



racial
equality

POLICY POSITION

Race Law Reform

Priorities and Recommendations



Equality Commission

FOR NORTHERN IRELAND

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Executive Summary

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

Priorities for Action

- vii. The Commission has highlighted five priority areas for change to the race equality laws:
- Harmonise and expand the scope of racial grounds
 - Increase protection for individuals against racial discrimination and harassment by public bodies when carrying out their public functions
 - Introduce protections against combined discrimination
 - Ensure greater protection for employees against third party racial harassment
 - Expand the scope of positive action
- viii. The Commission also has a long-standing priority call¹ to improve workforce monitoring on racial grounds.

Recommendations

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

Forms of discrimination

Harmonise and expand the scope of racial grounds

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

Definitions

- Remove the comparator requirement in the definition of victimisation
- Widen the definition of ‘racial harassment’

¹ ECNI (2009) [Proposals for Legislative Reform](#), pp. 25-27.

Public functions

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

Combined discrimination

- Introduce protections against combined discrimination

Protections in employment and analogous situations

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

Protections in schools and training

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

Positive Action

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

Influencing others and previous relationships

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

Exceptions

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

Enforcement and Remedies

Commission Powers

- Increase powers to issue Race Codes of Practice in a wider range of areas
- Strengthen formal investigation powers

- Strengthen and harmonise the Commission’s grant-making powers
- Empower the Commission and other representative bodies to bring a claim on behalf of named individuals and in its own name

Procedural and remedies

- Harmonise and simplify the enforcement mechanism for education complaints against schools
- Increase powers for tribunals
- Increase rights of individuals to take cases when they suffer detriment
- Maintain the questionnaire procedure

Article 2 of the Ireland/ NI Protocol

- Ensure race law reform is in compliance with Article 2 of the Ireland/Northern Ireland Protocol

- x. We have, and will continue to, proactively engage with a wide range of key stakeholders. In support of securing change, we would welcome any steps you could take to raise awareness of these recommendations and their supporting evidence base. We encourage you to engage with Ministers, wider elected representatives, or key government officials to call for the adoption of these proposals.

1 Introduction

- 1.1 The Equality Commission² is calling on the Northern Ireland Executive to make urgent changes to the race equality legislation in Northern Ireland.
- 1.2 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.
- 1.3 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.

Single Equality Legislation

- 1.4 We continue to call for action to deliver harmonised single equality legislation for Northern Ireland. We consider that single equality legislation is the most effective means of strengthening and maintaining protections against discrimination in Northern Ireland, while at the same time improving consistency, understanding and efficiency, saving time and costs for individuals, employers, service providers, advisory services, and those interacting with equality legislation more generally.
- 1.5 The Commission has consistently called for the harmonisation ‘upwards’ of equality law, in a way that strengthens equality rights and protections. The standard of legislation should be linked to those of the international conventions and best practice.
- 1.6 In the absence of progress on harmonised single equality legislation for Northern Ireland, we consider that urgent

² The Equality Commission for Northern Ireland (‘the Equality Commission’) is an independent public body established under the Northern Ireland Act 1998, with responsibility for implementing equality legislation across a range of grounds. It has specific powers regarding Article 2(1) of the Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement; and has also been designated as an ‘independent mechanism’ under the UN Convention on the Rights of Persons with Disabilities.

changes are required to strengthen the race equality legislation in Northern Ireland.

Priorities for Action

- 1.7 The Commission has highlighted five priority areas for change to the race equality laws:
- Harmonise and expand the scope of racial grounds
 - Increase protection for individuals against racial discrimination and harassment by public bodies when carrying out their public functions
 - Introduce protections against combined discrimination
 - Ensure greater protection for employees against third party racial harassment
 - Expand the scope of positive action
- 1.8 The Commission also has a long-standing priority call³ to improve workforce monitoring on racial grounds.

Wider Context

- 1.9 Individuals in Northern Ireland currently have protection against unlawful racial discrimination under the Race Relations (NI) Order 1997, as amended (RRO 1997). This legislation prohibits discrimination on racial grounds in employment and vocational training, and when accessing goods, facilities and services. It also gives protection against unlawful racial discrimination when accessing private clubs (such as golf clubs), buying or renting premises, when in education (including education in schools), and when subject to the functions of public bodies, such as the police.
- 1.10 Whilst the race equality legislation currently provides protections against racial discrimination and harassment, these protections are not comprehensive, with gaps in protection existing and increasing over time.
- 1.11 Pursuant to our duty under the race equality legislation to keep this legislation under review and to make recommendations for

³ ECNI (2009) [Proposals for Legislative Reform](#), pp. 25-27.

change, over the years we have made a number of recommendations relating to racial equality law.

- 1.12 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 Agreement⁴ in 2006 to ‘work rapidly’ towards the development of single equality legislation, this legislation has not been progressed by the Northern Ireland Executive.
- 1.13 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 legislation⁵.
- 1.14 In particular, in our Proposals for Legislative Reform, we made it clear that a priority area for reform of the race equality legislation was increased protection from discrimination and harassment on the grounds of colour and nationality across the scope of the race equality legislation.
- 1.15 The need for reform of the race equality legislation in Northern Ireland has been heightened by developments in Great Britain and elsewhere. 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).
- 1.16 It is important to note that in some areas we are of the view that the Equality Act 2010 in Great Britain 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.
- 1.17 In 2014, we published a series of detailed recommendations in relation to racial equality law⁶, following extensive engagement

⁴ NIO (2006) [The St Andrews Agreement](#), Annex B.

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

⁶ ECNI (2014) [Strengthening protection against racial discrimination: Recommendations for law reform](#)

with officials and stakeholders. These recommendations included proposals in relation to increasing protection in relation to colour and nationality, improved protection against racial harassment, and removing or modifying certain exceptions.

- 1.18 Calls for the reform of race equality law have received widespread support, including from international mechanisms such as those associated with the UN Convention on the Elimination of All Forms of Racial Discrimination; the European Commission against Racism and Intolerance; and the Framework Convention on the Protection of National Minorities (see next section).
- 1.19 This 2022 paper updates and adds to our 2014 recommendations, in the expectation that the TEO's Racial Equality Strategy 2015-2025 will lead to reform of race equality law in Northern Ireland.
- 1.20 To assist with updating our recommendations, we commissioned an expert paper by Professor Brice Dickson⁷, which, through engagement with stakeholders, was grounded in lived experience⁸.
- 1.21 Whilst a number of our recommendations call for specific changes to the race equality legislation, some of our recommendations apply equally to other equality grounds, for example: protection against combined discrimination; increased protection against discrimination by public bodies when carrying out their public functions; an increase in tribunal powers; and the strengthening of our enforcement powers.
- 1.22 In considering our recommendations on race law reform, there is also the opportunity to advance and harmonise protection against discrimination across a number of equality grounds. We therefore recommend action to address similar legislative gaps that exist under other areas of equality law in order to ensure a consistent and best practice approach is adopted across the equality legislative framework as a whole.

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

⁸ Dickson, B. (2021) [Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland](#), p.7.

Wider benefits of reform

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

Address key racial inequalities in Northern Ireland

- 1.24 We consider that these changes will help address key racial inequalities in Northern Ireland.
- 1.25 It is clear that there are still unacceptable levels of racial discrimination, harassment and prejudice in Northern Ireland. For example, *A Question of Attitude: Equality Awareness Survey 2016*, commissioned by the Equality Commission has revealed that the five most negatively viewed groups were racial groups, with Travellers and Roma being the most negatively viewed groups⁹. Racist hate crime is now the most common form of hate crime in Northern Ireland and that levels of racist hate crime have been increasing since 2019¹⁰. In addition, we continue to receive and investigate a substantial number of complaints alleging discrimination on racial grounds¹¹.
- 1.26 We recognise that legislative changes by themselves won't address all the issues or barriers facing individuals from ethnic minority communities in Northern Ireland. However, legislation outlines minimum standards and levels of protection in our society. It is therefore important we have robust and comprehensive equality legislation setting out clear standards which employers, service providers, and others must comply with.
- 1.27 Robust legislation acts as a catalyst for change which encourages good practice, raises standards and enables individuals to obtain redress when standards fall.
- 1.28 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

⁹ ECNI (2016) [A Question of Attitude: Equality Awareness Survey](#)

¹⁰ PSNI (2022) [Incidents and Crimes with a Hate Motivation Recorded by the Police in Northern Ireland](#)

¹¹ For example, over a twelve month period (1 April 2021 - 31 March 2022) the number of race discrimination enquiries received by the Commission was 196.

equality principally comes from a combination of legislation and the organisation's sense of moral or social responsibility¹². 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 the race equality legislation

- 1.29 Our recommended changes will also help harmonise and simplify the racial equality legislation making it easier for individuals in Northern Ireland to understand what their rights are and for employers, service providers and others to understand what their responsibilities are.
- 1.30 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.
- 1.31 Further, a number of our recommended changes will ensure that the race equality law is consistent with best practice standards that have already been adopted in other areas of equality law in Northern Ireland.
- 1.32 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.

¹² GEO (2012) [Evaluation of the Equality Act 2010: Report 1-Organisational Approaches to Equality](#)

Keep pace with developments in Great Britain, as a minimum

- 1.33 Further, many of our recommendations will help ensure that Northern Ireland race equality legislation keeps pace with legislative developments, including in Great Britain.
- 1.34 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.
- 1.35 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.
- 1.36 The Equality Act 2010 has harmonised, simplified and strengthened equality legislation in Great Britain, 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.
- 1.37 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. In support of ensuring best available protections, we also recommend a number of changes which go beyond the level of protection currently set out in equality legislation in Great Britain.

Further the aims of the Racial Equality Strategy

- 1.38 We consider that our recommendations are also in line with the aims and objectives of the Executive's current *Racial Equality Strategy 2015-2025* which sets out a strategic framework for tackling racial inequalities in Northern Ireland, as well as eradicating racism and hate crime.
- 1.39 In particular, one of the key aims of the Strategy is to eliminate racism, racial inequality and unlawful racial discrimination and promote equality of opportunity in all aspects of life.

1.40 The Strategy includes an action to review racial equality legislation, to ensure that the RRO offers at least the same levels of protection as in GB and the Republic of Ireland.

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

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

1.42 In particular, the lack of comprehensive, harmonised race equality legislation in Northern Ireland, and the gap in legal protections between the two jurisdictions, has been criticised by the European Commission on Racism and Intolerance (ECRI)¹³, the Advisory Committee on the Framework Convention for the Protection of National Minorities^{14 15} and the UN Committee on the Convention for the Elimination of all forms of Racial Discrimination (UN Committee on CERD)^{16 17}.

1.43 Calls for the reform of race equality law have received widespread support, including from international mechanisms who recommended that government should:

- act without further delay to adopt comprehensive legislation prohibiting racial discrimination in accordance with the provisions of the Convention¹⁸
- consolidate equality legislation into a single, comprehensive equality act, taking inspiration from the Equality Act 2010, and taking account of the

¹³ ECRI (2019) [Conclusions on the implementation of the recommendations in respect of the UK subject to interim follow up](#).

¹⁴ Advisory Committee on the Framework Convention for the Protection of National Minorities (2016) [Fourth Opinion on the United Kingdom](#)

¹⁵ Advisory Committee on the Framework Convention for the Protection of National Minorities (2011) [Third Opinion on the United Kingdom](#).

¹⁶ CERD (2011) [Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK \(2011\)](#) CERD/C/GBR/CO/18-20.

¹⁷ CERD (2016) [Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK \(2016\)](#) CERD/C/GBR/CO/21-23 para 8(b)

¹⁸ CERD (2016) [Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK \(2016\)](#) CERD/C/GBR/CO/21-23, para 8 (c).

recommendations of the Equality Commission for Northern Ireland¹⁹

- adopt robust and comprehensive single equality legislation or otherwise strengthen racial equality in Northern Ireland, and harmonise protection across the UK²⁰.

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

¹⁹ ECRI (2016) [ECRI Report On The United Kingdom \(fifth monitoring cycle\)](#) para 22.

²⁰ Advisory Committee on the Framework Convention for the Protection of National Minorities (2016) [Fourth Opinion on the United Kingdom](#), para 33.

2 Forms of discrimination

Harmonise and expand the scope of racial grounds

Increase protection on grounds of colour and nationality

- 2.1 We recommend increased protection from discrimination and harassment on the grounds of colour and nationality across the scope of the race equality legislation, including consideration of the removal or modification of exceptions that apply only on grounds of colour and/ or nationality, unless there are justifiable reasons for doing so, or statutory exception to protection.

Supporting rationale

- 2.2 This change will help to clarify, strengthen, harmonise and simplify the legislation.
- 2.3 Currently there are ‘two tier’ levels of protection against discrimination and harassment within the race equality legislation. In particular, there is less protection against discrimination and harassment on the grounds of colour and nationality than on the other racial grounds protected under the legislation; namely race, ethnic or national origins.
- 2.4 This ‘two tier’ level of protection came about following the introduction in Northern Ireland of legislation to implement the EU Race Directive²¹ in 2003²². 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 go as far as to also amend the provisions in the Race Relations (NI) Order 1997 as regards the grounds of colour and nationality.

²¹ 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

²² Namely, the [Race Relations Order \(Amendment\) Regulations \(NI\) 2003](#)

2.5 The main impacts of this 'two tier' level of protection are summarised below.

- The statutory definition of harassment which applies to the grounds of race, ethnic or national origins, in a wide range of areas (including employment and the provision of goods and services), does not extend to the grounds of colour and nationality. As a result, it is more difficult for individuals to bring complaints if they are subjected to offensive or degrading comments on the grounds of their colour or nationality.
- Whilst the race legislation prohibits public bodies from discriminating on the grounds of race, ethnic or national origins when exercising some of their public functions²³, this prohibition does not extend to the grounds of colour or nationality.
- Although the race legislation prohibits discrimination against office holders, such as chairpersons or board members of non-departmental public bodies, this prohibition does not exist on the grounds of colour and nationality.
- A more restrictive definition of indirect discrimination applies to the grounds of colour and nationality than on the other racial grounds. This means it is more difficult for claimants alleging unlawful discrimination on the grounds of colour and nationality to successfully prove 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. Exceptions that do not apply for the grounds of race, ethnic or national origins, do apply for discrimination based on colour or nationality. Such exemptions which apply only to colour or nationality should be considered for removal or

²³ See recommendation below on public functions - Increased protection for individuals against racial discrimination and harassment by public bodies when carrying out their public functions

modification, unless there is a justifiable reason to retain them. For example, exceptions relating to premises²⁴ and employment for the purposes of a private household apply to the grounds of colour and nationality and not the grounds of race, ethnic or national origins. Exemptions relating to discriminatory acts done under statutory authority regarding colour and nationality should be considered for modification²⁵
²⁶.

- 2.6 These anomalies have led to difficulties and confusion for those seeking to understand their responsibilities and to exercise their rights under the legislation, as well as resulting in reduced protection on the grounds of colour and nationality.
- 2.7 Further, removing the two-tier level of protection is in line with changes already implemented in other parts of the United Kingdom, as well as the recommendations of international human rights monitoring bodies. In particular, changes to address this gap in protection have been implemented in Great Britain under the Equality Act 2010. The Republic of Ireland's legislation²⁷ likewise defines the 'ground of race' as 'race, colour, nationality or ethnic or national origins'.
- 2.8 It is of note that, in the case of *Abbey National PLC v Chagger*, the Employment Appeal Tribunal in Great Britain was of the view that the Race Directive was intended to apply to discrimination on the ground of colour, as such discrimination is in practice necessarily an aspect or manifestation of discrimination based on racial or ethnic origins.
- 2.9 Although this is a welcome clarification as regards protection on the ground of colour, there is still a need to amend the race equality legislation in order to ensure equal levels of protection

²⁴ Dickson, B (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp.66-68.

²⁵ See also our recommendation on Narrowing of employment exception on foreign nationals in public service

²⁶ Dickson, B (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 48-52. We also note that Professor Dickson recommends that paragraphs (c) and (d) of article 40(2) of the RRO should either be deleted or made conditional upon there being statutory support for the ministerial or departmental actions concerned, which would go further than the Equality Act 2010, but may increase symmetry with other Northern Irish equality laws. He also recommends that 'colour' be inserted into article 40(1A).

²⁷ [Equal Status Act](#), 2000 3(2)(h).

against discrimination and harassment across all racial grounds. Following *Abbey National PLC v Chagger*, the legislation in Great Britain was changed to clarify the law in this area.

- 2.10 Further, our recommendation is in line with the recommendation of the UN Committee on the Elimination of Racial Discrimination. In particular, in 2003, it recommended that the UK Government extend the amending Regulations that implemented the Race Directive to cover discrimination on the grounds of colour and nationality. It was concerned that a failure to do so would result in inconsistencies in discrimination laws and differential levels of protection and create difficulties for the general public as well as law enforcement agencies.
- 2.11 Finally, this legislative gap and the need for action to address this, has already been recognised by TEO, and its predecessor, OFMDFM. In particular, in its consultation on single equality legislation in 2004, OFMDFM indicated that it ‘intended to rectify this gap’ in the race equality legislation. Likewise, the Racial Equality Strategy 2015-25, commits the Executive to review the law’s protection against colour and nationality discrimination²⁸.

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

- 2.12 The definitions of ‘race’ and ‘racial ground’ should be expanded and be non-exhaustive.
- 2.13 This should be clear in statute and reflect best international practice, in accordance with human rights standards.

Supporting rationale

- 2.14 Currently, NI equality law defines racial grounds as ‘colour, race, nationality or ethnic or national origins’²⁹. However, the

²⁸ OFMDFM (2015) [Racial Equality Strategy 2015-2025](#), para 5.13

²⁹ Article 5 of the [RRO 1997](#).

legislation in Great Britain defines race as *including* colour; nationality; ethnic or national origins³⁰.

- 2.15 Research³¹ commissioned by the Equality and Human Rights Commission (EHRC) states that '[c]aste is a form of identity that is used as a basis for social differentiation and usually involves inequality. It is generally accepted that caste is acquired by birth and sustained by endogamy, in which marriage is restricted to individuals of the same caste. Caste has considerable fluidity and also a global reach'.
- 2.16 In *Mandla v Dowell Lee*, Lord Fraser set out a wide range of shared characteristics which may suggest a distinct community and ethnic group³². More recently, the case of *Chandhok v Tirkey* suggested that many of the facts relevant in considering caste might be capable of constituting 'ethnic origin' in Great Britain³³. Therefore, claims based on descent or caste might already fall within the protected characteristic of 'ethnic origin'³⁴. However, it would be helpful for this to be confirmed in statute.
- 2.17 The Equality Act 2010³⁵ allows for 'caste' to be a protected characteristic in England, Wales and Scotland. However, following consultation, the UK Government³⁶ announced it believed the best way to provide protection against caste-based discrimination was to rely on emerging case law, such as *Tirkey v Chandhok*, citing reasons including low case numbers and difficulty defining caste.
- 2.18 This decision was controversial³⁷, and it was criticised by the EHRC who stated 'The government has missed a crucial opportunity to improve legal clarity...[t]his is inconsistent with

³⁰ Section 9(1) of the [Equality Act 2010](#).

³¹ Dhanda, M. et al (2014) [Caste in Britain: Socio-legal Review](#), EHRC Research Report 91, p. iii.

³² *Mandla v Dowell Lee* [1983] 2 AC 548, 562, also available at <https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKHL/1982/7.html>. Lord Fraser argued it was essential for ethnic groups to have a long shared history and own cultural tradition. Other relevant characteristics may include common geographical origin or descent from small number of common ancestors; common language; common literature; common religion; and being a minority, oppressed or dominant group.

³³ *Chandhok v Tirkey* [2015] ICR 527, also available at https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKCAT/2014/0190_14_1912.html.

³⁴ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 24.

³⁵ Section 9 (5)(a) of the [Equality Act 2010](#).

³⁶ Government Equalities Office (2018) [Caste in Great Britain and equality law: a public consultation Government consultation response](#), p. 14.

³⁷ Law Commission (2021) [Hate Crime Laws: Final Report](#), paras 4.56-4.66.

the UK's international obligations to provide for separate and distinct protection for caste in our legislation'³⁸.

- 2.19 Further, in its Concluding Observations on the UK in both 2011³⁹ and 2016⁴⁰, CERD recommended that the UK act to ensure that caste-based discrimination is explicitly prohibited.
- 2.20 Likewise, in 2016 the Advisory Committee on the Framework Convention for the Protection of National Minorities called upon the UK to amend its statutes so as to include caste as a ground of discrimination under the definition of race⁴¹.
- 2.21 Confirming that the equality legislation in Northern Ireland protects against discrimination related to caste in statute will simplify the process of dealing with relevant cases by reducing costs and providing certainty⁴².
- 2.22 The legislation should recognise discrimination based on descent, in line with Article 1 of the UN Convention on the Elimination of All Forms of Racial Discrimination⁴³. CERD has indicated that they understand that discrimination based on 'descent' includes 'discrimination against members of communities based on forms of social stratification such as caste'⁴⁴.
- 2.23 Professor Dickson argues⁴⁵ that broadening the definition of racial discrimination will help ensure such discrimination is not disguised as descent or caste discrimination in an attempt to avoid liability.
- 2.24 The definition of racial grounds should be phrased in a non-exhaustive way⁴⁶. Professor Dickson⁴⁷ recommends that other

³⁸ EHRC (2018) [Caste consultation: our response to the government statement](#).

³⁹ CERD (2011) [Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK \(2011\)](#) CERD/C/GBR/CO/18-20, para 30.

⁴⁰ CERD (2016) [Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK \(2016\)](#) CERD/C/GBR/CO/21-23, para 8(a).

⁴¹ Advisory Committee of the Framework Convention (2016) [Fourth Opinion on the United Kingdom](#), para 32.

⁴² Dhanda, M. et al (2014) [Caste in Britain: Socio-legal Review](#), EHRC Research Report 91, p. 26.

⁴³ UN (1965) [International Convention on the Elimination of All Forms of Racial Discrimination](#), Art. 1.

⁴⁴ CERD (2002) [General Recommendation 29](#).

⁴⁵ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 23

⁴⁶ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 23-26.

⁴⁷ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 23.

aspects of race (such as physical features, hairstyle, cultural practices, food choices or language usage) be considered as part of the definition in particular instances even though those aspects are not explicitly mentioned in the legislation. Recent case law suggests language can be treated as an indicator of race⁴⁸, but a statutory change would aid clarity in the law.

Definitions

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

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

Supporting rationale

- 2.26 Current legislation⁴⁹ states that a person discriminates against another if 'on racial grounds' he or she treats that other less favourably than he or she treats or would treat other persons.
- 2.27 However, Professor Dickson argues that 'because of' includes more behaviour than 'on grounds of' and includes factors beyond motivation⁵⁰.
- 2.28 As discrimination law aims to protect people from being the victim of discrimination, it usually disregards the motive behind a person's actions and focuses instead on the effect of the

⁴⁸ An example of 'language' being treated as an indicator of race is the recent decision by a court in England that prohibiting the use of Irish words on a gravestone amounted to racial discrimination. *In the matter of an Application for a Faculty for a memorial in the Churchyard of St Giles, Exhall, Diocese of Coventry* [2021] EACC 1, a decision of the Arches Court of Canterbury, 18 June 2021, also available at <https://lawandreligionuk.com/wp-content/uploads/2021/06/Re-St.-Giles-Exhall-2021-EACC-1-with-reasons.pdf>

⁴⁹ Article 3(1)(a) of [RRO 1997](#).

⁵⁰ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 35-36.

action on the alleged victim of those actions. It therefore makes sense to define direct discrimination as occurring ‘because of’ certain treatment rather than ‘on grounds of’ certain treatment.

2.29 This recommendation would be in line with changes made in Great Britain⁵¹.

Remove the comparator requirement in the definition of victimisation

2.30 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.

Supporting rationale

2.31 This change will make it easier for individuals to show that they have been subjected to victimisation.

2.32 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.

2.33 Professor Dickson argued⁵² that the current requirement for a comparison to be made is unjustifiable, as what matters is only whether the complainant suffered a disadvantage because of their original complaint.

2.34 Our recommendation is in line with changes that have already been implemented in Great Britain under the Equality Act 2010. Under that legislation, there is no longer a need to compare the

⁵¹ Section 13 (1) of the [Equality Act 2010](#).

⁵² Dickson, B (2021) [Race Equality Law Reform: Strengthening Protection](#): Report to the Equality Commission for Northern Ireland, pp. 44-45.

treatment of an alleged victim with that of a person who has not or made or supported a complaint under the Equality Act 2010.

- 2.35 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.

Widen the definition of 'racial harassment'

- 2.36 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.
- 2.37 We also recommend that this definition of harassment applies to all existing racial grounds; namely, race, ethnic or national origins, colour and nationality, as well as any new racial grounds, such as caste and descent.

Supporting rationale

- 2.38 Currently, harassment under the race equality legislation is defined as unwanted conduct 'on the grounds of' race or ethnic or national origins which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment⁵³.
- 2.39 This recommendation would enhance the protection of people who are being harassed, since proving that harassment was 'related to' race can be easier to do than proving that it was 'on grounds of' race⁵⁴.
- 2.40 Our recommendation is in line with the definition of harassment under the EU Race Directive⁵⁵ which refers to an unwanted conduct "related to" racial or ethnic origin.

⁵³ See Article 4A of the [RRO 1997](#).

⁵⁴ Dickson, B (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 38.

⁵⁵ See Article 3 of [Race Directive](#)

- 2.41 Following Brexit, EU law is still relevant in this regard as the UK Government has committed in the Ireland/Northern Ireland Protocol to ensuring that certain equality and human rights in Northern Ireland will continue to be upheld after Brexit, including those underpinned by the Race Equality Directive⁵⁶. There is also a commitment to ensuring that some of Northern Ireland's equality laws will keep pace with any changes the EU may make to amend or replace the EU equality laws, which include the Race Equality Directive, set out in Annex 1 to the Protocol^{57 58}.
- 2.42 It is of note that in the sex discrimination case of *R (Equal Opportunities Commission) v Secretary of State for Trade and Industry*⁵⁹, 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 Directive⁶⁰.
- 2.43 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.
- 2.44 Importantly, the court was of the view that the effect of the wording of the definition of harassment within the amended Equal Treatment Directive meant that an employer could be held liable on appropriate facts for the conduct of third parties, for example, suppliers or customers. In particular, it considered that an employer could be held liable for failing to take action

⁵⁶ [Race Equality Directive \(Race\): Directive 2000/43/EC](#) of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

⁵⁷ Ireland/Northern Ireland Protocol Annex 1 Directives: [Gender Goods and Services Directive \(Gender\)](#): Directive 2004/113/EC of 13 December 2004, [Recast Directive \(Gender\)](#): Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, [Race Equality Directive \(Race\)](#): Directive 2000/43/EC of 29 June 2000, [Framework Directive \(religion and belief; age; sexual orientation; and disability\)](#): Directive 2000/78/EC of 27 November 2000, [Equal Treatment Directive: Self-employment \(Gender\)](#): Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010, [Equal Treatment Directive: Social security \(Gender\)](#): Directive 79/7/EEC of 19 December 1978.

⁵⁸ In addition, UK courts when considering the interpretation of any of the equality directives listed in Annex 1, including the Race Directive, must do so in conformity with any relevant case law of the Court of Justice of the EU (CJEU). UK Government, [Explainer Document](#): UK Government commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland, 7 August 2020

⁵⁹ [\[2007\] ICR 1234](#)

⁶⁰ [EU Directive \(2002/73/EC\)](#) which amended the original Equal Treatment Directive (76/2007/EEC

where there is a continuing course of offensive conduct, which the employer knows of but does nothing to safeguard against.

- 2.45 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.
- 2.46 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.
- 2.47 Finally, we continue to recommend⁶¹ that this revised definition applies to all racial grounds, so that it applies not just to race, ethnic or national origins, but also on the grounds of colour and nationality, as the statutory definition of harassment does not apply to these grounds. The revised definition should also apply to any new racial grounds, such as caste and descent.

Public functions

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

- 2.48 We recommend that public bodies be prohibited from racial discrimination or harassment as regards all public functions, except in some narrowly defined limited areas where they can be objectively justified⁶².
- 2.49 This prohibition should apply to all racial grounds. Currently protection only exists on the grounds of race, ethnic or national origins and not on the grounds of colour or nationality.

⁶¹ ECNI (2014) [Strengthening protection against racial discrimination: Recommendations for law reform](#)

⁶² The exceptions in Section 21C of the [Disability Discrimination Act 1995](#) may be useful to consider. These include some limited exceptions relating to judicial acts and the making, confirming or approving of legislation.

Supporting rationale

- 2.50 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.
- 2.51 When being updated in 2003, the legislation was limited to these four areas to reflect the scope of the Race Directive⁶³ 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.
- 2.52 ‘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 complaints⁶⁴.
- 2.53 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.
- 2.54 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.
- 2.55 In those circumstances, the provisions under the race equality legislation relating to the provision of goods, facilities and services⁶⁵ will apply. Such activities will therefore not be

⁶³ [Race Directive](#) Council Directive 2000/43/EC of 29 June 2000.

⁶⁴ See for examples EHRC (2011) [EHRC Code of Practice on Services, Public functions and associations](#).para 11.16.

⁶⁵ Article 21 of the [RRO 1997](#).

covered by the provisions relating to the exercise of public functions.

- 2.56 In general, the public functions provisions apply in relation to a function of a public nature exercised by a public authority or on behalf of a public authority, and where the function is not covered by the other provisions in the race equality legislation, for example, the provisions relating to accessing goods and services, premises, work or education.
- 2.57 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.
- 2.58 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 legislation⁶⁶. 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 services⁶⁷.
- 2.59 We are of the view that there is currently the potential for some public functions, such as certain policing and law enforcement functions, including search and arrest functions, to fall outside the existing scope of the racial equality legislation in Northern Ireland. These activities would not be covered by the current provisions relating to goods and services in the race equality legislation.
- 2.60 We consider that the extension of the race legislation to all public functions, unless specifically falling within an exception, will ensure clarity both for those with rights under the legislation and those public bodies with responsibilities under the law.

⁶⁶ See the race discrimination case of *Farah v Commissioner of Police of the Metropolis*, the Court of Appeal in England, [1997] 2 WLR 824.

⁶⁷ 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.

- 2.61 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”⁶⁸.
- 2.62 This change will help to clarify, strengthen, harmonise and simplify the legislation. Our recommendation is also largely in line with changes implemented in Great Britain; changes already taken place under the disability equality legislation in Northern Ireland; and with the recommendations of international human rights monitoring bodies.
- 2.63 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.
- 2.64 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 Lawrence⁶⁹. These changes to the law meant that, for the first time, the police and many other public bodies could not discriminate on racial grounds when carrying out their public functions.
- 2.65 In addition, the race and other equality legislation was harmonised and strengthened in this area following the enactment of the Equality Act 2010 in Great Britain. In particular, public bodies were prohibited from discriminating when carrying out public functions across all racial grounds and as regards all functions, except in some limited areas.
- 2.66 However, Professor Dickson has raised concerns that some of the exemptions in the Equality Act 2010 may be unjustifiably broad⁷⁰. He has pointed to exemptions relating to commencing or continuing criminal prosecutions, insurance and other

⁶⁸ OFMDFM (2004) [A Single Equality Bill for Northern Ireland: Discussion Paper](#).

⁶⁹ Changes were introduced via the Race Relations (Amendment) Act 2000 following the [Macpherson report](#) into the murder of Stephen Lawrence.

⁷⁰ Dickson, B (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 41.

financial services provided by an employer and provision of a content service on television, radio or online broadcasting.

- 2.67 Any such exemptions in Northern Ireland should be carefully considered to ensure they are narrowly defined and objectively justified.
- 2.68 The limitation to four areas does not exist under the disability legislation in Northern Ireland. In particular, public authorities are prohibited from discriminating on the grounds of disability when carrying out public functions across all their functions, except in some clearly defined limited areas⁷¹.
- 2.69 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’⁷².
- 2.70 Finally, we continue⁷³ to recommend that protection against discrimination or harassment by public bodies when exercising their public functions should apply to all racial grounds; currently protection only exists on the grounds of race, ethnic or national origins and not on the grounds of colour or nationality.

Combined discrimination

Introduce protections against combined discrimination

- 2.99 We recommend the introduction of protection against combined discrimination so that there is legal protection for individuals who experience direct or indirect discrimination, victimisation or

⁷¹ 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.

⁷² [Second Opinion on the UK, the Advisory Committee on the Framework Convention for the Protection of National Minorities](#), June 2007

⁷³ ECNI (2014) [Strengthening protection against racial discrimination: Recommendations for law reform](#), paras 3.2-3.14.

harassment because of a combination of equality grounds, including racial grounds.

Supporting rationale

- 2.100 This change will remove unjustifiable legal barriers that individuals face when trying to prove discrimination on more than one equality ground.
- 2.101 Individuals experiencing intersectional and/ or multiple discrimination face a number of difficulties in seeking legal redress; this is primarily due to the fact that current legal processes solely focus on one prohibited factor at a time and are unable to adequately address in tandem discrimination complaints on more than one ground.
- 2.102 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.
- 2.103 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.
- 2.104 Although case law⁷⁴ in Great Britain suggests judicial interpretation might allow for multiple discrimination cases to be heard, the introduction of express and specific legislative provisions prohibiting intersectional and multiple discrimination would provide clarity and certainty for individuals that this legislative gap had been addressed.
- 2.105 The Fundamental Rights Agency's Handbook on European Non-Discrimination Law⁷⁵ suggests that 'multiple discrimination' should be used to describe discrimination that takes place on the basis of several grounds operating separately, while

⁷⁴ See for example, tribunal decision in *Miriam O'Reilly v BBC*, January 2011, Employment Tribunal Case no.2200423/10; *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] IRLR 870, available at <https://www.bailii.org/uk/cases/UKSC/2012/37.html>.

⁷⁵ FRA (2019) [Handbook on European non-discrimination law](#), p 59.

‘intersectional discrimination’ describes a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable and produce specific types of discrimination.

- 2.106 However, finding agreed definitions has proven difficult⁷⁶ and therefore the phrase ‘combined discrimination’ may be helpful⁷⁷. This reflects the Canadian approach, which prohibits discrimination on one or more grounds, and the effect of a combination of grounds⁷⁸. Professor Dickson argues⁷⁹ that this wording ‘leaves open the possibility that in particular circumstances the combination may amount to more than the sum of its distinct parts, without requiring that additional element to be proved in every case’.
- 2.107 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.
- 2.108 For example, a NICEM research report on the experiences of ethnic minority women in Northern Ireland⁸⁰ 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.
- 2.109 Further, an EU report (2017) on immigrants and ethnic minorities’ experiences found that 16% of respondents had

⁷⁶ Dickson (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland pp. 28-29.

⁷⁷ Dickson (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 28-29.

⁷⁸ Section 3(1) of the [Canadian Human Rights Act 1985](#) states ‘For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds’

⁷⁹ Dickson (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland,, p. 29.

⁸⁰ NICEM (2013) [Experiences of Ethnic Minority women in Northern Ireland.](#),

faced discrimination on more than one ground in the last five years⁸¹.

- 2.110 In addition, statistics collected by the Equality Commission also highlight that in many instances, individuals believe that they are discriminated against on more than one equality ground. For example, over a twelve-month period (1 April 2021 - 31 March 2022), we received 63 hybrid race discrimination enquiries /applications. These represented complaints where individuals were alleging discrimination due to a combination of equality grounds including race⁸².
- 2.111 These concerns have been recognised by the NI Executive; the 2015-2025 Racial Equality Strategy⁸³ recognises that some individuals, particularly minority ethnic women, are vulnerable to discrimination on the basis of more than one characteristic. The Strategy commits to exploring 'how we might provide protection against forms of multiple discrimination'.
- 2.112 Our recommendation is also in line with the recommendations of international human rights monitoring bodies, and the approach embraced by other jurisdictions.
- 2.113 In particular, the need for multiple discrimination provisions to be included in equality legislation has been highlighted by international human rights monitoring bodies. In its latest Concluding Observations, in 2016 and 2020 respectively, on the UK's and Ireland's compliance with the UN Convention on the Elimination of All Forms of Racial Discrimination, CERD⁸⁴ recommended that both states should explicitly provide for the prohibition of multiple discrimination.
- 2.114 Furthermore, the Concluding Observations of the Committee on the Elimination of Discrimination Against Women, in 2019, called upon the UK government to bring into force section 14 of the Equality Act 2010⁸⁵.

⁸¹ FRA (2017) [Second European Union Minorities and Discrimination Survey: Main results](#), p. 23.

⁸² This represented 28% of the overall number of enquiries/applications on race (namely 406 enquiries).

⁸³ OFMDFM (2015) [Racial Equality Strategy 2015 – 2025](#), paras 3.22-3.25

⁸⁴ [CERD/C/GBR/CO/21-23](#) (3 October 2016), para 8(b) for the UK; [CERD/C/IRL/CO/5-9](#) (23 January 2020), para 12(b) for Ireland.

⁸⁵ CEDAW/C/GBR/CO/8 (14 March 2019), para 16(d). The most recent report of the Advisory Committee of the Framework Convention for the Protection of National Minorities, in 2016, did not repeat the recommendation made in 2011.

- 2.115 The extension of protection against multiple discrimination on more than two grounds has already been embraced by other jurisdictions, including nine EU Member States⁸⁶, Canada⁸⁷ and South Africa⁸⁸.
- 2.116 The Equality Act 2010 originally contained a dual discrimination provision, designed to enable people to bring claims where they have experienced less favourable treatment because of a combination of two protected characteristics. The provisions for dual discrimination in the Equality Act 2010 were limited to claims of direct discrimination only and to a combination of only two relevant protected characteristics. The provisions did not extend to indirect discrimination or harassment, and the Commission raised concerns over the approach taken in the Equality Act 2010^{89 90}.
- 2.117 Despite being broadly welcomed, these provisions on dual discrimination did not come in force and in April 2011⁹¹ 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.
- 2.118 To ensure consistency and harmonisation, legislation should protect against combined direct and indirect discrimination, as well as harassment and victimisation⁹².
- 2.119 Finally, as this legislative gap exists across all equality strands, we recommend provisions to prohibit combined discrimination are introduced across all equality grounds, including race.

⁸⁶ Fundamental Rights Agency (2017) [Fundamental Rights Report](#), p. 69; Austria, Bulgaria, Croatia, Germany, Greece, Italy, Romania, Slovenia and Sweden.

⁸⁷Section 3(1) of the [Canadian Human Rights Act 1985](#).

⁸⁸ Section 9 (3) of the [Constitution of the Republic of South Africa, 1996, Chapter 2: Bill of Rights](#).

⁸⁹ ECNI (2007) [Response to the DLR Consultation on a single equality Bill](#).

⁹⁰ ECNI (2009) [Response to the Government Equalities Office consultation on multiple discrimination](#), p. 3.

⁹¹ Government Equalities Office (2013) [Equality Act Guidance](#).

⁹² Dickson (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland.

Protections in employment and analogous situations

Ensure greater protection for employees against third party racial harassment

- 2.120 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.
- 2.121 We recommend that employers are liable in circumstances that they ought to have been reasonably aware of the risk of third party harassment, as this should encourage employers to take steps to reduce harassment from the start of a person's employment. If this is not introduced, employers should be liable when their employee has been subjected to third party harassment on one previous occasion.
- 2.122 Employers should also be liable if, after such harassment has occurred, the employee is treated differently because they rejected or accepted the harassment.

Supporting rationale

- 2.123 Our recommendation reflects the need for stronger duties on employers to take action in light of the clear evidence that black and minority ethnic employees are being subjected to racial harassment by customers/clients.
- 2.124 For example, BAYANIHAN! The Filipino Community in Northern Ireland, a report produced by the Northern Ireland Council for Ethnic Minorities (NICEM) in 2012⁹³, reports that 44.4% of Filipino healthcare workers surveyed had been racially harassed by customers/service users. The research also found that holding certain immigration statuses made it particularly difficult to challenge harassment.
- 2.125 In particular, the report argues that “they cannot move to another firm, nor are they likely to be in a position to take a

⁹³ NICEM (2012) [Bayanihan! The Filipino community in NI](#).

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.

- 2.126 More recently, a UK-wide TUC survey⁹⁴ found that 65% of all ethnic minority survey participants had experienced racial harassment at work in the last five years. Of those who have experienced such harassment, 6% of Black, Asian and Mixed heritage and 23.5% of non-British White workers identified customers, clients and service users as being the main perpetrator(s). It reported participants were faced with a ‘Customer is always right’ attitude when reporting third-party racism to employers.
- 2.127 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.
- 2.128 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”.
- 2.129 In order to encourage the employer to take steps to reduce the risk of the third-party harassment from the start of a person’s employment, this requirement should be replaced across the equality characteristics with a provision that an employer will be liable when they ought to have been reasonably aware of the risk of third party harassment, and, if not, be reduced to one previous incident⁹⁵.
- 2.130 The UK Government has repealed this provision in Great Britain. It states that very few cases of third party harassment have been taken to an employment tribunal since the protection was introduced in April 2008 under the sex equality legislation.

⁹⁴ Ashe, S. et al (2019) [Racism Ruins Lives: An analysis of the 2016-2017 Trade Union Congress Racism at Work Survey](#), pp. 27-30.

⁹⁵ Dickson (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 71-75.

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.

- 2.131 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.
- 2.132 Without a change in the law employees are at risk of having no redress against racial harassment by third parties. The decision of the Employment Appeal Tribunal in *Bessong v Pennine Care NHS Trust*⁹⁶ illustrates the problem. A black mental health nurse was assaulted and racially abused by a patient. The Hospital Trust recorded the assault but not the racist abuse, which the claimant alleged was typical of the Trust's approach. However, his claims against the Trust for harassment and direct discrimination were unsuccessful. He won only on the grounds of indirect discrimination: the employment tribunal found that the failure to create a culture in which all racist incidents were formally reported contributed to an environment in which racial abuse from patients was more likely to occur. An appeal to the Employment Appeal Tribunal on the harassment claim failed.
- 2.133 It should also be noted that the equality legislation in the Republic of Ireland⁹⁷ imposes liability on employers for failing to prevent harassment of their employees if reasonable steps to prevent it have not been taken, whether or not there have been any other instances of harassment.
- 2.134 Finally, it will be noted that the UN Committee on CERD expressed concern⁹⁸ about the UK Government's Red Tape

⁹⁶ UKEAT/0247/18/JOJ (18 October 2019, Choudhury J), [2020] ICR 849.

⁹⁷ Section 14A of the [Employment Equality Act](#), 1998.

⁹⁸ CERD (2011) [Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK \(2011\)](#) CERD/C/GBR/CO/18-20.

challenge⁹⁹. 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 protection¹⁰⁰.

- 2.135 Any post-harassment discriminatory treatment of employee by employers should also be explicitly prohibited, as is the case in the Republic of Ireland¹⁰¹.

Increase protection for agency and contract workers

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

Supporting rationale

- 2.138 The need for reform in this area has been highlighted by the Northern Ireland case of *Bohill v Police Service of Northern Ireland (PSNI)*¹⁰² and the case in Great Britain of *Muschett v-HM Prison Service (HMPS)*¹⁰³. 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.

⁹⁹ Home Office (2012) [Equalities red tape challenge and reform of the Equality and Human Rights Commission: outcome](#). The Red Tape Challenge included scrutiny of measures envisaged under the Equality Act 2010 designed to prune those legislative provisions deemed as “unnecessary or disproportionate burdens on business

¹⁰⁰ CERD (2011) [Concluding Observations of the Committee on the Elimination of Racial Discrimination on UK \(2011\)](#) CERD/C/GBR/CO/18-20.

¹⁰¹ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 74-75.

¹⁰² [2011] NICA 2, <http://www.bailii.org/nie/cases/NICA/2011/2.html>

¹⁰³ [2010] EWCA Civ 25, <http://www.bailii.org/ew/cases/EWCA/Civ/2010/25.html>

- 2.139 In particular, *Bohill* case, the NI Court of Appeal raised concerns that potential employees who seek work through an agency, due to type of arrangements that they have as an agency, can be deprived of important protections under the equality legislation. Importantly, the NI Court of Appeal also highlighted this was an area of law likely to benefit from law reform.
- 2.140 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.
- 2.141 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.
- 2.142 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'.
- 2.143 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 LJ¹⁰⁴ that a gap might exist in the remedies available to workers in the appellant's position would appear to be confirmed".
- 2.144 Importantly, the Court of Appeal concluded that the case "does seem to illustrate how an agency arrangement may deprive

¹⁰⁴ In the case of *Muschett v HM Prison Service*, [2010] EWCA Civ 25

potential employees of important protections against discrimination.”

- 2.145 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.”
- 2.146 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.”
- 2.147 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.
- 2.148 Of further note is the Court of Appeal in Great Britain’s decision in the case of *Muschett v HM Prison Service (HMPS)* in 2010¹⁰⁵. 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.
- 2.149 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.
- 2.150 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.
- 2.151 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

¹⁰⁵ [2010] EWCA Civ 25, <http://www.bailii.org/ew/cases/EWCA/Civ/2010/25.html>

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.

- 2.152 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.
- 2.153 Whilst the Agency Workers Regulations (NI) 2011¹⁰⁶ have resulted in additional equal treatment protection for agency workers, we are of the view that they do not address the gaps in legislative protection as highlighted in the *Bohill* and *Muschett* cases. Those Regulations protect only persons who have an employment contract with the work agency or another form of contract under which they undertake to perform work and services personally for the agency¹⁰⁷.
- 2.154 It is important to stress that agency workers who are contract workers and are employed by agencies have protection against racial discrimination and harassment under existing equality legislation¹⁰⁸. 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.
- 2.155 However, unlike the legislation in Great Britain¹⁰⁹, contract workers in Northern Ireland are not explicitly protected against victimisation, which may reduce the likelihood of victims raising concerns¹¹⁰. We therefore recommend that racial equality legislation specifies that both contract and agency workers are protected against victimisation.
- 2.156 We also recommend steps are taken to address similar gaps in protection relating to other equality grounds.

¹⁰⁶ [Agency Workers Regulations \(NI\) 2011](#) came into force in Northern Ireland on 5 December 2011.

¹⁰⁷ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 100.

¹⁰⁸ Article 9 of the [RRO 1997](#).

¹⁰⁹ Section 41 of the [Equality Act 2010](#).

¹¹⁰ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 99

Clarify protections against victimisation for office-holders

- 2.157 The current law should be amended to clarify protections against victimisation for office-holders, by making explicit provision in the legislation that all office-holders have the right not to be victimised.
- 2.158 Office holders include offices and posts such as directors, non-executive directors, company secretaries, positions on the board of non-departmental public bodies, some judicial positions and positions held by some ministers of religion¹¹¹.

Supporting rationale

- 2.159 The current law in Northern Ireland concerning discrimination against office-holders is complex and needs to be clarified to ensure protection for all office-holders¹¹². It does not include an explicit right for office-holders not to be victimised, unlike the Equality Act¹¹³.
- 2.160 Office-holders in Northern Ireland who believe they have been victimised may be protected by the general prohibition¹¹⁴ against victimisation. However, clarification would be beneficial¹¹⁵.
- 2.161 The Equality Act 2010 refers to victimisation at several points, despite also having a general provision outlawing victimisation¹¹⁶, and this recommendation would make Northern Irish law consistent with the law in Great Britain in relation to victimisation of office-holders. Likewise, it would make equality

¹¹¹ EHRC (2011) [Employment Statutory Code of Practice](#), para 11.32.

¹¹² Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 76. Article 72 of the 1997 Order protects persons appointed by a Minister of the Crown or a government department, but only if those persons are not already protected as employees or applicants for employment (under article 6) or as other office-holders (under article 72ZA, which was inserted into the 1997 Order in 2003 as a result of the Race Equality Directive 2000). Yet article 72ZA says, in sub-section 8, that it applies, for example, to 'any office or post to which appointments are made by... a Minister of the Crown... or a government department'. It is therefore unclear what role article 72 of the Order continues to play.

¹¹³ Sections 49(8), 50(9) and 50(10) of the [Equality Act 2010](#).

¹¹⁴ Article 4 of the [RRO 1997](#).

¹¹⁵ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 76-78.

¹¹⁶ Section 27 of the [Equality Act 2010](#).

legislation in Northern Ireland more in line with the law in the Republic of Ireland¹¹⁷.

- 2.162 In addition, the RRO 1997 currently affords some greater protections than the Equality Act 2010 to office-holders relating to termination of appointment and harassment; Professor Dickson recommends that these stronger protections should be retained in NI¹¹⁸.

Expand protection for law enforcement officers

- 2.163 Racial equality legislation should ensure that all law enforcement officers, not just those in the Police Service of Northern Ireland (PSNI), are treated as employees for the purposes of the legislation.
- 2.164 The law should make it clear that police officers from other forces who are in Northern Ireland to give assistance to the PSNI¹¹⁹, as well as those in other law enforcement services, such as the Belfast Harbour Police,¹²⁰ the Belfast International Airport Constabulary¹²¹ and the National Crime Agency,¹²² are all protected by the race equality laws while serving in Northern Ireland.
- 2.165 Police cadets should be covered too, similar to the status of police trainees.

¹¹⁷ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 77.

¹¹⁸ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 76-78.

¹¹⁹ Such officers are normally considered to be equivalent to PSNI officers in terms of their powers and also with regard to their obligation to abide by the PSNI's Code of Ethics.

¹²⁰ In existence since 1847 under the Harbours, Docks, and Piers Clauses Act of that year.

¹²¹ Article 19 of the [Airports \(NI\) Order 1994](#).

¹²² Under the National Crime Agency (Limitation of Extension to Northern Ireland) Order 2013 (for excepted and reserved matters) and the Crime and Courts Act 2013 (National Crime Agency and Proceeds of Crime) (NI) Order 2015 (for other matters).

Supporting rationale

- 2.166 Currently, some law enforcement officers are protected against racial discrimination in Northern Ireland, while others may not be¹²³.
- 2.167 Police trainees and police reserve trainees in Northern Ireland are currently protected against discrimination by the Police (NI) Act 2000¹²⁴.
- 2.168 However, if police cadets were to be appointed in Northern Ireland (none have been to date), they would not currently be protected against discrimination because there is no provision for them comparable to provision for police trainees.
- 2.169 Professor Dickson has argued¹²⁵ that it 'is anomalous and unfair that some law enforcement officers are currently protected against racial discrimination in Northern Ireland while others may not be'.

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

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

Supporting rationale

- 2.171 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

¹²³ Article 72B of [RRO 1997](#) may already provide for that, but it is not clear.

¹²⁴ Section 41(2) of the [Police \(NI\) Act 2000](#) provides that '[a]ny statutory provision... which for any purpose treats a police officer as being in the employment of the Chief Constable or the Policing Board shall apply in relation to a police trainee and a police reserve trainee as it applies in relation to a police officer'.

¹²⁵ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 81.

Councillor on racial grounds, when carrying out his/her official duties.

- 2.172 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.
- 2.173 Professor Dickson argues¹²⁶ ‘there can be no justification for continuing to exclude such protection’.
- 2.174 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.
- 2.175 Further, as this legislative gap exists under other equality grounds, we recommend increased protection for Councillors against discrimination and harassment across all equality grounds including race.

Enhance protection regarding providers of employment services

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

¹²⁶ Dickson, B (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp 79-80.

Supporting rationale

- 2.177 Current legislation¹²⁷ in Northern Ireland provides protection against discrimination by providers of vocational training and employment agencies. However, in Great Britain there is a wider definition of providers of employment services¹²⁸, including providers of vocational guidance, and providers of assessments required for particular professions or trades.
- 2.178 Dickson argues¹²⁹ that ‘the services provided by all of these various persons are so similar that it makes no sense to apply the race equality law to only some of them’.
- 2.179 Under the Equality Act 2010 in Great Britain¹³⁰ three further types of discrimination are prohibited:
- discrimination in the arrangements made for selecting persons to whom to provide, or to whom to offer to provide, an employment service,
 - discrimination as to the terms on which such a service is provided and;
 - discrimination in subjecting a person for whom such a service is provided ‘to any other detriment’.
- 2.180 Northern Irish law only contains the ‘any other detriment’ provision in relation to vocational training¹³¹, but not employment agencies¹³². There is therefore a gap in protection compared to Great Britain, which should be filled.

Provide legal protection for volunteers

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

¹²⁷ Article 15 of the [RRO 1997](#).

¹²⁸ Section 56 (2) of the [Equality Act 2010](#).

¹²⁹ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 96.

¹³⁰ Sections 54(1)(a), 54(2)(a) and 55(2)(d) of the Equality Act 2010.

¹³¹ Article 15 of the [RRO 1997](#).

¹³² Article 16 of the [RRO 1997..](#)

Stakeholder engagement should inform how occasional, very short-term volunteers can best be protected.

- 2.182 The inclusion of protections for volunteers will need to be accompanied by appropriate resourcing and guidance to ensure organisations, of all sizes, that use volunteers have support to adhere to their obligations.

Supporting rationale

- 2.183 Currently, those who do unpaid voluntary work for an organisation are not usually covered by anti-discrimination law anywhere in the United Kingdom or Ireland¹³³.
- 2.184 The Commission has previously set out its view that it ‘wishes to see a situation in which citizens can take part in substantial, established voluntary work with the legitimate expectation that they will be protected from discrimination’¹³⁴.
- 2.185 Further, we have worked with Volunteer Now, producing a guide on Promoting Equality and Diversity in the Workplace¹³⁵. The document recognises a moral responsibility for organisations to protect volunteers from discrimination, even without current legal protections. This moral obligation should be enforced by statute.
- 2.186 However, concerns have been raised that such protections could expose small, volunteer-led organisations to a disproportionate level of liability¹³⁶. The UK Government¹³⁷, in relation to sexual harassment, was cautious about protecting volunteers, due to worries that such organisations could face difficulties that outweigh the service they provide. This is particularly the case regarding one-off events or occasional volunteers.

¹³³ Unless they have responded to an offer from the organisation which is providing volunteering ‘services’ to members of the public.

¹³⁴ ECNI (2004) [Response to OFMDFM Consultation Paper ‘A Single Equality Bill for Northern Ireland](#), para 4.6.2.

¹³⁵ ECNI and Volunteer Now (2019) [Promoting Equality and Diversity in Volunteering: A Guide for Volunteer Involving Organisations](#), p. 7.

¹³⁶ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland pp. 103.

¹³⁷ UK Government (2021) [Consultation on sexual harassment in the workplace: government response](#), para 4.3.

- 2.187 However, Professor Dickson argues that this reasoning is hard to substantiate, highlighting that many volunteers perform tasks similar or identical to those performed by employees with whom they work alongside and it is unfair that the latter are protected against discrimination but the former are not¹³⁸.
- 2.188 This recommendation would provide greater protections than the Equality Act in Great Britain or Ireland, where people who do unpaid voluntary work for an organisation are not usually covered by anti-discrimination law¹³⁹.

Protections in schools and training

Increase protection against victimisation for pupils in schools

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

Supporting rationale

- 2.191 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

¹³⁸ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland p. 103.

¹³⁹ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland p. 103.

complaint against the school, and clarify the protection available if a child makes the complaint themselves.

- 2.192 The current law does not explicitly prohibit the victimisation of school children following the making of an allegation of discrimination, whether by the child themselves or by the child's parent or sibling¹⁴⁰.
- 2.193 Confirming pupils in schools have protection from being victimised if they make a discrimination or harassment complaint, for example, a complaint that they have been racially harassed by a teacher, would clarify the law¹⁴¹.
- 2.194 This change will also mean, for example, that if a parent complains to the school that their child is suffering racial discrimination or harassment at school, the child is protected from being victimised by the school because of the parent's complaint.
- 2.195 Our recommendation is also in line with changes that have already been implemented in Great Britain, where such conduct has been prohibited across all equality grounds. Under the Equality Act 2010, there are express protections both for victimisation of school children after they themselves have raised an allegation of discrimination¹⁴² and for children who are victimised as a result of a protected act (such as making or supporting a complaint of discrimination) carried out by their parent or sibling¹⁴³. This latter protection was introduced in order to prevent parents being discouraged from raising an issue of discrimination within a school, for example, because of a worry that their child may suffer less favourable treatment as a result.
- 2.196 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.

¹⁴⁰ The only references to victimisation throughout the whole [RRO 1997](#) are in articles 2(4) and 4. These may be enough to allow a child to claim victimisation, but clarity would be preferable.

¹⁴¹ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 92-93.

¹⁴² Section 85(4)(5) of the [Equality Act 2010](#).

¹⁴³ Section 86(2) of the [Equality Act 2010](#).

Ensure greater protection in relation to admission to educational establishments

- 2.197 Race equality legislation should clearly prohibit racial discrimination in the arrangements made for deciding who is to be offered admission to educational establishments, such as admissions criteria.
- 2.198 The current protections in Northern Ireland against discrimination by a school, college or university are in the terms on which they offer to admit that person to the establishment or by refusing to accept an application for admission from that person should be expanded to also offer protection against discrimination in the arrangements for admissions.
- 2.199 This could help ensure admissions criteria are not racially discriminatory.

Supporting rationale

- 2.200 Currently, a school, college or university in Northern Ireland could potentially avoid liability for racial discrimination by making its admissions criteria discriminatory rather than by making its offer or rejection decisions discriminatory¹⁴⁴.
- 2.201 It is unlawful¹⁴⁵ for those who are running a school, college or university to racially discriminate against a person in the terms on which they offer to admit that person or by refusing to accept an application for admission from that person.
- 2.202 However, the Equality Act 2010¹⁴⁶ also provides protection in Great Britain against discrimination in the arrangements made for deciding who is to be offered admission. The law in Northern Ireland should also ensure protection in this situation¹⁴⁷.

¹⁴⁴ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p.94.

¹⁴⁵ Article 18 (1) of the [RRO 1997](#).

¹⁴⁶ Sections 85(1) and 91(1) of the [Equality Act 2010](#).

¹⁴⁷ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 94-95.

Clarify protection in provision of education

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

Supporting rationale

- 2.204 Racial discrimination in the way an educational establishment provides or does not provide education is not currently mentioned in the Northern Irish legislation, whereas it is explicitly stated in Great Britain's law¹⁴⁸. It may already be covered by the protection against suffering 'any other detriment'¹⁴⁹, but specific provision would remove doubt.
- 2.205 Dickson argues¹⁵⁰ this would 'make it abundantly clear to educational establishments, especially schools, that they cannot use race as a reason for distinguishing between students either in the way that they are taught or in the way that they are excluded from being taught'.
- 2.206 This recommendation would clarify the law in Northern Ireland. It would also make race equality law in this area consistent with the law in Great Britain.

Extend protection from qualification bodies

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

¹⁴⁸ Sections 85 (2) and 91 (2) of the [Equality Act 2010](#).

¹⁴⁹ Article 18(1)(c) of the [RRO 1997](#).

¹⁵⁰ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 90.

Supporting rationale

- 2.208 Qualification bodies are bodies which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade.
- 2.209 Currently, the law in Northern Ireland¹⁵¹ makes three types of discrimination by such bodies unlawful:
- the terms on which they are prepared to confer the qualification,
 - when they refuse to grant an application for the qualification; and
 - when they withdraw the qualification or vary the terms on which it is held.
- 2.210 However, the law in Great Britain¹⁵² protects against two further types of unlawful discrimination:
- in the arrangements made for deciding upon whom to confer a relevant qualification; and
 - by subjecting to any other detriment a person who has been conferred with the qualification.
- 2.211 Professor Dickson argues¹⁵³ that ‘to avoid a qualification body from slipping through the net it is appropriate to make those two further types of discrimination unlawful in Northern Ireland too’.

Positive Action

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

- 2.212 We recommend that the race equality legislation is amended to expand the scope of voluntary positive action that employer, service providers and public bodies can lawfully take in order to

¹⁵¹ Article 14(1) of the [RRO 1997](#).

¹⁵² Sections 53 (d) and (e) of the [Equality Act 2010](#).

¹⁵³ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 94.

promote racial equality, and remove unnecessary barriers relating to collecting statistical information before taking such action.

- 2.213 Positive action should be permitted where an employer, service provider or public body reasonably thinks that a racial group suffer a related disadvantage, or have different needs, or have a disproportionately low rate of participation in an activity. Any action should be a proportionate means of achieving the aim of enabling other persons who share the racial characteristic to minimise the disadvantage, meet their needs or participate in the activity¹⁵⁴.

Supporting rationale

- 2.214 Currently, employers, service providers, and public bodies carrying out public functions in Northern Ireland are allowed, but not required, to take a limited range of special measures, known as ‘positive action’ measures, aimed at alleviating disadvantage experienced minority ethnic groups or individuals.
- 2.215 For employers, this limited action primarily relates to encouraging job applications and providing specific training where individuals from minority ethnic groups are under-represented in the workforce. Service providers are also permitted to take action to meet the special needs of particular racial groups in the areas of education, training or welfare or any ancillary benefits.
- 2.216 This change will mean that employers, service providers and others can take a wider range of voluntary positive action to promote racial equality than currently permitted. It will result in the removal of unnecessary barriers to their taking positive action, and extend what is permissible positive action to the extent allowed by EU law.
- 2.217 Even after Brexit, EU law is still important in this regard because under the Ireland/Northern Ireland Protocol the UK Government has committed to ensuring that certain equality and human rights in Northern Ireland will continue to be upheld after Brexit, including those underpinned by the Race Equality

¹⁵⁴ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 55.

Directive. There is also a commitment to ensuring that some of Northern Ireland's equality laws will keep pace with any changes the EU may make to amend or replace the EU equality laws, set out in Annex 1 to the Protocol¹⁵⁵ which include the Race Equality Directive¹⁵⁶. However, the current provisions allowing positive action under the race equality legislation in Northern Ireland are more limited than those permitted under EU law^{157 158}.

- 2.218 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.
- 2.219 Section 33 of the Republic of Ireland's Employment Equality Act 1998, as amended by the Equality Act 2004, allows measures taken which promote integration in the working environment. We note that Professor Dickson¹⁵⁹ has recommended that promoting integration in the workplace be included as a permitted ground for positive action in an employment context. He suggests that, although there has not been any case law, that measures could be taken, provided they were proportionate, to allow employees from a minority ethnic group the right to take leave on days which are important to them because of their ethnic background.
- 2.220 Our recommendation is also similar to changes already implemented in Great Britain. There is currently a greater scope

¹⁵⁵ Ireland/Northern Ireland Protocol Annex 1 Directives: [Gender Goods and Services Directive \(Gender\)](#): Directive 2004/113/EC of 13 December 2004, [Recast Directive \(Gender\)](#): Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, [Race Equality Directive \(Race\)](#): Directive 2000/43/EC of 29 June 2000, [Framework Directive \(religion and belief; age; sexual orientation; and disability\)](#): Directive 2000/78/EC of 27 November 2000, [Equal Treatment Directive: Self-employment \(Gender\)](#): Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010, [Equal Treatment Directive: Social security \(Gender\)](#): Directive 79/7/EEC of 19 December 1978.

¹⁵⁶ ECNI (2014) [Strengthening Protection Against Racial Discrimination](#), paras 3.125.

¹⁵⁷ It will be noted that under Article 2 of the Ireland/Northern Ireland Protocol, the UK Government has committed not to reduce the rights underpinned by the Race Directive and which were in force in Northern Ireland as at the end of the Brexit transition period (31 December 2020), and to ensure NI race equality law keeps pace with any EU changes to the Race Directive made after that date.

¹⁵⁸ Positive action is a central element of EU anti-discrimination law and policy, with EU Equality Directives providing broad permissive provisions to enhance equality of opportunity (see Equinet, [Positive Action Measures: The Experience of Equality Bodies](#), 2014). Article 5 of the EU Race Directive states, "With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin."

¹⁵⁹ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 53-57.

for employers and service providers in Great Britain to take positive action to promote racial equality than those in Northern Ireland. Professor Dickson has recommended that the change is largely modelled on Section 158 of the Equality Act 2010¹⁶⁰.

- 2.221 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.
- 2.222 International human rights standards allow for positive action that is necessary, proportionate and time limited. These standards were reflected in the Equality Act 2010 which permitted employers, service providers and others to take any proportionate action if it is aimed at; overcoming or minimising a disadvantage; meeting the needs of a particular racial group; or so as enable or encourage members of a particular group to participate in an activity where their participation is proportionally low.
- 2.223 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.
- 2.224 With regards to wider barriers, some employers in Northern Ireland may experience difficulties in taking positive action due to the limitations imposed by legislation. For example, before taking positive action, employers must have gathered and assessed statistical information relating to a previous 12 month period which shows the degree to which a particular racial group is undertaking work of a particular nature in Northern Ireland or in an area within Northern Ireland. This is likely to present difficulties due to a lack of statistical information about the extent of participation by individuals from minority ethnic

¹⁶⁰ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 55.

groups in the workplace¹⁶¹. This lack of statistics further reinforces the need for improved workforce monitoring by employers on the grounds of nationality and ethnic origin, as recommended below¹⁶².

- 2.225 In Great Britain, there is no requirement on employers to assess statistical data relating to under-representation of a racial group across a 12 month period¹⁶³; 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.
- 2.226 Further, our recommendation is also compatible with the principles underpinning the statutory duties under Section 75, which are aimed at encouraging public bodies to pay due regard to the need to promote equality of opportunity for people of different racial groups.
- 2.227 In making the above recommendations, the Commission is not calling for the ‘tie-break’ provisions included in the Equality Act to be introduced in Northern Ireland.
- 2.228 Since 2011 in Great Britain¹⁶⁴ an employer can take a protected characteristic into consideration when deciding who to recruit or promote, where people having the protected characteristic are at a disadvantage or under represented; often referred to as a ‘tie-break’ situation. However, this can only be done with candidates who are equally qualified¹⁶⁵, and is considered to be little used in practice¹⁶⁶. Recent case law has suggested it may be difficult for employers to implement and there is a need for sufficient justification for the discriminatory effect of the positive action, although such case law is limited¹⁶⁷.

¹⁶¹ 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.

¹⁶² ECNI (2014) [Strengthening protection against racial discrimination: Recommendations for law reform](#), paras 3.201-3.222.

¹⁶³ Although they must ‘reasonably think’ that persons who share a protected characteristic suffer a disadvantage connected to the characteristic, , or participation in an activity by persons who share a protected characteristic is disproportionately low. [Sec 159 of Equality Act 2010](#).

¹⁶⁴Section 159 of the [Equality Act 2010](#).

¹⁶⁵ EHRC (2014) [Supplement to the Employment Statutory Code of Practice](#), p. 8.

¹⁶⁶ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 60-61.

¹⁶⁷ See *Furlong v Chief Constable of Cheshire*, available at <https://www.gov.uk/employment-tribunal-decisions/mr-m-furlong-v-the-chief-constable-of-cheshire-police-2405577-2018>. The Employment Tribunal ruled that the police’s resort to section 159 was disproportionate because, amongst other

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

Allow political parties to take positive action measures when selecting candidates

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

Supporting rationale

- 2.232 The Commission has previously welcomed the legislation permitting temporary special measures (such as all women shortlists) allowed for the purpose of reducing inequality in the numbers of men and women elected¹⁶⁸.
- 2.233 The Equality Act 2010 allows for positive action measures when parties select candidates for election, provided that the purpose is to reduce inequality in the party's representation in the elected body¹⁶⁹ concerned and that they are a proportionate means of achieving that purpose. However, except in the case of sex, this does not include short-listing only people with a particular protected characteristic¹⁷⁰.
- 2.234 Professor Dickson argues¹⁷¹ that 'it is important for the health of democracy that the people who are elected to represent the electorate are as representative as possible of the population. It

things, they had not first conducted a full analysis of the impact of positive action measures already in place and had set an artificially low threshold for applicants to the service.

¹⁶⁸ Section 2 of the [Sex Discrimination \(Election Candidates\) Act 2002](#),

¹⁶⁹ The UK Parliament, the Welsh Senedd, the Scottish Parliament and local government bodies.

¹⁷⁰ Section 104(6) and (7) of the [Equality Act 2010](#).

¹⁷¹ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 69.

is good if the electorate can be given a broad range of candidates to choose from and one way of helping to achieve that is to permit political parties to adjust their candidate selection procedures to facilitate people from relatively unrepresented parts of the population to put themselves forward for selection’.

- 2.235 The Commission has recognised the under-representation of elected representatives from ethnic minority backgrounds as a key inequality^{172 173}.
- 2.236 The Commission has previously called¹⁷⁴ for positive action measures to continue and extend beyond gender in relation to political representation. The Commission supports the case for representative decision making at all levels, that we support the option of positive action which is necessary and proportionate in political parties and in other spheres
- 2.237 Consideration should be given as to whether these measures should be time-limited. We noted, for example, that the Sex Discrimination (Election Candidates) Act 2002 is due to expire in 2030, and the Equality Act 2010 includes shortlisting as permitted on the grounds of sex only, and this exception will also expire in 2030.

Influencing others and previous relationships

Introduce additional preventions against influencing others to discriminate

- 2.238 Racial equality law should widen the circumstances in which it prohibits a person from influencing another to discriminate against a third person, to ensure that ‘causing or attempting to cause’ discrimination is prohibited, and clarify that indirect influence is expressly prohibited.

¹⁷² ECNI (2018) [Statement on Key Inequalities in Participation in Public Life](#), p. 29.

¹⁷³ ECNI (2021) [Participation in Public Life: Increasing Diversity in Political Representation](#)

¹⁷⁴ ECNI (2007) [Response to the Proposals for a Single Equality Bill for Great Britain](#), para 54.

- 2.239 Protections should apply where the person giving the instruction is in a relationship with the recipient of the instruction in which discrimination, harassment or victimisation is prohibited. Further, a wider array of fields should be covered when prohibiting influencing discrimination, including relationships that have ended and the aiding of contraventions / unlawful acts.

Supporting rationale

- 2.240 The current legislation in Northern Ireland¹⁷⁵ prohibits instructing, procuring, attempting to procure, inducing or attempting to induce a person to so discriminate. The Equality Act 2010 covers causing or attempting to cause a person so to discriminate, rather than procuring¹⁷⁶.
- 2.241 Dickson argues¹⁷⁷ that the verb 'procure' is not defined in the 1997 Order, but it is almost certainly embraced by the verb 'cause', which may also include a wider range of situations not currently covered.
- 2.242 Dickson also argues¹⁷⁸ the law should reflect the Equality Act and ensure indirect influence is covered. This would mean, for example, that a situation where a CEO suggests to a hiring manager that engaging a receptionist from a minority ethnic group may reflect poorly on their judgement is likely to amount to indirect causing or attempting to cause the hiring manager to act unlawfully¹⁷⁹.
- 2.243 The law in Great Britain also covers a wider range of relationships between the influencer and the person being influenced. Under the RRO, provision applies only if the influencer is a person who has authority over the person being influenced or is a person in accordance with whose wishes the person being influenced is accustomed to act.
- 2.244 However, under the Equality Act, the only requirement is that the relationship between the person giving the instruction, or

¹⁷⁵ Articles 30 and 31 of the [RRO 1998](#).

¹⁷⁶ Section 111 of the [Equality Act 2010](#).

¹⁷⁷ Dickson, B (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 46-47.

¹⁷⁸ Dickson, B (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 46-47.

¹⁷⁹ EHRC (2011) [Employment Statutory Code of Practice](#), para 9.18.

causing or inducing the unlawful act, and the recipient must be one in which discrimination, harassment or victimisation is prohibited, including employment relationships, the provision of services and public functions, and other relationships governed by the Act¹⁸⁰.

- 2.245 Further, the Equality Act 2010 covers a wider array of fields when prohibiting influencing discrimination¹⁸¹. Among the fields covered by the Equality Act, but not the RRO, are relationships that have ended and the aiding of contraventions / unlawful acts.
- 2.246 Dickson recommends that these points should also be reflected in the law in Northern Ireland¹⁸².

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

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

Supporting rationale

- 2.248 Currently¹⁸³ discrimination or harassment following the end of a 'relevant relationship'¹⁸⁴ is prohibited, if the discrimination or harassment 'arises out of and is closely connected to that relationship'. This may include a racially discriminatory

¹⁸⁰ EHRC (2011) [Employment Statutory Code of Practice](#), para 9.22.

¹⁸¹ The Order prohibits the instructing or procuring of any act which is unlawful under Parts II or III of the Order or under article 72ZA. Part II covers discrimination and harassment in the employment field; Part III covers discrimination in other fields; article 72ZA covers the appointment of office holders. The Act, in contrast, prohibits the instructing, causing or inducing of any act which is in contravention of Parts 3, 4, 5, 6 or 7 or sections 108(1) or (2) or 112(1) of the Act..

¹⁸² Dickson, B (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 46-47.

¹⁸³ Article 27A of the [RRO 1997](#).

¹⁸⁴ A relationship during the course of which an act of discrimination by one party to the relationship ('the relevant party') against another party to the relationship, on grounds of race, or ethnic or national origins, or harassment of another party to the relationship by the relevant party, is unlawful

reference written by an employer in respect of a former employee.

- 2.249 However, this does not apply to former members of clubs/ associations¹⁸⁵.
- 2.250 There is no justification for denying former members of associations the right to claim discrimination after the relationship has ended, while granting the right to those who were formerly in an employment relationship, an educational relationship or a business-customer relationship¹⁸⁶.
- 2.251 This recommendation would be in line with legislation in Great Britain¹⁸⁷, where provision dealing with relationships that have ended is more general.

¹⁸⁵ Article 27A(1) of [RRO 1997](#) make it clear that the acts of discrimination it covers are only those covered by the provisions mentioned in articles 3(1B) and 4A of the Order. Article 4A deals with harassment but the list of provisions in article 3(1B) does not include discrimination by associations, dealt with by article 25 of the Order.

¹⁸⁶ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland pp. 107-108.

¹⁸⁷ Section 108 of the [Equality Act 2010](#).

3 Exceptions

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

- 3.1 The current exemption in race equality law based on public order should be removed and exemptions based on national security and public safety should be limited.
- 3.2 These limits should require the use of an exemption to be justified in terms of the legitimacy of the aim it is pursuing; the necessity for the exemption in a democratic society at the time; the unavailability of alternative effective measures that could be taken without having resort to the exemption; and the proportionality of the exemption to the alleged risks that need to be confronted.

Supporting rationale

- 3.3 The law in Northern Ireland is much more permissive of exemptions than the law in England, Wales and Scotland.
- 3.4 At present, race equality law¹⁸⁸ includes an exemption for the purpose of safeguarding national security or protecting public safety or public order. However, in Great Britain¹⁸⁹ there is only an exemption for the purpose of safeguarding national security.
- 3.5 Defining national security, public safety and public order is notoriously difficult¹⁹⁰. Use of the exemption must be justified by showing that it is pursuing a legitimate aim, that it is necessary in a democratic society, that there are no other effective measures that could be taken and that it is proportionate¹⁹¹.

¹⁸⁸ Article 41 of the [RRO 1997](#).

¹⁸⁹ Section 192 of the [Equality Act 2010](#).

¹⁹⁰ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 109-110

¹⁹¹ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 109-110..

- 3.6 Dickson argues¹⁹² that it is especially difficult to envisage a situation where the preservation of public order might be the basis for applying an exemption to race discrimination law, especially as public disorder almost inevitably threatens public safety, so it should be dropped as an exemption.
- 3.7 Given recent experience gained from the COVID-19 pandemic it may be reasonable to consider retaining the ‘public safety’ basis, even though it is not contained in the Equality Act 2010¹⁹³. However, exemptions claimed for on the basis of public safety or national security should be permitted only if they are fully justified.

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

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

Supporting rationale

- 3.9 This change will result in the removal of an unjustified exception¹⁹⁴ which permits immigration practices that can have a discriminatory and disproportionate impact on minority groups.
- 3.10 Current legislation allows discrimination in the carrying out of immigration functions on the grounds of a person’s ethnic or national origins. In practice, therefore, immigration officials can carry out their functions by openly discriminating against people

¹⁹² Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 110.

¹⁹³ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 110.

¹⁹⁴ See Article 20C of [RRO 1997..](#)

on the basis of their general appearance where it might indicate a person's ethnic or national origin¹⁹⁵.

- 3.11 We recognise that immigration is a reserved matter and remains the responsibility of the Westminster Parliament. However, it is also clear that immigration policies and practices can significantly impact on BME communities in Northern Ireland.
- 3.12 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 immediately¹⁹⁶.
- 3.13 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*¹⁹⁷ and the *Committee on the Elimination of Racial Discrimination*¹⁹⁸.
- 3.14 The CERD Committee has expressed "deep concern" that the Equality Act 2010 permitted public officials to discriminate on grounds of nationality, ethnic and national origin, provided it is authorised by a Minister¹⁹⁹.
- 3.15 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

¹⁹⁵ Dickson, B. (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 84.

¹⁹⁶ NIHRC (2009) [Our Hidden Borders: The UK Border Agency's Powers of Detention](#).

¹⁹⁷ Advisory Committee on the Framework Convention for the Protection of National Minorities (2011) [Third Opinion on the United Kingdom. The Committee was of the view that racial profiling and "stop and search" measures, including during controls at ports, airports and on the border with Ireland, "have a disproportionate and discriminatory impact on persons belonging to minority ethnic communities."](#)

¹⁹⁸ [Concluding observations of the Committee on the Elimination of Racial Discrimination: United Kingdom, \(2003\)](#).

¹⁹⁹ 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 \(2011\)](#)

nationalities in granting visas and when carrying out checks at airports and ports and points of entry of the State Party.

- 3.16 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.
- 3.17 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 form²⁰⁰.
- 3.18 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”.
- 3.19 It highlighted that the provisions of 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.
- 3.20 Equality and human rights stakeholders have raised concerns with the Commission in relation to an increased risk of racial profiling due to the requirements of the proposed Electronic Travel Authorisation (ETA) requirement within the UK Government’s Nationality and Borders Act²⁰¹. Similar concerns

²⁰⁰ [Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill*](#), 26th Report of Session 2008-09, 2009

²⁰¹ Under the Nationality and Borders Act, people resident in Ireland who are non-Irish or non-British citizens will be required to apply for a US-style visa waiver known as an Electronic Travel Authorisation (ETA) before entering the UK, including when crossing the land Border into NI. The requirement will also apply to citizens of the European Economic Area (EEA) living here, which includes people from Norway, Liechtenstein and Iceland. Non-British or non-Irish citizens from other countries, outside the EU/EEA, which previously did not require a visa to enter the UK, will now need an ETA. Clause 71 of the Bill introduced ETA requirements into the UK immigration system. This provides for a pre-entry clearance system, which requires anyone who does not need a visa, entry clearance or other specified immigration status to obtain authorisation before travelling to the UK. This includes on journeys within the CTA, including between Ireland-Northern Ireland.

have also been raised with the Commission about racial profiling in relation to revised CTA Guidance issued by the Home Office²⁰².

- 3.21 The Commission notes that the ETA requirement means people resident in Ireland who are non-Irish or non-British citizens and regularly travel into NI, fall within the scope of this requirement. The Commission is concerned about the impact of this living on people in border communities, including frontier workers who are not British/Irish citizens and persons with existing UK immigration status.
- 3.22 The Commission has received specific concerns from equality and human rights stakeholders in Northern Ireland about the potential impact of the ETA requirement on certain people resident in border areas and who need to enter Northern Ireland for essential purposes, such as visiting family, attending permitted work engagements, and accessing childcare, services and goods.
- 3.23 Concerns have also been raised with us that the enforcement of the ETA could result in an increase of racial profiling / racial discrimination / differential treatment based on race and ethnic origin and we share these concerns.
- 3.24 The Commission has written to the Secretary of State at the Home Office highlighting our concerns on proposals to introduce an ETA and have recommended that effective steps are taken by the Home Office to ensure that the revised guidance on the CTA and the ETA requirements will not lead to an increase in instances of racial profiling of black and ethnic minority people and migrant people, in the context of cross-border travel.
- 3.25 The Commission has previously supported a claim of racial discrimination against the Home Office, which concerned racial profiling by UK immigration officers²⁰³. This resulted in the settlement of the claim of alleged racial discrimination against a black British woman, arising from the actions of an immigration officer at Belfast City Airport.

²⁰² UK Home Office, [Common Travel Area Guidance](#), 11 October 2021

²⁰³ ECNI (2016) [Race case supported by Commission settled with Home Office](#).

- 3.26 Where the actions of immigration authorities breach race anti-discrimination law, the Commission will use its enforcement powers, including assisting individual complaints, as necessary.
- 3.27 The Commission, jointly with NIHRC, raised concerns regarding the potential increase in racial profiling as a result of Electronic Travel Authorisations across the island of Ireland and suggested further consideration was required, including specifically Protocol Article 2's 'non-diminution' guarantee, which includes the right to 'equal opportunity in all social and economic activity'.²⁰⁴

Narrow the employment exception on foreign nationals in public service

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

Supporting rationale

- 3.29 This change will narrow the exception that permits particular public bodies to restrict certain posts in the civil, diplomatic, armed or security and intelligence services to people of a particular birth, nationality, descent or residence. This exception particularly impacts on the employment of non-UK nationals who are not Commonwealth or Irish nationals, or who are EEA nationals that do not have, or who are not eligible for, status under the EU Settlement Scheme (EUSS). Non-UK nationals who arrived in the UK prior to the end of the Brexit transition period on 31 December 2020 and who have retained their EU rights are not impacted²⁰⁵.

²⁰⁴ The Belfast (Good Friday) Agreement section on Rights, Safeguards and Equality of Opportunity – Human Rights; the Agreement references “the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity”.

²⁰⁵ Listed exceptions covering those here prior to Brexit are set out in [the Immigration and Social Security Coordination \(EU Withdrawal\) Act 2020 \(Consequential, Saving, Transitional and Transitory Provisions\) \(EU Exit\) Regulations 2020](#)

- 3.30 Following the UK's exit from the EU, the UK Government has published updates to the Civil Service Nationality Rules²⁰⁶ and amended the definition of 'a relevant European' in the Aliens Employment Act 1955²⁰⁷. These changes have impacted the ability of EU/EEA citizens who arrive in the UK, following the end of the transition period (31 December 2020), to work in civil service posts. Prior to these changes fewer restrictions applied to EU nationals, with 'relevant Europeans', including all EEA and Swiss nationals, eligible to work in non-reserved Civil Service posts in line with free movement rules.
- 3.31 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.
- 3.32 We support the views of the Joint Committee on Human Rights which made it clear in 2009 when scrutinising the Equality Bill that it considered that the re-enactment of existing restrictions on the employment of non-UK nationals in the public services represents a "missed opportunity to review these restrictions, to remove those that are no longer justified and to minimise the scope of those that remain"²⁰⁸.

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

- 3.33 Action is required to address potential inconsistencies in this area of race law, and Article 8, which we consider is now redundant, should be removed.

²⁰⁶ UK Government (January 2021) [Changes to the Civil Service Nationality Rules from the 1st January 2021 Guidance & Departmental Actions](#)

²⁰⁷ Amendments were made by the Immigration and Social Security Coordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020.

²⁰⁸ [Joint Committee on Human Rights, Legislative Scrutiny: Equality Bill](#), 26th Report of Session 2008-09, 2009,

- 3.34 Any occupational requirement exception should be extended to persons analogous to employees, such as contract workers, partners, office-holders and volunteers.
- 3.35 It should be explicit that the exception must be applied proportionately and be a means of achieving a legitimate aim.

Supporting rationale

- 3.36 This recommendation would update the existing legislation²⁰⁹.
- 3.37 Article 8 of the original RRO 1997 allowed for exceptions where being of a particular racial group is a genuine occupational qualification for limited range of jobs²¹⁰.
- 3.38 In 2003, article 7A was inserted into the Order to ensure compliance with the Race Equality Directive of 2000²¹¹. It provides for a more general category of exceptions than those allowed for by article 8, namely, where being of a particular race or of particular ethnic or national origins is a genuine and determining occupational requirement. Article 8 was amended in 2003, to make it applicable only in situations where article 7A does not apply. However, it is unclear where the four types of 'qualification' referred to in article 8 would not also constitute a 'requirement' for the purposes of article 7A²¹².
- 3.39 Article 7A also prevents the law on race discrimination from applying to an employee's dismissal whereas article 8 does not expressly do so. On the other hand, article 7A applies only if it is proportionate to apply the occupational requirement in the particular case, whereas article 8 is not so limited.
- 3.40 Article 8 is now outdated and should be removed; it mentions only four contexts where an occupational qualification can be deemed relevant and it is not limited by the proportionality principle, as article 7A is.

²⁰⁹Dickson., B (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, pp. 63-65.

²¹⁰ Where the job in question involves participation in a dramatic performance or other entertainment, participation as an artist's or photographic model, working in a place where food or drink is provided to members of the public in a particular setting, or providing persons of a racial group with personal services promoting their welfare.

²¹¹ See the [Race Relations Order \(Amendment\) Regulations \(NI\) 2003](#).

²¹² Dickson, B (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 63.

- 3.41 To avoid doubt²¹³, the law should explicitly require that the exception be applied proportionately and be a means of achieving a legitimate aim, and the exception should apply to those analogous to employees [including volunteers].
- 3.42 This recommendation is in line with the law in Great Britain²¹⁴, and would also move the law to become more consistent with legislation in the Republic of Ireland²¹⁵.

Clarify law regarding competitive activities

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

Supporting rationale

- 3.44 At present, race equality legislation in Northern Ireland²¹⁶ provides an exemption for discrimination on grounds of nationality or place of birth or the length of time of residence in a particular area or place, if the discrimination relates to selecting one or more persons to represent a country, place or area, or any related association, in any sport or game²¹⁷.
- 3.45 However, the British legislation²¹⁸ also allows an exemption for ‘a sport or game or other activity of a competitive nature’. This would include activities like e-sports, music and talent competitions, which are analogous to the traditional definition of ‘sport or game’²¹⁹. Participants in these activities in Northern Ireland should also be able to benefit from the exemption which currently relates only to the selection of persons to represent an

²¹³Dickson, B (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 64.

²¹⁴ Schedule 9 (1)(1) of the [Equality Act 2010](#).

²¹⁵ Dickson, B (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 64.

²¹⁶ Article 38 of the [RRO 1997](#).

²¹⁷ Or in pursuance of the rules of any competition so far as they relate to eligibility to compete in any sport or game.

²¹⁸ Section 195 (6) of the [Equality Act 2010](#).

²¹⁹ Dickson., B (2021) Race Equality Law Reform: Strengthening Protection: Report to the Equality Commission for Northern Ireland, p. 105.

area or to the determination of eligibility to compete *in a sport or game*.

4 Enforcement and Remedies

Commission Powers

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

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

Supporting rationale

- 4.2 These changes will enhance our powers to issue additional Race Codes of Practice in a wider range of areas.
- 4.3 Under the race equality legislation, we currently only have the power to issue Codes of Practice in the fields of employment and housing. We therefore do not have the power to issue Race Codes of Practice in relation to the provision of goods, facilities and services, the exercise of public functions or education, either as regards schools or institutions of further and higher education.
- 4.4 Codes of Practice have an important status. Courts and tribunals must take into account any part of a Code of Practice that appears to them to be relevant to any question arising in those proceedings.
- 4.5 For example, the provisions of the *Fair Employment Code*²²⁰ 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’.²²¹

²²⁰ECNI (2007) [Fair Employment Code of Practice](#)

²²¹ O’Gara v Limavady Borough Council 31 July 1992 FET.

- 4.6 Further, we have issued a wide range of Codes of Practice on other equality grounds which have proved beneficial in helping employers, service providers, etc., to understand their obligations under the equality legislation and encouraging the adoption of good practice measures.
- 4.7 Our ability to issue Codes of Practice is therefore an essential tool in helping us to embed our work to promote equality of opportunity and ensure the elimination of discriminatory practices.
- 4.8 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.
- 4.9 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.

Strengthen formal investigation powers

- 4.10 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 legislation²²².
- 4.11 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, These powers should apply across employment and goods, facilities and services issues.

²²² ECNI (2004) [Response to OFMdFM Consultation paper ‘A Single Equality Equality Bill for Northern Ireland](#), paras 9.3.5-9.3.8.

Supporting rationale

- 4.12 These changes will enhance our ability to undertake formal race investigations by removing unnecessary procedural barriers.
- 4.13 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.
- 4.14 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.
- 4.15 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 workers²²³.
- 4.16 We also have the power to conduct ‘named person’ investigations under the race equality legislation, where we reasonably suspect that named persons have committed acts of unlawful discrimination. In these investigations, we may make findings of unlawful discrimination.
- 4.17 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.

²²³ ECNI (2014) [Role of the recruitment sector in the employment of migrant workers, A formal investigation](#).

- 4.18 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.
- 4.19 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.
- 4.20 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.
- 4.21 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.
- 4.22 We also recommend that our powers that exist under the fair employment legislation in this area are replicated across all equality grounds, including race, for both employment and goods, facilities and services related investigations. Our current investigatory powers under FETO are confined to the employment field.

Strengthen and harmonise the Commission’s grant-making powers

- 4.23 The Commission’s grant making powers in relation to race should be retained, and the provision of assistance should not require the prior approval of the TEO.

Supporting rationale

- 4.24 The current legislation²²⁴ states the Commission ‘may give financial or other assistance to any organisation appearing to the Commission to be concerned with the promotion of equality of opportunity, and good relations, between persons of different racial groups’.
- 4.25 TEO approval, with consent from the Department of Finance, is needed to give grants under the race legislation. However, the EHRC is not required under the Equality Act 2006 to obtain prior departmental approval, and such approval should not be necessary for ECNI.
- 4.26 Any grants made by the Commission should consider other relevant funds, such as the Minority Ethnic Development Fund²²⁵, and avoid duplication.

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

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

Supporting Rationale

- 4.29 The Equality Commission currently does not have the power to bring legal proceedings in its own name on behalf of individuals who have experienced unlawful discrimination or harassment.

²²⁴ Article 43 of the [RRO 1997](#).

²²⁵ TEO (2022) [Racial Equality](#)

4.30 However, the Commission, along with NIHRC, has powers to bring a legal action in relation to breach (or potential future breach) of Protocol Article 2 or intervene in other legal action that engages Protocol Article 2. The Commissions can also assist persons in legal proceedings in respect of a breach (or potential future breach) of Protocol Article 2²²⁶.

4.31 We have supported the call by Equinet for the inclusion of provisions to allow equality bodies to take cases in their own name²²⁷. In particular, Equinet has recommended as follows

“EU legislation should require that all equality bodies have robust litigation powers (including for strategic litigation) with legal standing before the courts (in individual and collective complaints and ex officio) and/or authoritative decision-making powers with legally binding decisions and the capacity to issue effective, proportionate and dissuasive sanctions.”²²⁸

4.32 The Commission has a longstanding recommendation²²⁹ that it should have standing to bring cases on behalf of named individuals and that this standing should also be granted to trade unions and other suitably qualified organisations. A crucial element in the debate upon effective enforcement concerns the extent to which the system of judicial process should move beyond one predicated upon an individual bringing his or her own case²³⁰. Although the Commission has assisted many highly significant cases, with ramifications well beyond the facts of the particular case, there are still many examples of discrimination and inequality which are never addressed because individuals, frequently in highly vulnerable positions, do not wish to, or cannot afford, to litigate.

4.33 In highly strategic cases, the issue at stake is whether the policies and practices of an employer or service provider exhibit evidence of institutionalised or systemic discrimination. In such cases, the Commission is of the view that standing should be

²²⁶ Sections 78C - 78D of the [Northern Ireland Act 1998](#)

²²⁷ ECNI (2022) Equality Commission for Northern Ireland's response to the European Commission's public consultation on Binding standards for Equality Bodies, para 2.25.

²²⁸ Equinet (2016) [Developing Standards for Equality Bodies: An Equinet Working Paper](#), p. 7.

²²⁹ ECNI (2004) [Response to OFMDFM Consultation Paper, 'A Single Equality Bill For Northern Ireland](#) paras 10.6-10.9.

²³⁰ ECNI (2004) [Response to OFMDFM Consultation Paper, 'A Single Equality Bill For Northern Ireland](#), para 10.7.

available even in the absence of a named ‘victim’. The European Parliament, during the passage of the Revised Equal Treatment Directive, proposed an amendment to allow for genuinely autonomous standing for organisations, as follows, “[associations, organisations and other legal entities] may, where national law permits, bring a collective action, in any judicial and/or administrative procedure, on their own initiative and aside from the particular circumstances of an individual case, in order to determine whether or not the principle of equal treatment ... is applied”. A similar provision to allow the Commission and other suitably qualified organisations to bring cases in its own name will help tackle some of the most entrenched aspects of discrimination and inequality²³¹.

Procedural and remedies

Harmonise and simplify the enforcement mechanism for education complaints against schools

- 4.34 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.
- 4.35 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.

Supporting rationale

- 4.36 These changes will harmonise and simplify the enforcement mechanism for education complaints against schools. They will

²³¹ ECNI (2004) [Response to OFMDFM Consultation Paper, ‘A Single Equality Bill For Northern Ireland](#) paras 10.10-10.11.

also remove unnecessary barriers to pupils in schools making complaints under the race equality legislation.

- 4.37 Currently, under the race equality legislation, the enforcement mechanism requires that before a complaint can be lodged with the county court, notice of the complaint against the school must be given in the first instance to the Department of Education for Northern Ireland.
- 4.38 Further restrictions apply as regards race discrimination complaints against schools on the grounds of colour and nationality. In particular, civil proceedings cannot be lodged with the county court unless the Department of Education has informed the claimant that it does not require further time to consider the matter or a period of two months has elapsed since the claimant gave notice to the Department of Education.
- 4.39 These restrictions unnecessarily prolong the adjudication process and is a form of enforcement not found in other areas covered by the race equality legislation.
- 4.40 It will, however, be noted that complaints against schools under the disability discrimination legislation have a different process and procedure in that complaints are brought to the Special Educational Needs and Disability Tribunal (SENDIST) and not the county court.
- 4.41 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.
- 4.42 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 complaints²³², must be lodged with the county court within six months of the

²³² Disability complaints are lodged with SENDIST in England and Wales.

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.

- 4.43 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.

Increase powers for tribunals

- 4.44 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').

Supporting rationale

- 4.45 These changes will widen the powers of tribunals to make recommendations that benefit the whole workforce.
- 4.46 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).

- 4.47 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*²³³ and *McGrath -v- Viper International Limited*,²³⁴ 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.
- 4.48 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.
- 4.49 Our recommended changes also reflect the original approach adopted in Great Britain under the Equality Act 2010; which contained provisions granting tribunals wider powers to make recommendations (although did not provide for enforcement, unlike FETO²³⁵). The UK Government repealed these provisions through the 2015 Deregulation Act²³⁶, suggesting they are an ‘unnecessary burden on business’²³⁷. However, the removal of these provisions was controversial and a House of Lords Select Committee recommended in 2016 that they be reinstated²³⁸, pointing to the ability of tribunals to have a longer-term impact on the extent of discrimination in society.

Increase rights of individuals to take cases when they suffer detriment

- 4.50 Individuals should be able to take cases if they have suffered detriment relating to discriminatory advertising or through

²³³ 22.05.1992 FET

²³⁴ 30.10.1991 FET

²³⁵ Article 39(8) of [FETO 1997](#).

²³⁶ Section 2 of the [Deregulation Act 2015](#).

²³⁷ GEO (2012) [Equality Act 2010: A Consultation](#), paras 3.1-3.4.

²³⁸ Select Committee on the Equality Act 2010 and Disability (2016) [The Equality Act 2010: The Impact on Disabled People](#), HL Paper 117, paras 411-416. This relates to disability discrimination, but the arguments raised are also applicable to racial discrimination.

someone instructing or pressurising another to racially discriminate. The Commission's current powers to take cases should also be retained.

- 4.51 Related articles on persistent discrimination, enforcement, and preliminary action in employment cases could be amalgamated to simplify use, but ensuring that Commission powers are retained.

Supporting rationale

- 4.52 Currently, proceedings in respect of a contravention of Article 29, 30 or 31 of the Race Relations Order (1997) can only be brought by the Commission²³⁹.
- 4.53 Article 29 relates to discriminatory advertising (such as discriminatory housing or job adverts), and articles 30 and 31 relates to instructions and pressure to commit unlawful acts²⁴⁰.
- 4.54 The Equality Act 2010²⁴¹ allows proceedings to be brought by a party who suffers detriment, as well as the EHRC. There is no direct equivalent for article 29 in the Equality Act, with provision for discriminatory advertising included in the general prohibitions against both direct and indirect discrimination, enforceable by individual complainants. However, such discriminatory advertisements are explicitly prohibited in other equality legislation²⁴², and therefore should be retained.
- 4.55 Powers in articles 59-61 (on persistent discrimination, enforcing articles 29-31, and preliminary action in employment cases) should be retained by the Commission, but could be amalgamated into reworded articles 29-31, to simplify their use.
- 4.56 Powers under article 62 relating to the Commission's ability to seek undertakings should also be retained.
- 4.57 This recommendation would, in a range of areas, increase individuals' rights to take cases to the level currently available in Great Britain.

²³⁹ Article 60 of the [RRO 1997](#).

²⁴⁰ As above, there is a proposal to further prevent persons influencing others to discriminate.

²⁴¹ Section 111(50) of the [Equality Act 2010](#).

²⁴² For example Article 34 of [FETO 1998](#), Article 39 of the [Sex Discrimination Order 1976](#).

Maintain the questionnaire procedure

- 4.58 The rights of individuals under to obtain information through the questionnaire procedure should be retained.
- 4.59 This recommendation would mean individuals in Northern Ireland would have access to information from potential respondents exceeding those available to individuals in Great Britain where the questionnaire procedure has been removed.

Supporting rationale

- 4.60 The questionnaire procedure²⁴³ is intended to help a person who thinks they have been discriminated against by another to obtain information from that person order to decide whether or not to bring legal proceedings, and if proceedings are brought, to present their complaint in the most effective way.
- 4.61 The former equivalent in Great Britain²⁴⁴ was repealed by the Enterprise & Regulatory Reform Act 2013, due to concern about the impact on business²⁴⁵.
- 4.62 The procedure can benefit both the complainant and respondent as:
- If the respondent's answers satisfy the complainant that the treatment was not unlawful discrimination, there will be no need for legal proceedings.
 - Even if the respondent's answers do not satisfy the complainant, they should help to identify what is agreed and what is in dispute between the parties. For example, the answers should reveal whether the parties disagree on the facts of the case, or, if they agree on the facts, whether they disagree on how the Order applies. In some cases, this may lead to a settlement of the grievance, again making legal proceedings unnecessary.

²⁴³ Article 63 of the [RRO 1997](#).

²⁴⁴ Section 66 of the [Equality Act 2010](#).

²⁴⁵ Department for Business Innovation and Skills (2013) [Enterprise and Regulatory Reform Bill: Policy Paper](#), p. 23.

- If it turns out that the complainant institutes proceedings against the respondent, the proceedings should be simpler because the matters in dispute will have been identified in advance.

4.63 The questionnaire procedure also exists across different areas of equality law²⁴⁶ in NI and to remove it would disadvantage those complaining on grounds of racial discrimination.

²⁴⁶ For example, Article 44 of [FETO 1998](#); Reg 42 of the [SOR 2006](#); Article 74 of the [SDO 1976](#).

5 Article 2 of the Ireland / Northern Ireland Protocol

Ensure race law reform is in compliance with Article 2 of the Ireland / Northern Ireland Protocol

- 5.1 The Commission recommends that the Northern Ireland Executive, Assembly and departments ensure that any legislative developments on race law reform in Northern Ireland are in compliance with Article 2 obligations under the Ireland/Northern Ireland Protocol. Any future new draft legislation should also make clear in its Explanatory Memorandum what consideration has been given to Article 2 of the Protocol.
- 5.2 The Northern Ireland Executive, Assembly and departments should ensure that any legislative developments on race do not reduce the equality and human rights protected within the scope of Article 2, including those rights within the Race Equality Directive, contrary to the UK Government commitment under Article 2.
- 5.3 In addition, the Northern Ireland Executive, Assembly and departments should ensure Northern Ireland race law keeps pace with any changes by the EU to the Race Equality Directive in the Protocol, including ensuring conformity with current and future Court of Justice of the European Union (CJEU) decisions relating to the Directive, that enhance equality protections²⁴⁷.
- 5.4 We recommend that the NI Executive monitors EU developments on rights in this area and takes steps to avoid divergence of equality rights across the island of Ireland.
- 5.5 Further, the Commission recommends that the NI Executive ensures that equality and human rights law in Northern Ireland keeps pace with any changes to equality and human rights law

²⁴⁷ The Northern Ireland Office has, in its [2020 Explainer Document](#), stated that when a UK Court is considering the interpretation of any of the directives listed in Annex 1, this will be done in conformity with any relevant case law of the CJEU

in Ireland that promote equality for minority ethnic and migrant people, including rights introduced in the Ireland as a result of EU laws introduced on or after 1 January 2021, that enhance protections. This should include rights introduced as a result of EU laws that do not amend or replace the Protocol Annex 1 Directives.

Supporting rationale

- 5.6 Following the UK's exit from the EU, the UK Government has committed under Article 2 of the Ireland/Northern Ireland Protocol ('the Protocol') to ensuring that certain equality and human rights in Northern Ireland will continue to be upheld after Brexit. Since 1 January 2021, the Equality Commission, together with the Northern Ireland Human Rights Commission, has been given additional powers and responsibilities, as the 'dedicated mechanism', to ensure that the UK Government's commitment under Article 2 of the Protocol is met²⁴⁸.
- 5.7 Under Article 2(1) the UK Government has committed to ensuring there is no diminution of rights, safeguards and equality of opportunity protections and provisions, including those underpinned by the Race Equality Directive²⁴⁹, as set out in the relevant part of the Belfast (Good Friday) Agreement.
- 5.8 There is also a commitment by the UK Government to ensuring that some of Northern Ireland's equality laws – will keep pace with any changes the EU may make to amend or replace the EU equality Directives, set out in Annex 1 to the Protocol including the Racial Equality Directive²⁵⁰²⁵¹ that enhance protections against discrimination in Northern Ireland.

²⁴⁸ Schedule 3 of the European Union (Withdrawal Agreement) Act 2020 amended the Northern Ireland Act 1998 to confer these additional powers on the Commission – to monitor, advise, report on and enforce the UK's adherence to its commitment.

²⁴⁹ [Race Equality Directive \(Race\): Directive 2000/43/EC](#) of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

²⁵⁰ Ireland/Northern Ireland Protocol Annex 1 Directives: [Gender Goods and Services Directive \(Gender\): Directive 2004/113/EC](#) of 13 December 2004, [Recast Directive \(Gender\): Directive 2006/54/EC](#) of the European Parliament and of the Council of 5 July 2006, [Race Equality Directive \(Race\): Directive 2000/43/EC](#) of 29 June 2000, [Framework Directive \(religion and belief; age; sexual orientation; and disability\): Directive 2000/78/EC](#) of 27 November 2000, [e: Directive 2010/41/EU](#) of the European Parliament and of the Council of 7 July 2010, [Equal Treatment Directive: Social security \(Gender\): Directive 79/7/EEC](#) of 19 December 1978.

²⁵¹ In addition, UK courts when considering the interpretation of any of the equality directives listed in Annex 1, including the Race Directive, must do so in conformity with any relevant case law of the Court

- 5.9 Significantly, neither the Northern Ireland Assembly, nor the Northern Ireland Executive, can act in a way that is incompatible with the UK Government's commitment. If they do, those actions can be challenged in courts, by way of judicial review proceedings.
- 5.10 This commitment therefore has significant implications for the work of the Northern Ireland Assembly, Executive Ministers and departments, including as they develop, consult on, and introduce new legislation. They must ensure that this legislation complies with the UK Government's commitment under the Protocol.
- 5.11 Therefore, as a result of this commitment in the Protocol, it should be noted that any changes by the EU which amend or replace the provisions in the Racial Equality Directive so as to enhance protections, will have implications for race equality rights in Northern Ireland.
- 5.12 In light of the obligations under the Withdrawal Agreement and the Protocol²⁵² in relation to UK courts consideration of the interpretation of the Protocol Annex 1 Directives and the ongoing relevance of relevant CJEU case law, including as regards case law delivered after the end of the Brexit Transition period, we bring to the Department's attention an EU Commission Report on the Racial Equality Directive and the Employment Equality (Framework) Directive (2021)²⁵³ that highlights recent legal and other developments in these areas. These developments, particularly as regards the Race Directive, are of particular significance in relation to the ongoing review of the Race Relations (NI) Order 1997.
- 5.13 While the Protocol requires that NI equality law keeps pace with any EU changes to the Annex 1 equality directives which enhance protections, there is the potential for equality and

of Justice of the EU (CJEU). UK Government, [Explainer Document](#): UK Government commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland, 7 August 2020

²⁵² See Article 4 of the Withdrawal Agreement and Art 13(2) of the Protocol. 'Notwithstanding Article 4(4) and (5) of the Withdrawal Agreement, the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union'.

²⁵³ EU Commission Report to the EU Parliament and Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive') - COM/2021/139, (EU Commission, 2021).

human rights on the island of Ireland to diverge after the end of the Brexit transition period. For example, there are already a number of proposed EU laws, and/or EU laws which were not transposed into Northern Ireland law prior to the end of the Brexit transition period, that have the potential to strengthen equality and human rights. Such EU laws, if introduced, will need to be implemented in law in Ireland, but the UK Government will not, under the terms of the Protocol, be required to 'keep pace' with them in terms of implementing them into Northern Ireland law. Such EU laws include, for example, the Parental Leave Directive²⁵⁴, and the European Accessibility Act.²⁵⁵

²⁵⁴ [Directive \(EU\) 2019/1158](#) of the European Parliament and of the Council of 20 June 2019 work-life balance for parents and carers

²⁵⁵ [Directive \(EU\) 2019/882](#) of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services

6 Conclusions and Next Steps

- 6.1 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.
- 6.2 We welcome the commitment in the 2015-2025 Racial Equality Strategy to reform race equality law, and look forward to the enactment of reformed legislation, taking full account of our recommendations, being achieved within its lifespan.
- 6.3 As many of the gaps and inconsistencies that exist in the race equality legislation also exist under other areas of equality law, we further recommend action to address similar legislative gaps in other areas of equality law in order to ensure a consistent and best practice approach is adopted across the equality legislative framework. This should be taken forward through single equality legislation.
- 6.4 In addition, we have, and will continue to, proactively engage with a wide range of key stakeholders, including MLAs, Assembly Committees, and representatives from the race sector. Government should ensure the full involvement of stakeholders in their work to develop and implement improved equality legislation.
- 6.5 In support of securing change, we would welcome any steps you could take to raise awareness of these recommendations and their supporting evidence base. We encourage you to write to, or engage directly with, Ministers, elected representatives, or key government officials to call for the adoption of these proposals.
- 6.6 Please visit www.equalityni.org/RaceLawReform for further information. There you can download full, summary and key point briefing versions of our recommendations and supporting arguments, along with wider materials.

August 2022.