁰ [Inequalities and multiple discrimination in access to and quality of healthcare](#). FRA, 2013

⁷¹ ECNI (2007) [Response to the DLR Consultation on a single equality Bill](#).

⁷² ECNI (2009): [Response to the Government Equalities Office consultation on multiple discrimination](#).

⁷³ Ditto, see page 3

to direct discrimination. It was of the view that introducing provisions prohibiting combined discrimination on two grounds should not be an excessive burden to employers and recommended that serious consideration be given to extending protection to more than two grounds in the future.⁷⁴

3.123 Despite being broadly welcomed, these provisions on dual discrimination **did not come in force** and in April 2011⁷⁵ the UK Government stated that although it had taken action to reduce the disproportionate cost of the regulations for business, there was still more to be done and that it would not bring forward the dual discrimination provisions.

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

⁷⁴ [Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill*](#), 26th Report of Session 2008-09, 2009

⁷⁵ Government Equalities Office (2013): *Equality Act Guidance*. Available at <https://www.gov.uk/equality-act-2010-guidance>

Expand the scope of positive action

Key points

- This change will mean that employers, service providers and others will be allowed to take a **wider range of voluntary action** to promote racial equality.
- Our recommendation is line with changes already implemented in Great Britain where there is currently a greater scope for employers and service providers to take positive action to promote racial equality. The changes will also extend what is permissible positive action to the extent allowed by EU law.

Our recommendation

3.125 We **recommend** that the race equality legislation is amended to **expand the scope of voluntary positive action** that employers and service providers and public bodies can lawfully take in order to promote racial equality.

Rationale

3.126 This change will mean that employers, service providers and others can take a **wider range** of voluntary positive action to promote racial equality. It result in the removal of unnecessary barriers to their taking positive action, and extend what is permissible positive action to the extent allowed by EU law.

3.127 Currently, employers , service providers, and public bodies carrying out public functions in Northern Ireland are allowed, but not required, to take a limited range of special measures, known as ‘positive action’ measures, aimed at alleviating disadvantage experienced by BME individuals or groups.

3.128 For employers, this limited action primarily relates to encouraging job applications and providing specific training where BME individuals are under-represented in the workforce. Service providers are also permitted to take action to meet the special

needs of particular racial groups in the areas of education, training or welfare or any ancillary benefits.

- 3.129 However, the current provisions allowing positive action under the race equality legislation in Northern Ireland are **more limited** than those **permitted under EU law**.
- 3.130 In addition, some **employers** in Northern Ireland have **experienced difficulties** in taking positive action due to the limitations imposed by legislation. For example, before taking positive action, employers must have gathered and assessed statistical information relating to a previous 12 month period which shows the degree to which a particular racial group is undertaking work of a particular nature in Northern Ireland or in an area within Northern Ireland.
- 3.131 This has presented difficulties due to a lack of statistical information about the extent of BME participation in the workplace⁷⁶. This lack of statistics further reinforces the need for improved workforce monitoring by employers on the grounds of nationality and ethnic origin, as recommended below⁷⁷.
- 3.132 Further, the positive action proposed has to be in relation to ‘particular work’; which does not always accord with employers’ training programmes that are aimed at improving certain skills and competencies rather than a particular type of work.
- 3.133 Our recommendation is also **in line with changes already implemented in Great Britain**. In particular, there is currently a **greater scope** for employers and service providers in Great Britain to take positive action to promote racial equality than those in Northern Ireland.
- 3.134 In addition, the Equality Act 2010 brought **consistency** in terms of what positive action could be taken across all equality grounds and **extended** what was permissible action for employers and others to take, to the extent allowed by EU law.

⁷⁶ The current provisions state that certain types of positive action can only be taken if it reasonably appears that within the previous 12 months there were no or a relatively small proportion of persons of that racial group undertaking that work in Northern Ireland or in an area within Northern Ireland.

⁷⁷ See section on recommended changes to the fair employment legislation.

- 3.135 International human rights standards allow for positive action that is necessary, proportionate and time limited. These standards were reflected in the Equality Act 2010 which permitted employers, service providers and others to take **proportionate action** if it is aimed at; overcoming or minimising a disadvantage; meeting the needs of a particular racial group; or so as enable or encourage members of a particular group to participate in an activity where their participation is proportionally low.
- 3.136 For example, across **all** equality grounds, **employers** in Great Britain can take a range of measures; such as targeting training at a specific group, work shadowing, or encouraging applications from an underrepresented group. In addition, across **all** equality grounds, **service providers** and others can take positive action measures; such as providing additional or bespoke services, separate facilities, accelerated access to services, targeting resources or induction or training opportunities to benefit a particular disadvantaged group.
- 3.137 Importantly, there is no requirement on employers to assess statistical data relating to under-representation of a racial group across a 12 month period; nor is positive action limited to 'particular work'. This contrasts with the requirements placed on employers in Northern Ireland, as highlighted above, under the race equality legislation.
- 3.138 Further, our recommendation is also **compatible with** the principles underpinning the statutory duties under Section 75, which are aimed at encouraging public bodies to take action that promotes equality of opportunity for people of different racial groups.

Exceptions

Removal of immigration exception

Key points

- This change will prohibit discrimination by **immigration authorities** on the grounds of ethnic or national origins when carrying out immigration functions.
- This change will result in the removal of an unjustified exception which permits, for example, racial profiling by immigration authorities which can have a discriminatory and disproportionate impact on minority groups. Our recommendation is in line with the recommendations of international human rights monitoring bodies.

Our recommendation

3.139 We **recommend** the **removal of the immigration exception** in the race equality legislation which permits discrimination on the grounds of ethnic or national origins in the carrying out of immigration functions⁷⁸.

Rationale

3.140 This change will result in the **removal of an unjustified exception** which permits, for example, immigration practices that can have a discriminatory and disproportionate impact on minority groups.

3.141 For example, currently, due to this exception, it would not be possible for a person of a particular ethnic or national origin who is singled out by immigration authorities for a more rigorous examination because of his/her ethnic or national origin to bring a race discrimination complaint⁷⁹.

3.142 We recognise that immigration is a reserved matter and remains the responsibility of the Westminster Parliament. However, it is

⁷⁸ See Article 20C of Race Relations (NI) Order 1997, as amended.

⁷⁹ Provided the practice is authorised by a Minister.

also clear that immigration policies and practices can significantly impact on BME communities in Northern Ireland.

- 3.143 For example, research commissioned by the Northern Ireland Human Rights Commission (NIHRC) *Our Hidden Borders: The UK Border Agency's Powers of Detention* (2009) raised specific concerns 'particularly around what appeared to be the practice of racial profiling', by the UK Border Agency and recommended that the practice of singling out particular nationalities and people visibly from a minority ethnic background should cease immediately⁸⁰.
- 3.144 Further, our recommendation is **in line with the recommendations of international human rights monitoring bodies**; in particular, the *Advisory Committee on the Framework Convention for the Protection of National Minorities* and the *Committee on the Elimination of Racial Discrimination*.
- 3.145 For example, the *Advisory Committee on the Framework Convention for the Protection of National Minorities* in 2011 highlighted "serious concerns of racial profiling targeting, in particular, persons belonging to some minority groups" at Northern Ireland ports and airports⁸¹.
- 3.146 It was of the view that racial profiling and "stop and search" measures, including during controls at ports, airports and on the border with Ireland, "have a disproportionate and discriminatory impact on persons belonging to minority ethnic communities."
- 3.147 In addition, the *Committee on the Elimination of Racial Discrimination* (CERD Committee) in its *Concluding Observations* on the UK in 2003, recommended that the UK consider reformulating or repealing the immigration exception in order to ensure full compliance with the Convention⁸².
- 3.148 The CERD Committee in its more recent recommendations in 2011 also expressed "deep concern" that the Equality Act 2010

⁸⁰ [Our Hidden Borders: The UK Border Agency's Powers of Detention](#), NIHRC, 2009

⁸¹ See [Third Opinion on the United Kingdom](#) of the *Advisory Committee on the Framework Convention for the Protection of National Minorities*, June 2011

⁸² [Concluding observations of the Committee on the Elimination of Racial Discrimination: United Kingdom, \(2003\)](#).

permitted public officials to discriminate on grounds of nationality, ethnic and national origin, provided it is authorised by a Minister⁸³.

- 3.149 It expressed its concern at reports that a ministerial authorisation had come into force on 10 February 2011 which permitted the UK Border Agency to discriminate among nationalities in granting visas and when carrying out checks at airports and ports and points of entry of the State Party.
- 3.150 The CERD Committee recommended that the UK remove the exception based on ethnic and national origin in the exercise of immigration functions, as well as the discretionary powers granted to the UK Border Agency to discriminate at border posts among those entering the territory of the UK.
- 3.151 Further, the Joint Committee on Human Rights in Great Britain has made it clear that it did not consider that the UK Government had established a case for retaining the ethnicity and nationality immigration exception in its current form.⁸⁴
- 3.152 It recognised that discrimination on the basis of nationality is an “unavoidable feature of immigration control”. However it stated that “the case law of the European Court of Human Rights, the House of Lords and other courts have established that pressing justification must be shown for the use of distinctions based on race, ethnicity or associated concepts such as national origin”.
- 3.153 It highlighted that the provisions of the *UN Convention on the Elimination of Racial Discrimination* (CERD) also required States to take steps to avoid the use of race-based distinctions. In summary, it was of the view that given the range of immigration powers available and the ability of the government to authorise the use of distinctions based on nationality, it considered that there was **insufficient justification** for including an exception that permits discrimination based on ethnicity and national origins in the Equality Act 2010.

⁸³ It will be noted that the Equality Act 2010 contains an exception allowing public authorities to discriminate in the exercise of their public functions on the grounds of a person’s ethnic or national origins or nationality, in relation to the exercise of immigration functions.

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

⁸⁴ [Joint Committee on Human Rights, Legislative Scrutiny: Equality Bill](#), 26th Report of Session 2008-09, 2009

Narrowing of employment exception on foreign nationals in the public service

Key points

- This change will **narrow** the **exception** relating to the **employment of foreign nationals in the public service**. This exception allows the Crown or a prescribed public body to restrict employment to people of a particular birth, nationality, descent or residence.
- This change will ensure that unjustifiable and disproportionate restrictions on the employment of foreign nationals, particularly non-EU nationals, are removed.

Our recommendation

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

Rationale

3.155 This change will **narrow** the **exception** that permits particular public bodies to restrict certain posts in the civil, diplomatic, armed or security and intelligence services to people of a particular birth, nationality, descent or residence. This exception **particularly impacts** on the employment of **non-EU nationals** in these areas, as fewer restrictions apply to EU nationals.

3.156 In general, we consider that all derogations from the general principle of equality of treatment should be applied narrowly and clearly shown to be a proportionate means of achieving a legitimate aim.

3.157 We support the views of the Joint Committee on Human Rights who made it clear that it considers that the re-enactment of existing restrictions on the employment of non-UK nationals in the

public services represents a “missed opportunity to review these restrictions, to remove those that are no longer justified and to minimise the scope of those that remain.”⁸⁵

- 3.158 The impact of the exception has also been highlighted by the Joint Committee, in that it notes that “95% of civil service posts in the UK are available to Commonwealth, Irish or EEA nationals but other non-UK nationals are almost entirely excluded from those posts, even if there is no good operational reason for that”. It expresses concern that as a result, “many members of long-standing minority communities in the UK are entirely banned from government employment, no matter how well qualified they are, and even if they are married to a UK national”.

⁸⁵ [Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill*](#), 26th Report of Session 2008-09, 2009,

Enforcement and remedies

Increased powers for the Equality Commission

Key points

- These changes will enhance the **powers of the Equality Commission** to issue additional **Race Codes of Practice** in a wider range of areas. Our recommendations are in line with powers available to the Equality Commission under other equality grounds and with the powers granted to the Equality and Human Rights Commission in Great Britain.
- These changes will also enhance the ability of the Equality Commission to undertake **formal race investigations** by removing unnecessary procedural barriers. Our recommendation is in line with Commission powers that already exist under the fair employment legislation.

Our recommendations

Codes of Practice

- 3.159 We **recommend** that we are granted **increased powers** to issue **Race Codes of Practice in a wider range of areas**. In particular, we **recommend** that our powers to issue Race Codes of Practice are extended to cover **all areas**, including **goods, facilities and services, the exercise of public functions** and **education** (at all levels).

Rationale

- 3.160 These changes will enhance our **powers** to issue additional **Race Codes of Practice** in a wider range of areas.
- 3.161 Under the race equality legislation, we currently **only** have the power to issue Codes of Practice in the fields of employment and housing. We therefore do not have the power to issue Race Codes of Practice in relation to the provision of goods, facilities

and services, the exercise of public functions or education; either as regards schools or institutions of further and higher education.

- 3.162 Codes of Practice have an important status. For example, courts and tribunals **must** take into account any part of a Code of Practice that appears to them to be relevant to any question arising in those proceedings.
- 3.163 For example, the provisions of the *Fair Employment Code*⁸⁶ have been referred to extensively by the Fair Employment Tribunal in its decisions. It is of note that the Tribunal has referred to the Fair Employment Code as ‘fundamental to the provision of equality of opportunity’ and stated that ‘it cannot safely be ignored by any employer’.⁸⁷
- 3.164 Further, we have issued a wide range of Codes of Practice on other equality grounds which have proved beneficial in helping employers, service providers, etc., to understand their obligations under the equality legislation and encouraging the adoption of good practice measures.
- 3.165 Our ability to issue Codes of Practice is therefore an **essential tool** in helping us to embed our work to promote equality of opportunity and ensure the elimination of discriminatory practices.
- 3.166 Our recommendation is also **in line with powers available to the Equality Commission under other equality grounds**; for example, under the disability legislation, we have the power to issue Codes of Practices in a wide range of areas, including goods, facilities and services, the exercise of public functions and education.
- 3.167 Our recommendation is also **in line with powers that have been granted to the Equality and Human Rights Commission** in Great Britain. It, for example, has the power to issue Codes of Practice across **all** equality grounds including race, in relation to **both** employment and non-employment areas.

⁸⁶ Equality Commission, *Fair Employment Code of Practice*, 2007

⁸⁷ O’Gara v Limavady Borough Council 31 July 1992 FET.

Formal investigations

- 3.168 We **recommend** that our powers under the race legislation are strengthened in line with the powers of investigation which currently exist under the fair employment legislation.⁸⁸
- 3.169 In particular, we **recommend**, in line with provisions under the fair employment legislation, that our power to conduct a formal ‘named person’ investigation under the race legislation, does **not require** a “belief” that an act of discrimination has occurred.

Rationale

- 3.170 These changes will enhance our ability to undertake formal race investigations **by removing unnecessary procedural barriers**.
- 3.171 We require effective legal tools in order to support our work and to enable us to work strategically and to take enforcement action when required on racial equality grounds.
- 3.172 Our ability to conduct formal investigations into the practices of employers, service providers, etc., is an important tool in enabling us to tackle deep-rooted and systematic racial discrimination.
- 3.173 Under the race equality legislation, we have the power to conduct two main types of formal investigation. Firstly, there is the power to conduct general investigations into issues within our mandate. These do not result in findings of unlawful discrimination or the issuing of non-discrimination notices. We have, for example, undertaken a general formal investigation under the race equality legislation into the role of employment agencies in the recruitment and employment of migrant workers.⁸⁹
- 3.174 We also has the power to conduct ‘named person’ investigations under the race equality legislation; where we reasonably suspect that named persons have committed acts of unlawful

⁸⁸ As made it clear in our [Response to OFMdFM Consultation paper ‘A Single Equality Equality Bill for Northern Ireland](#), 2004

⁸⁹ [Role of the recruitment sector in the employment of migrant workers, A formal investigation](#), 2010, ECNI

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

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

- 3.180 We therefore recommend, in line with provisions under the fair employment legislation, that our power to conduct a formal ‘named person’ investigation under the race legislation, does not require a “belief” that an act of discrimination has occurred.
- 3.181 We also recommend that our powers that exist under the fair employment legislation in this area are widened across all equality grounds, including race.

Increased powers for tribunals

Key Points

- This change will **widen the powers of tribunals** to make recommendations that benefit the whole workforce.
- Our recommendation is in line with powers already available to the Fair Employment Tribunal under the fair employment legislation.

Our recommendation

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

Rationale

3.184 These changes will widen the powers of tribunals to make recommendations that benefit the whole workforce.

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

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

training), or more specifically on particular policies (for example, recruitment, selection and promotion procedures or terms and conditions of employment).

- 3.186 Our recommendation is **in line with** powers already available to the **Fair Employment Tribunal** under the fair employment legislation. For example, pursuant to its powers under the fair employment legislation, in the fair employment cases of *Grimes - v- Unipork Limited*⁹⁰ and *McGrath -v- Viper International Limited*,⁹¹ the Fair Employment Tribunal made a recommendation that the employer display on a works notice board, a statement to the effect that the complainant (a former employee) had been unlawfully discriminated against on the grounds of religious belief.
- 3.187 We also **recommend** that the race equality legislation is amended to ensure, in the case of non-compliance with a tribunal recommendation, that there are sanctions which are effective, proportionate and dissuasive.
- 3.188 Our recommended changes also reflect the **original approach** adopted in Great Britain under the Equality Act 2010; which originally contained provisions granting tribunals wider powers to make recommendations. It will however be noted that the UK Government, as part of its *Red Tape challenge*⁹², has recently indicated that it proposes to repeal this provision through the draft Deregulation Bill currently progressing through Parliament.⁹³

⁹⁰ 22.05.1992 FET

⁹¹ 30.10.1991 FET

⁹² <http://www.redtapechallenge.cabinetoffice.gov.uk/home/index/>

⁹³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/210035/130701_CM_8642_Draft_Deregulation_Bill.pdf

Harmonise enforcement mechanism for education complaints

Key Points

- These changes will harmonise and simplify the **enforcement mechanism for education complaints** against schools under the race equality legislation.
- Our recommendation is in line with time limits and procedures which exist in other non-employment discrimination complaints and with changes implemented in Great Britain.

Our recommendation

3.189 We **recommend** that the enforcement mechanism for education complaints against schools under the race equality legislation is harmonised and simplified.

Rationale

3.190 These changes will **harmonise and simplify** the enforcement mechanism for education complaints against schools. They will also **remove unnecessary barriers** to pupils in schools making complaints under the race equality legislation.

3.191 Currently, under the race equality legislation, the enforcement mechanism requires that before a complaint can be lodged with the county court, notice of the complaint against the school **must be given in the first instance** to the Department of Education for Northern Ireland.

3.192 Further restrictions apply as regards race discrimination complaints against schools **on the grounds of colour and nationality**. In particular, civil proceedings cannot be lodged with the county court unless the Department of Education has informed

the claimant that it does not require further time to consider the matter or a period of two months has elapsed since the claimant gave notice to the Department of Education.

- 3.193 We **recommend** that racial complaints in relation to education in schools should be subject to the **same time limits** as those which apply in the case of complaints of race discrimination as regards the provision of goods and services; namely **six months** from the date of the alleged act of discrimination.
- 3.194 We further **recommend** that the requirement to give notice to the Department of Education prior to lodgement of complaints **is removed**. In addition, the requirement either to wait up to two months or to receive confirmation from the Department of Education that it does not require further time to consider the matter, should also be abolished.
- 3.195 These restrictions unnecessarily prolong the adjudication process and is a form of enforcement not found in other areas covered by the race equality legislation.
- 3.196 It will, however, be noted that complaints against schools under the **disability discrimination** legislation have a different process and procedure in that complaints are brought to the Special Educational Needs and Disability Tribunal (SENDIST) and **not** the county court.
- 3.197 The **time limits** for disability education complaints are, however, consistent with those that apply in other non-employment areas. In particular, disability discrimination complaints must be made to SENDIST within six months of the alleged act of discrimination. Unlike under the race equality legislation, there is therefore **no requirement** to give prior notice to the Department of Education before lodging proceedings with SENDIST; or to allow a period of two months to elapse since giving notice to the Department of Education before lodging proceedings.
- 3.198 Our recommendations are also **in line with** changes that have been introduced in other parts of the United Kingdom under the Equality Act 2010. In particular, in Great Britain, discrimination complaints against schools, other than disability complaints⁹⁴,

⁹⁴ Disability complaints are lodged with SENDIST in England and Wales.

must be lodged with the county court within six months of the alleged act of discrimination. No restrictions exist similar to those that currently operate in Northern Ireland as regards notice to the Department of Education, etc.

- 3.199 Finally, as this anomaly equally exists in other areas of equality law, including sex and sexual orientation, we **recommend** a harmonisation of time limits and procedures across the equality grounds.

Fair employment legislation

Introduction

3.200 In this section we set out our recommendation for change to the **fair employment legislation** which is aimed at improving workforce monitoring on racial grounds by registered employers.

Improving workforce monitoring on racial grounds

Key Points

- A **priority area** for reform¹ is improving **workforce monitoring on racial grounds**. In particular, we recommend that the fair employment legislation is amended to **require** registered employers to collect additional workforce monitoring information on racial grounds.
- The **primary reason** for this change is that it will assist employers make a more accurate and meaningful assessment of fair participation in employment under the fair employment legislation. There are also a number of **secondary benefits** associated with introducing this recommended change.
- Our recommendation is consistent with existing monitoring duties on public bodies, good practice recommendations and the recommendations of international human rights monitoring bodies.

Our recommendation

3.201 We **recommend** that registered employers in Northern Ireland, in addition to monitoring the community background and sex of their employees and job applicants, are **required** under the fair

employment legislation to collect **monitoring information** as regards **nationality** and **ethnic origin**.

3.202 As set out in our *Proposals for legislative reform*⁹⁵ submitted to Junior Ministers in OFMDFM in 2009, we are clear that this is a **priority area** for reform.

Background

3.203 The fair employment legislation⁹⁶ protects individuals from unlawful discrimination because of their religious belief and/or political opinion. Under this legislation, certain employers, including public and private sector employers, are **required** to register with the Equality Commission and to collect **monitoring information** on the **community background** and **sex** of their workforce⁹⁷.

3.204 Registered employers are required to monitor the community background and sex of their employees, job applicants, appointees and apprentices. In addition, private, voluntary and community sector employers who employ more than 250 employees and all specified public authorities must also monitor their promotees and leavers.

3.205 All registered employers are required to collect this monitoring information and submit it to the Equality Commission in their annual monitoring return.

3.206 This monitoring information is then used by employers to conduct **periodic reviews** of the composition of their workforce and of their employment practices.

3.207 In particular, it is used by employers in order to determine whether members of the Protestant and Roman Catholic communities are enjoying, and are likely to continue to enjoy, **fair participation** in employment. These reviews, known as Article 55 reviews, must be conducted at least once every three years.

⁹⁵ [ECNI Proposals for Legislative Reform](#), 2009

⁹⁶ Fair Employment and Treatment (NI) Order 1998, as amended

⁹⁷ All public sector employers and all private sector employers with 11 or more employees are required to register. This monitoring information is submitted by registered employers to the Equality Commission in their annual monitoring return.

- 3.208 Although the term ‘fair participation’ is not defined in the fair employment legislation, further guidance on what employers are required to consider is set out in the *Fair Employment Code of Practice*⁹⁸. This Code makes it clear that ‘*what is required is that you afford opportunities to both communities and, where a community is under-represented, you take affirmative action steps to remedy that under-representation.*’
- 3.209 There is currently **no requirement** under the fair employment legislation for registered employers to collect workforce monitoring information on the racial composition of their workforce.

Rationale

- 3.210 The **primary reason** for the proposed changes is to ensure the continuing usefulness of the fair employment Monitoring Regulations. In particular, it will enable employers to **make a more accurate and meaningful assessment of fair participation** in employment in their organisation.
- 3.211 We also consider our proposed change is **in line with good practice recommendations**. For example, it is a key recommendation in the Equality Commission’s **Race Code of Practice** for employers⁹⁹. In particular, this Code recommends employers regularly monitor the outcome of selection decisions and the effects of personnel practices and procedures in order to assess whether equality of opportunity is being achieved.
- 3.212 More recently, as set out in its *Unified Guide to Promoting Equal Opportunities in Employment*, the Equality Commission has made it clear that it recommends, **as a matter of good practice**, that employers should **monitor the racial group** of job applicants and employees¹⁰⁰.
- 3.213 Our recommendation is also **consistent with existing monitoring duties on public authorities** under Section 75 of the Northern Ireland Act 1998.

⁹⁸ Equality Commission, [Fair Employment Code of Practice](#), 2007

⁹⁹ [Code of Practice for employers for the elimination of racial discrimination and the promotion of equality of opportunity in employment](#), ECNI, 1999

¹⁰⁰ [A Unified Guide to Promoting Equal Opportunities in Employment](#), ECNI, 2010

- 3.214 The Equality Commission’s *Section 75 Monitoring Guidance for use by Public Authorities*, highlights that Section 75 places a clear onus on public authorities to put in place systems to collect relevant information and to make use of that information for assessing and monitoring the impact of their policies on the promotion of equality of opportunity¹⁰¹. We consider that collecting this additional workforce monitoring data on racial grounds will enhance the ability of public bodies to fulfil their Section 75 duties.
- 3.215 Further our recommendation is **in line with workforce monitoring duties placed on certain public bodies in other parts of the United Kingdom**. In particular, under changes to the public sector equality duties in Great Britain, certain public bodies in Great Britain are already under a duty to collect and publish monitoring information relating to employees across a number of equality grounds including race¹⁰².
- 3.216 Finally, our recommendation is **consistent with the recommendations of international human rights monitoring bodies**.
- 3.217 In particular, the *Advisory Committee on the Framework Convention for the Protection of National Minorities* has recommended that authorities in Northern Ireland give consideration to “including persons belonging to minority ethnic communities in workforce monitoring”¹⁰³.
- 3.218 It was of the view that “workforce monitoring could be mainstreamed and expanded to include persons belonging to minority ethnic communities as a means of assessing equality of opportunity in the labour market for these persons as well.” It also encouraged authorities to build on the criteria in the 2011 Census

¹⁰¹ [Section 75 Monitoring Guidance for use by Public Authorities](#), ECNI, 2007

¹⁰² Equality monitoring requirements differ across different jurisdictions within the UK. In Great Britain, specified public bodies must comply with public sector duties, which consist of a general equality duty that is underpinned by specific duties. Specific duties vary in different parts of the UK. For example, in England, under the specific public sector duties, public bodies with 150 or more employees are under a duty to collect and publish monitoring information relating to employees across a number of equality grounds, including race. In Scotland, the specific duties require public bodies to take steps to gather information on the composition of their employees and on the recruitment, development and retention of employees across a range of equality grounds, including race. This monitoring information, once collected, must be published in line with the detailed requirements set out in the specific duties.

¹⁰³ See [Third Opinion on the United Kingdom](#), of the *Advisory Committee on the Framework Convention for the Protection of National Minorities*, June 2011,

and “start using identification criteria other than community/religious background so as to obtain more accurate data on the population as a whole”.

Secondary benefits

3.219 Whilst the **primary reason** underpinning our recommendation is to ensure the continuing usefulness of the fair employment Monitoring Regulations, we consider that introducing a duty on registered employers to collect racial monitoring data will have the following **secondary benefits**.

- Firstly, workforce monitoring on racial grounds can assist employers in assessing the **impact of their employment policies and procedures on particular ethnic groups** in the workplace. In particular, it can assist them in identifying discriminatory employment practices, which impact directly or indirectly on racial groups in their workforce.

For example, racial monitoring can help employers to identify barriers that hinder certain racial groups from accessing employment or career development. As made clear in the Equality Commission’s *Section 75 Monitoring Guidance for use by Public Authorities*, monitoring is more than data collection; it is an ongoing process, the objective of which is to highlight possible inequalities and why these might be occurring¹⁰⁴.

- Secondly, workforce monitoring on racial grounds can assist employers to ascertain the situations in which it would be lawful or permissible to take voluntary **positive action** for certain racial groups. Positive action, for example, could include providing access to facilities for training to members of a certain racial group which is under-represented in the organisation.

As highlighted in the Equality Commission’s *Recommendations for Changes to the Race Relations Order*

¹⁰⁴ [Section 75 Monitoring Guidance for use by Public Authorities](#), ECNI, 2007.

1997¹⁰⁵, ‘employers in Northern Ireland **face particular difficulties** in that the statistical information about the extent of minority ethnic participation in the workplace is not available to allow employers and training providers to assess the applicability of positive action measures.’

Racial monitoring under the fair employment legislation can therefore provide the **evidential basis** for justifying the taking of lawful positive action measures under the race equality legislation.

- Further, it can provide a **valuable and extensive source of data** on the racial composition of employees and applicants in Northern Ireland which will benefit a wide range of organisations, including Government Departments. For example, the data can help inform **high level indicators** for monitoring priority outcomes of Government strategies, including the revised Racial Equality Strategy.

The lack of robust disaggregated research on the employment experiences of BME groups has, for example, been highlighted by the Joseph Rowntree Foundation (2013), in *Poverty and Ethnicity in Northern Ireland*. In particular, it highlighted that “despite the policy progress on equalities, any impact on outcomes for people of minority ethnic backgrounds is unclear as data is required to demonstrate the policy effectiveness.”

In addition, subsequent research by the Joseph Rowntree Foundation (2014) has further indicated that there is “a lack of local level data as to how individuals from different ethnic minority communities are living, the employment sectors they work in and their levels of employment and training.”¹⁰⁶

It will be noted that the need for urgent consideration to be given to extending monitoring under the fair employment legislation to include nationality and ethnicity was also

¹⁰⁵ Equality Commission’s *Recommendations for Changes to the RRO 1997, 2000*,

¹⁰⁶ <http://www.jrf.org.uk/sites/files/jrf/ethnic-minorities-northern-ireland-summary.pdf>

highlighted by research in 2009 by *New Migration, Equality and Integration, Issues and Challenges for Northern Ireland*.¹⁰⁷

Impact on employers

- 3.220 Finally, we consider that an additional requirement to collect workforce monitoring data on racial grounds will **not** pose a **disproportionate burden** on registered employers.
- 3.221 All registered employers across all sectors (public, private, and voluntary/community sector) **already have monitoring practices and procedures in place** to collect workforce monitoring data on grounds of community background and sex. Therefore, the introduction of this duty and the collection of additional monitoring data on racial grounds will not in our view place an excessive administrative burden on registered employers.
- 3.222 Further, many **public bodies**, pursuant to their Section 75 duties, already have in place mechanisms by which they collect equality monitoring data on applicants for employment and their workforce, **including data on racial grounds**. The collection by public authorities of additional workforce monitoring data on racial grounds will not therefore, in our view, be an onerous requirement.

¹⁰⁷ [*New Migration, Equality and Integration, Issues and challenges for NI*](#) 2009, Institute for Conflict Research, commissioned by ECNI.

4. Wider benefits of reform

Introduction

- 4.1 We consider that there is a **robust case** for strengthening the rights of individuals in Northern Ireland against racial discrimination and harassment.
- 4.2 In the previous section, in relation to each recommendation, we highlighted the rationale in support of our specific recommendation. In this section, we **summarise** the **key reasons** underpinning our recommendations for reform of the **race equality legislation**.

Help address key racial inequalities in Northern Ireland

- 4.3 We consider that these changes will help **address key racial inequalities** in Northern Ireland.
- 4.4 It is clear that there are still unacceptable levels of racial discrimination, harassment and prejudice in Northern Ireland. For example, the *Equality Awareness Survey 2011*, commissioned by the Equality Commission¹⁰⁸ has revealed high levels of negative attitudes towards certain racial groups; particularly Irish Travellers and Eastern European migrant workers. It is also the case that racist hate crime is the second most common form of hate crime in Northern Ireland and that levels of racist hate crime are continuing to increase¹⁰⁹. In addition, we continue to receive and investigate a large number of complaints alleging discrimination on racial grounds¹¹⁰.

¹⁰⁸ [Do you Mean Me? Discrimination: Attitudes and Experience in Northern Ireland, Equality Awareness Survey 2011](#), Equality Commission.

¹⁰⁹ PSNI statistics for 2013/14 show racist crimes were up by 221 (47.0%) . There were 982 racist incidents in 2013/14. Wider research also suggests that hate crime is generally hugely under-reported. See PSNI statistical bulletin summarising PSNI Annual Statistics for 2013/14.

http://www.psni.police.uk/2013_14_press_release_for_web.pdf

¹¹⁰ For example, over a twelve month period (1 April 2013 - 31 March 2014) the number of race discrimination enquiries received by the Commission was 406. The vast majority of these enquiries related to discrimination in employment (approximately 60%, 219 enquiries), but a considerable number of complaints related to access to goods, facilities and services (30%, 110 enquiries).

- 4.5 Our recommendations for change to the race equality law will, for example, provide greater protection for individuals against racial discrimination and harassment who currently have **no or limited** protection under the race equality law. For example, they will introduce **new protections** for Councillors and certain categories of agency workers against unlawful racial discrimination.
- 4.6 They will also result in the **removal of unjustifiable exceptions** which limit the scope of the race equality legislation and **unnecessary barriers** that limit individuals' ability to exercise their rights under the legislation.
- 4.7 We recognise that legislative changes by themselves won't address all the issues or barriers facing BME individuals in Northern Ireland. However, legislation outlines minimum standards and levels of protection in our society. It is therefore important we have **robust and comprehensive equality legislation** setting out clear standards which employers, service providers, and others must comply with.
- 4.8 Robust legislation acts as a **catalyst for change** which encourages good practice, raises standards and enables individuals to obtain redress when standards fall.
- 4.9 It is of note that a report from the Government Equalities Office in Great Britain following the introduction of the Equality Act 2010, has highlighted that pressure on employers to promote equality principally comes from a combination of **legislation** and the organisation's **sense of moral or social responsibility**¹¹¹. It indicates that the reason why the vast majority of employers adopt a conscious approach to equality and discrimination matters is in order to comply with equality legislation and because they consider it morally important.

Harmonise, simplify and clarify

- 4.10 Our recommended changes will also help **harmonise** and **simplify** the racial equality legislation making it **easier** for BME individuals in Northern Ireland to understand what their rights are

¹¹¹ *Evaluation of the Equality Act 2010: Report 1-Organisational Approaches to Equality*, GEO, 2012, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78432/Eval_of_Equality_Act_Report1.PDF

and for employers, service providers and others to understand what their responsibilities are.

- 4.11 Many of our recommended changes will **remove significant unjustifiable anomalies and complexities** within the race equality legislation which have led to difficulties and confusion for those seeking to exercise their rights under the legislation and for those seeking to comply with the law. A number of our recommended changes will ensure greater **legal certainty** and **clarity** in areas where the scope of legislation is unclear; for example, the scope of protection against discrimination in the exercise of public functions.
- 4.12 Further, a number of our recommended changes will ensure that the race equality law is **consistent with best practice standards** that have already been adopted in other areas of equality law in Northern Ireland.
- 4.13 They will therefore **help improve consistency** between the race equality legislation and other equality legislation in Northern Ireland. For example, a number of the changes we recommend have already been implemented in other areas of Northern Ireland equality law, such as disability equality law. This will assist employers, service providers and others who struggle to understand, and keep pace with, the differences between race equality law and other equality law in Northern Ireland.

Keep pace with legislative developments in Great Britain

- 4.14 Further, many of our recommendations will help ensure that Northern Ireland race equality legislation **keeps pace with legislative developments in Great Britain**.
- 4.15 As highlighted above, Northern Ireland race equality law, since its introduction in 1997, has in a number of key respects, consistently failed to keep pace with legislation in Great Britain which has strengthened and improved protection against racial discrimination for different racial groups.
- 4.16 Further, following the enactment of the Equality Act 2010, the gap in protection between the two jurisdictions has now significantly widened. There is now **significantly less protection** against discrimination, harassment and victimisation across all racial

grounds and in a wider range of areas in Northern Ireland than in other parts of the UK.

4.17 The Equality Act 2010 has harmonised, simplified and strengthened equality legislation in Great Britain for BME individuals, as well as other groups protected under legislation. A significant number of our recommended changes have already been implemented in Great Britain through the Equality Act 2010 in October 2010.

4.18 It is important to stress that whilst a number of the recommended changes have already been introduced in Great Britain, in certain areas, we consider that the Equality Act 2010 has **not gone far enough**. We recommend a number of changes which **go beyond** the level of protection currently set out in equality legislation in Great Britain.

4.19 In particular, we recommend Northern Ireland race equality law **goes beyond** the level of protection which currently exists in Great Britain by:

- ensuring increased protection for certain categories of agency workers against racial discrimination and harassment;
- providing protection against intersectional multiple discrimination;
- strengthening protection for employees against third party racial harassment;
- removing the exception on the grounds of ethnic or national origins in relation to immigration;
- narrowing the employment exception on foreign nationals in the public service;
- increasing the powers of tribunals to make wider recommendations;
- increasing the powers of the Equality Commission to undertake formal investigations.

Further the aims of the Race Equality Strategy

4.20 We consider that our recommendations are also in line with the aims and objectives of the Executive's current *Racial Equality Strategy 2005-2010*, currently being revised, which sets out a

strategic framework for tackling racial inequalities in Northern Ireland, as well as eradicating racism and hate crime.

4.21 In particular, one of the key aims of the Strategy is to eliminate racism, racial inequality and unlawful racial discrimination and promote equality of opportunity in all aspects of life.

4.22 In addition, it aims to combat racism and provide effective protection and redress against racism and racist crime, as well as ensuring equality of opportunity for minority ethnic people in accessing and benefiting from all public services.

Consistent with International Human Rights obligations

4.23 The introduction of many of our recommendations will ensure that Northern Ireland race equality legislation is in line with the **UK Government's international obligations** relating to the promotion of human rights for racial minorities, and with the **recommendations** of international human rights monitoring bodies.

4.24 In particular, the lack of comprehensive, harmonised race equality legislation in Northern Ireland, and the gap in legal protections between the two jurisdictions, has been criticised by both the *Advisory Committee on the Framework Convention for the Protection of National Minorities* and the *UN Committee on the Convention for the Elimination of all forms of Racial Discrimination (UN Committee on CERD)*.

4.25 The *UN Committee on CERD*, for example, has expressed concern at the UK Government's response that Northern Ireland is responsible for developing its own equality legislative framework. It reminded the UK Government that the **obligation to implement the provisions of the Convention** in all parts of the territory is **borne by the UK Government**.¹¹²

4.26 It made it clear that 'this makes the UK Government the duty bearer at the international level in respect of the implementation of the Convention in all parts of its territory notwithstanding specific governance arrangements that it may have adopted.'

¹¹² [Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK \(2011\)](#)

- 4.27 The *UN Committee on CERD* **recommended** that immediate steps were taken to ensure that a single equality law was adopted in Northern Ireland or that the Equality Act 2010 is extended to Northern Ireland.¹¹³
- 4.28 In June 2011, *the Advisory Committee on the Framework Convention for the Protection of National Minorities* (Advisory Committee) expressed concern that, despite the commitment undertaken in the *St Andrew's Agreement*¹¹⁴, there had been no progress made towards adopting comprehensive equality legislation in Northern Ireland.
- 4.29 In addition, it highlighted that Northern Ireland legislation remains 'complex and piecemeal' and was concerned about the significant discrepancies and inconsistencies that exist between Great Britain and Northern Ireland.
- 4.30 The *Advisory Committee* 'urged the authorities to adopt harmonised, comprehensive anti-discrimination legislation in Northern Ireland in order to put an end to the disparity in protection against discrimination that exists between Northern Ireland and Great Britain'¹¹⁵.
- 4.31 More recently, the gap in legal protections between Great Britain and Northern Ireland has also been criticised by the *Committee on the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, which expressed concern that women in Northern Ireland did not have the same remit of equality protections as compared to their counterparts in other parts of the UK. It also expressed concern that certain provisions of the Equality Act 2010 had not come into force¹¹⁶.
- 4.32 Further, as outlined in more detail above, international human rights monitoring bodies have recommended that the UK Government address a number of the **specific recommendations** for change that we advocate; for example, broader protection against discrimination in the exercise of public

¹¹³ Ditto

¹¹⁴ *St Andrew's Agreement*, 2006,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136651/st_andrews_agreement-2.pdf

¹¹⁵ Advisory Committee on the Framework Convention for the Protection of National Minorities (June 2011): *Third Opinion on the United Kingdom*.

¹¹⁶ *Concluding Observations on UK*, CEDAW Committee, 26 July 2013.

functions; increased protection against multiple discrimination;
and the removal of the immigration exception.

5. Conclusions and next steps

- 5.1 In conclusion, it is clear that there is a **robust case** for addressing significant gaps and weaknesses within the race equality legislation in Northern Ireland. We believe that our recommended changes to the race equality and fair employment legislation in Northern Ireland will strengthen the rights of individuals against racial discrimination and harassment and ensure a more comprehensive, harmonised and consistent legislative framework.
- 5.2 We welcome the Northern Ireland Executive's commitment to bring forward a revised **Racial Equality Strategy**. We **recommend**, in light of the clear need for reform of the race equality legislation in Northern Ireland, that there is a **clear commitment** in the revised Racial Equality Strategy to address legislative gaps in the race equality legislation so that individuals in Northern Ireland have effective protection against racial discrimination and harassment.
- 5.3 We further **recommend** steps are taken to amend the **fair employment legislation** in order to require registered employers in Northern Ireland, in addition to monitoring the community background and sex of their employees and job applicants, to collect **monitoring information** as regards **nationality** and **ethnic origin**.
- 5.4 As highlighted earlier, as many of the gaps and inconsistencies that exist in the race equality legislation equally exist under other areas of equality law, **we recommend action to address similar legislative gaps** in other areas of equality law in order to ensure a consistent and best practice approach is adopted across the equality legislative framework.
- 5.5 We have taken a number of proactive steps in order to raise awareness of our recommendations for reform of the race equality and fair employment legislation, and to secure support for the recommended changes.

- 5.6 In addition, we have, and will continue to, proactively engage with a wide range of key stakeholders, including MLAs, Assembly Committees, and representatives from the race sector.

August 2014
Equality Commission