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**Submission to the Ad Hoc Committee on Conformity with Equality Requirements,
Welfare Reform Bill 2012**

December 2012

1. Introduction

The Northern Ireland Council for Ethnic Minorities (NICEM) is an independent non-governmental organisation working to promote a society free from all forms of racism and discrimination and where equality and human rights are guaranteed. As an umbrella organisation¹ we represent the views and interests of black and minority ethnic (BME) communities.²

Our vision is of a society in which equality and diversity are respected, valued and embraced, that is free from all forms of racism, sectarianism, discrimination and social exclusion, and where human rights are guaranteed. Our mission is to work to bring about social change through partnership and alliance building, and to achieve equality of outcome and full participation in society.

Over the course of the last few months the Committee on Social Development has heard evidence from a number of groups representing the interests of women, persons with disabilities and children and the impact of the Welfare Reform Bill on those groups, as well as others, has been well documented. When NICEM presented evidence to the Committee on 31 October 2012, we informed the committee that since the Belfast Migrant Centre opened in 2010, 41% of cases related to welfare benefits. The migrants presenting to the centre are not only migrants but they are also persons with disabilities, females and persons with young families. Therefore, it is important to bear in mind, that persons with multiple identities may become the subjects of multiple discrimination as a result of the Welfare Reform Bill.

In our evidence, both oral and written, we raised concerns about the capacity of this Bill, as drafted, to treat EEA nationals differently to Irish or British citizens. In our last submission, we also mentioned that since the Welfare Reform Bill is a piece of enabling legislation, it is difficult to assess what the full impact of the new system will be as most details will be set out in the regulations, which have not yet been drafted in Northern Ireland. However, we have looked at the draft regulations in Great Britain and are concerned that the same approach will be taken in Northern Ireland, given the fact that the Bill before the Assembly today largely mirrors the Welfare Reform Act 2012 in Great Britain.

In this submission we will focus specifically on the concept of equality in domestic, international and EU law and set out the particular requirements, which the Welfare Reform Bill must comply with.

¹ Currently we have 27 affiliated BME groups as full members. This composition is representative of the majority of BME communities in Northern Ireland. Many of these organisations operate on an entirely voluntary basis.

² In this document “Black and Minority Ethnic Communities” or “Minority Ethnic Groups” or “Ethnic Minority” has an inclusive meaning to unite all minority communities. It refers to settled ethnic minorities (including Travellers, Roma and Gypsy), settled religious minorities, migrants (EU and non-EU), asylum seekers and refugees and people of other immigration status.

2. Legislative scrutiny and Welfare Reform Bill 2012

NICEM would like to welcome the use of Standing Order 35 in setting up this Committee to examine the equality requirements and observance of human rights in relation to the Bill. Mainstreaming equality and human rights was a key element of the Belfast/Good Friday Agreement and the Assembly has a vital role to play in scrutinising the work of the Executive to ensure that equality and human rights have not been compromised in the development of law and policy.

During NICEM's evidence to the Committee on Social Development, we noted the absence of a Joint Committee on Human Rights (JCHR) (such as that in Westminster) in the Northern Ireland Assembly. NICEM would continue to argue there is a need for such a joint committee to scrutinise bills to ensure compliance with equality and human rights. However, NICEM believes there is a potential to use the petition of concern in the Assembly as a warning sign to signal the need for pre-legislative scrutiny similar to the level of scrutiny carried out by the JCHR in Westminster. This would provide ample time for the relevant government agencies, i.e. the NI Human Rights Commission and the Equality Commission NI, to provide expert evidence, which can then feed into the ad hoc committee's report and subsequently be taken as a point of departure in the relevant statutory committee.

3. The equality framework in Northern Ireland and the Welfare Reform Bill

3.1. EQIA: Section 75 requirements and monitoring data

According to the Equality Commission's Revised Guidance (2005):

“the main aim of section 75 is to ensure that equality opportunity is ‘mainstreamed’ by public authorities in their policy making, policy implementation and policy review.”³

The Commission's 2012 Outline Guide highlights that:

“the Section 75 statutory duties aim to encourage public authorities to address inequalities and demonstrate measureable positive impacts on the lives of people experiencing inequalities. Its effective implementation should improve the quality of life for all of the people of Northern Ireland.”⁴

The Outline Guide goes on to consider the meaning of ‘due regard’ in the section 75 duty. According to the Guide, having ‘due regard’ and ‘regard’ means that the weight given to the need to promote equality of opportunity and good relations is proportionate to the relevance of a particular duty, to any function of a public authority. Therefore, having ‘due regard’ and ‘regard’ entails taking a proportionate

³ See Chapter 1 of the Revised Guidance for discussion on mainstreaming equality, at page 1.

⁴ Section 75 of the Northern Ireland Act 1998: A Guide for Public Authorities - An Outline Guide, 2002, Equality Commission for Northern Ireland, available at: http://www.equalityni.org/archive/pdf/S75_Public_Authorities_Outline_Guide.pdf

approach in determining the relevance of equality opportunity and/or good relations to a particular function or policy.”⁵ In our view the partially completed EQIA of the Welfare Reform Bill fails to meet the requirement of “due regard”.

In *Brown*⁶, the closure of a post office in a rural area was challenged on the basis of failure to comply with a disability equality duty⁷, and in particular the failure to carry out a disability equality impact assessment. The Court held that public authorities did have to assess the impact their proposed policies had on equality and in order to prove they had give ‘due regard’ to the relevant equality needs consideration must be given to the following:

“a. When a public authority makes decisions that do or might affect an equality group, it must be made aware of its duty to have due regard to the equality goals in the equality duties. An incomplete or erroneous appreciation of these duties will mean that ‘due regard’ has not been paid.

b. The ‘due regard’ must be exercised with rigour and with an open mind. It is not a question of “ticking boxes”. The duty has to be integrated within the discharge of the public functions of the authority (the equivalent Section 75 duty). It involves a conscious and deliberate approach to policy-making and needs to be thorough enough to show that ‘due regard’ has been paid before any decision is made.

c. If the public authority has not specifically mentioned the relevant general equality duty when carrying out a particular function, this does not mean that the duty to have ‘due regard’ has not been performed. However, it is good practice for the policy itself or the public authority to make reference to the duty and any code or other non-statutory guidance. This will reduce the chance of someone successfully arguing that ‘due regard’ has not been paid to equality considerations. This is also likely to enable a public authority to ensure that factors relevant to equality are taken into account when developing a policy.

d. It is good practice for public authorities to keep an adequate record showing that they had actually considered their equality duties and pondered relevant questions. Appropriate record-keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. If records are not kept, it will be difficult, evidentially, for a public authority to persuade a court that it has fulfilled its general equality duty.”

When the principles developed in the *Brown* case are applied to the DSD’s completed EQIA, it is clear that the requirements under section 75 have not been discharged. Having read through both the consultation EQIA document of September 2011 and the completed EQIA of April 2012, NICEM is not satisfied that the Department’s completed EQIA is comprehensive. It is argued that the EQIA has only been partially completed since it does not recognise the potential adverse

⁵ *Ibid.*

⁶ *R(Brown) v Secretary of State for Work & Pensions* [2008] EWHC 3158 (Admin).

⁷ Enshrined in the Disability Discrimination Act 2005. This is similar to the equality duty in section 75.

impact on certain groups, such as ethnic minorities due to the fact that the Department claims it does not hold information on its administrative systems. We are deeply concerned that twelve years after the entry into force of the section 75 duty, the Department has no monitoring data on race, religion, political opinion and sexual orientation in relation to this particular policy, which the Committee is well aware will have wide reaching impact on every section of the community.

3.2. Equality Requirements: Using available data sources

Under the Racial Equality Strategy 2005-2010 the Department has appointed a Race Champion (senior management board level) to implement six shared aims of the Strategy through a departmental Action Plan. The aims relevant to the Welfare Reform Bill include the elimination of racial inequality and the promotion of equality of opportunity in all aspects of life, as well as equal access to public services.

In the 2006 Action Plan DSD is aware the language barrier that affecting ethnic minority people to access to public services. In their Action Plan they “Will ensure customers who do not speak English as a first language will have access to the full range of services provided by the Social Security Agency; The Child Support Agency and the Social Security Agency will continue to identify the need to producing specific information and advice leaflets in a variety of languages other than English.”

The 2006 Action Plan also highlighted a lot of actions, which were to be taken forward by the Northern Ireland Housing Executive. In October 2007 the Housing Executive published the Black and Minority Ethnic and Migrant Worker Mapping Update. The update collected all relevant data on race (both settled and ne migrant communities) from different sources, as well as the Executive’s own data on the breakdown by ethic origin of position 1 applicants in social housing at local government district, as well as the waiting list. The latest update is in February 2012.

In July 2011, the OFMdfM launched the Guidance for Monitoring Racial Equality for all public authorities, which was the outcome of the inter-departmental working group, including DSD, led by the OFMdfM. NICEM indirectly involved with the Project by working with the Equality Head of the 5 Trusts, the Department of Health and OFMdfM under NICEM Ethnic Monitoring Project by pilot ethnic monitoring in the Child Health Care Hand Book and the Patient Administrative System in the hospital. The success of the pilot translated into the OFMDFM approved Guidance for Monitoring Racial Equality.

3.3. The Completed EQIA: The potential and imminent differential impacts on race

Firstly, the language and cultural barrier for ethnic minority access to public services are commonly recognised by all public authorities, including DSD. The justification of the policy applied to all regardless argument will potentially become indirect discrimination but for the ethnic group that could not be in compliance with the requirements. In this regard the new online by computerisation to implement the Bill is falling short of EQIA as the only group recognised is the older people despite without statistics but not race⁸.

The language barrier also impacts on the uptake rate of entitlements in the current benefit system. The benefit system is so complex for a non-national to understand and it can pose difficulties to apply without help or advice. We also envisage that when the new Universal Credit system is put in place in April 2014 as proposed there is a big challenge to communicate the changes to the ethnic minority claimants who cannot speak English. Simply just to publish leaflets in foreign languages and the use of interpreters might not necessarily discharge all the duties under section 75. We look forward to seeing the response from the Department in this regard, particularly in terms of what mitigation factor the Department will take into consideration.

Moreover, the proposal for the administration of universal credit takes as a point of departure that all these claimants have a bank account. This is not necessarily the case for ethnic minorities, particularly for EEA nationals on jobseeker's allowance. Under the current anti-terrorism legislation persons wishing to open a bank account must have resided in the UK for at least six months and must have proof of residential address, such as tenancy agreement and/or utility bills with the name of the applicant. Therefore, the requirement to have a bank account would delay access to entitlements for minority communities.

Secondly, as already mentioned in the introduction, members of ethnic minority communities may also have other protected characteristics which is known as multiple identity. We must acknowledge that the Department has the statistics that based on the claimant's gender, marital status, dependents and disability under the current welfare benefit entitlements. We might have a situation that an ethnic minority disabled woman with no English skills and with dependent children might have more disadvantage than the local woman in similar situation. Moreover the current data set is one size to fit all situations. There are different disadvantaged groups within each data set according to their status. Regrettably, the completed EQIA does not take this into account nor does it consider the issue of multiple identities, which may lead to a claimant being in a further disadvantaged position. It may have the effect of creating further poverty, particularly for ethnic minority women on joint claim and joint assessment will leave women without income.

⁸ See p.45 of the completed EQIA.

Due to the continued economic downturn, the impacts on the new migrant community are enormous, particularly those from the former A8 and the current A2 national. Therefore, it is crucial that 'due regard' is paid to section 75 equality of opportunity duty.

4. The equality framework in international and EU law and the Welfare Reform Bill

The right to equal treatment is a key concept of the international human rights legal framework. In addition, the right to social security is enshrined in a number of international human rights instruments to which the UK is a party. Of particular relevance to this Committee is the fact the principles of non-discrimination and equal treatment underpins human rights instruments. For example, according to Article 5 of the United Nations Convention on the Elimination of Racial Discrimination (CERD):

States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(e) Economic, social and cultural rights, in particular:

...

(iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

Moreover, Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR) (which has been incorporated into domestic law by the Human Rights Act 1998) recognises a right to property, which includes social security.⁹ Again, the concept of non-discrimination is enshrined in Article 14 of the Convention in terms of the enjoyment of other Convention rights. Moreover, case law has demonstrated that Article 3 of the Convention prohibits the creation of an environment, which would lead to state-enforced destitution.¹⁰

The right to social security is also enshrined in Article 34 of the EU Charter of Fundamental Rights and the principle of non-discrimination is enshrined in Article 21. While the Charter only has legal effect when implementing EU law, it is highly relevant for EU migrant workers because they are exercising their EU Treaty right to free movement and therefore the Charter comes into effect. Moreover, Article 2 of the Treaty on the European Union (TEU) provides:

'[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

⁹ *Stec v. United Kingdom* (2005) 41 E.H.R.R. SE18.

¹⁰ *Regina v. Secretary of State for the Home Department (Appellant) ex parte Limbuela (FC)*, [2005] UKHL 66.

Similarly, Article 3 TEU states that the Union:

‘shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.’

In addition, the principle of non-discrimination on the basis of nationality is enshrined in article 45 of the Treaty on the Functioning of the European Union (TFEU).

Moreover, the Racial Equality Directive 2000/43 prohibits discrimination on the grounds of racial or ethnic origin in the provision of social protection, including social security, social advantages and access to the supply of public housing¹¹. The concept of discrimination as defined in the Directive includes direct and indirect discrimination as well as harassment. In relation to the Welfare Reform Bill, NICEM is particularly concerned that the administration of Universal Credit online, with the requirement for an individual to have a bank account, would indirectly discriminate against migrants. As a result of anti-terrorism legislation, it is more difficult for migrants to open a bank account when they initially arrive so this could further discriminate in terms of access to benefits.

Finally, it is important to bear in mind that social security is also an area of co-ordination in EU law, and this is governed by Regulation 1408/71 and Regulation 884/2004. The principle of equality of treatment for EEA nationals is enshrined in Article 4 of EU Regulation 884/2004.

5. The compatibility of specific provisions of the Welfare Reform Bill 2012 with EU law

As already mentioned, the Welfare Reform Bill is a piece of enabling legislation and the key tenets of the proposals will be set out in the regulations. Schedule 1 of the Bill provides for regulation-making powers. Paragraph 7 of Schedule 1 provides:

7. Regulations may provide that a claimant who -
- (a) asserts a right to reside in the United Kingdom under the EU Treaties, and
 - (b) would otherwise fall within section 19, 20 or 21,¹²
- is to be treated as not falling within that section.

As already mentioned in our submission to the Committee for Social Development, this provision gives the power to directly discriminate against EU nationals (who are not British or Irish), which is unlawful under EU law. NICEM recommends that this provision be deleted from the Bill.

Lastly, as already mentioned social security is an area of coordination in EU law and therefore there are pieces of EU primary and secondary legislation which must be considered when reforming the welfare system. It should be borne in mind that infringement proceedings by the European Commission are currently ongoing on the

¹¹ Articles 2 and 3(e)(f) Directive 2000/43/EC.

¹² Sections 19-21 relate to work-related requirements.

basis of the UK's application of the right to reside test. In addition, it is unclear what particular benefits will fall within the remit of Universal Credit. At the moment there are certain EU laws regulating certain benefits, such as special non-contributory benefits.¹³ Thus, careful consideration must be given to the equality requirements under EU law as well as international instruments and the domestic equality framework.

Therefore, NICEM calls upon the Committee to put in place safeguards within the Bill to ensure that those provisions do not provide a pathway for discrimination in the regulations.

6. Advice from AIRE (Advice on Individual Rights in Europe) Centre

Further to NICEM's submission to the Committee on Social Development and the interest from members of that Committee on the potential incompatibility of certain provisions of the Welfare Reform Bill with EU law, NICEM sought expert legal advice from the AIRE centre.

The advice from the AIRE Centre is attached at Annex 1 of this submission. The AIRE Centre provides legal advice to individuals and organisations representing individuals (such as NICEM) amongst other activities but is not directly involved in lobbying activities. For further information the vision, mission, strategic objectives and activities of the AIRE Centre are set out in Annex 2 of this submission.

7. Further Information

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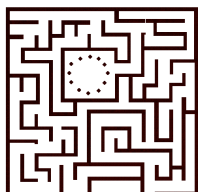
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¹³ These include income based JSA; Employment and Support Allowance (contribution-based); DLA mobility component; State Pension Credit). Income support used to be considered a special non-contributory benefit but has now been de-classified.



THE AIRE CENTRE

Advice on Individual Rights in Europe

Observations on the Welfare Reform Bill (Northern Ireland) and Regulations pursuant to that Bill

1. The AIRE Centre is a specialist legal charity, whose mission is to promote awareness of European Law rights and to assist marginalised individuals and those in vulnerable circumstances to assert those rights.
2. The AIRE Centre makes the following observations on the Welfare Reform Bill (Northern Ireland) and future draft regulations.

Schedule 1, Paragraph 7

3. Sections 19 to 21 of the Welfare Reform Bill ('the WRB') exempt certain categories of person from some or all of the work related requirements set out in sections 15 to 18 of that Bill. Schedule 1, Paragraph 7 of the WRB purports to grant the power to draft Regulations that provide that a claimant, who would otherwise fall within the scope of sections 19 to 21, is to be treated as not falling within them if (s)he is asserting a right to reside in the UK under EU Treaties.
4. Schedule 1, paragraph 7 of the WRB, if enacted, will run contrary to basic principles of EU law because it purports to grant a wide power to discriminate against Union citizens on grounds of nationality.
5. Such discrimination is prohibited by Article 18 of the Treaty on the Functioning of the European Union states that '*within the scope of the application of the [EU] Treaties and without prejudice to any special provisions contained in them, any discrimination on grounds of nationality shall be prohibited*'. On this basis, the AIRE Centre submits that Schedule 1, para 7 of the WRB should be deleted.

Comparison with the Welfare Reform Act 2012

6. Sections 15-21 and schedule 1, para 7 of the WRB are identical in wording to their counterparts in the Welfare Reform Act 2012, which applies in England and Wales. In Westminster, draft Universal Credit Regulations have been produced. Regulation 83 of these draft regulations provides that EEA nationals asserting the right to reside in the UK as a jobseeker are to be treated as falling outside sections 19 to 21 of the Welfare Reform Act 2012. This provision discriminates on grounds of nationality *and* disability.

7. Regulation 7 of the Draft Universal Credit Regulations 2012 makes it a condition of qualifying for Universal Credit that a claimant is habitually resident in the UK. For the reasons given in paragraph 8, below, The AIRE Centre submits that this requirement is unlawful as a matter of EU law, and urges the Northern Irish administration not to include such a requirement in its own Regulations.
8. Universal Credit will replace income-based Jobseeker's Allowance and Employment and Support Allowance (income-related). Both of these benefits are listed as special non-contributory benefits under Annex X of Regulation 883/04. Thus they are covered by Article 4 of Regulation 883/04, which prohibits discrimination on grounds of Nationality. The Supreme Court, in *Patmalniece* [2011] UKSC 11, found that the habitual residence test is indirectly discriminatory, and is justified on grounds independent of nationality. However, the European Commission has subsequently issued infringement proceedings against the UK on the basis that the habitual residence test, applied to special non-contributory benefits, amounts to unlawful discrimination under EU law. Whilst the Westminster administration may wish to continue to impose a legal test that violates European Union law, we urge the authorities in Northern Ireland to refrain from doing so.

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Participatory
Status



Organisation No.
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Annex 2 - Advice on Individual Rights in Europe (AIRE) Centre: Vision, Mission, Strategic Objectives and Activities

Vision

For all people to enjoy their rights under European law.

Mission

To promote awareness of European law rights and assist marginalised individuals and those in vulnerable circumstances to assert those rights.

Strategic Objectives

- To promote awareness of the rights protected by European law which are not well known or understood, including the European Convention on Human Rights, the European Social Charter, the Council of Europe Convention on Action Against Trafficking in Human Beings, but also European Union legislation governing the rights of individuals.
- To protect the rights of low-income EU migrants and their family members under EU free movement law, in particular their right to enter and remain in their host state and their right to equal treatment with respect to matters such as working conditions and access to social security and social assistance benefits.
- To assist individuals who would otherwise have difficulty securing expert advice and adequate representation in cases involving the application of the European Convention on Human Rights.
- To enable other legal advisers to provide effective help to marginalised individuals who need to assert their rights under European law.
- To work with those responsible for implementing rights guaranteed under European law to ensure that such implementation is effective.
- To train young lawyers from all areas of Europe and beyond to use European law in assisting marginalised individuals in their future careers.

Activities

- Providing second-tier advice to the legal representatives of marginalised individuals who are asserting their rights under European law.
- Advising individuals and their family members in coordination, where appropriate, with other advisers on their rights under European law and putting them in touch with other advisers in the voluntary sector for matters on which we are unable to assist.
- Representing applicants and assisting applicants' representatives before the European Court of Human Rights and other international bodies.
- Training lawyers, judges, and state officials on individual rights under European law.
- Writing reports, petitions, and third-party interventions on issues relating to the implementation of European rights guarantees.