



Northern Ireland  
Assembly

Ad Hoc Committee on Conformity with  
Equality Requirements, Welfare Reform Bill

# OFFICIAL REPORT (Hansard)

Northern Ireland Council for Ethnic Minorities  
Briefing

4 December 2012

# NORTHERN IRELAND ASSEMBLY

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**Members present for all or part of the proceedings:**

Mr Trevor Lunn (Chairperson)  
Mr Robin Swann (Deputy Chairperson)  
Ms Paula Bradley  
Mr Mickey Brady  
Mr Tom Elliott  
Ms Bronwyn McGahan  
Lord Morrow  
Mr Alastair Ross  
Mr Peter Weir

**Also in attendance:**

Mr F McCann  
Mr McDevitt

**Witnesses:**

Ms Karen McLaughlin	Northern Ireland Council for Ethnic Minorities
Mr Patrick Yu	Northern Ireland Council for Ethnic Minorities

**The Chairperson:** I welcome Patrick Yu, the executive director of the Northern Ireland Council for Ethnic Minorities (NICEM), and Karen McLaughlin, the legal policy officer. You are very welcome. Members, you have a pack from NICEM for reference.

Patrick, it is over to you. I think that you know what we are about here. We are discussing human rights and equality issues only.

**Mr Patrick Yu (Northern Ireland Council for Ethnic Minorities):** Thank you, Chairman and members, for inviting us to give evidence on the equality requirement of the Welfare Reform Bill. We made a submission to the Committee yesterday. This morning, we circulated another document from our partners in London, who are the key experts in human rights law, particularly social security. That document was sent to us only this morning, which is why we could not include it in the information for the Committee. We will incorporate it afterwards.

In September last year, the Department sent out the equality and impact assessment (EQIA) for the Bill's consultation document. Unfortunately, NICEM did not respond at that time because our policy team was engaged intensively with the Department of Education (DE) on our published research report, 'Promoting Racial Equality in Northern Ireland's Post-Primary Schools'. We have limited

human resources to deal with the vast volume of section 75 consultations. Each month, there are roughly 10 to 20. It depends on the nature of the requirements on different consultation papers.

In our evidence today, we will focus specifically on the concept of equality in domestic, international and EU law and set out the particular requirements with which the Welfare Reform Bill must comply. My colleague Karen will start off with the legislative scrutiny of the Bill.

**Ms Karen McLaughlin (Northern Ireland Council for Ethnic Minorities):** I will briefly comment on the legislative scrutiny. When we gave evidence to the Committee for Social Development, as some of you are aware, NICEM stated that it would fully support the use of Standing Order 35. We are glad to welcome the setting up this Committee, not because we are interested in delaying the introduction of welfare reform but because we are aware of the importance of ensuring that legislation is compliant with equality requirements and human rights standards, particularly under the Human Rights Act 1998. If such requirements were not met, legislation would be open to legal challenge. When a legal challenge is initiated, particularly in relation to welfare entitlements, it is often too late for individuals, as their rights have already been violated. They may already have been forced to live in destitution or take out loans and have to deal with debt as a consequence.

In addition, we welcome this Committee because the mainstreaming of equality and human rights lies at the core of the Belfast/Good Friday Agreement and the Northern Ireland Act 1998. The crucial scrutiny powers of the Assembly are essential in ensuring that equality and human rights requirements are observed in the development of all law and policy. The very active civil society engagement in the Welfare Reform Bill indicates that this legislation will have wide-ranging implications for every faction of society and many of the section 75 groups. Thus, it is of pivotal importance to ensure that equality of opportunity is taken as a starting point when scrutinising such legislation.

During NICEM's evidence to the Committee for Social Development, we commented on the system in Westminster, the Joint Committee on Human Rights (JCHR). NICEM continues to call for the establishment of such a Committee in the Assembly to consider equality and human rights in order to ensure that Bills have undergone rigorous scrutiny. NICEM believes that there is 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 Joint Committee in Westminster. That would provide ample time for statutory bodies, such as the Human Rights Commission and the Equality Commission, to provide expert evidence, which could then be taken as a point of departure when the relevant Statutory Committee examines the Bill.

**Mr Yu:** I will focus on the Department's EQIA. The first question that I would like to ask is this: does the EQIA fulfil the equality requirement under section 75 and other equality law? We need to look at the nature of section 75 and its robust requirement. The main aim of section 75 is to ensure that equality of opportunity is mainstreamed by public authorities in their policymaking, policy implementation and policy review. In short, it puts equality into the mindset of the decision-maker when he or she is making a policy decision. The new guidance from the Commission also encourages public authorities to address inequalities and demonstrate measurable positive impacts on the lives of people experiencing inequality.

The legislation also highlights the "due regard" duty. 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. In our view, the partially completed EQIA of the Welfare Reform Bill fails to meet the requirement of due regard. The Brown case in Great Britain, which is, I think, the only case law in GB, developed the principles of due regard to the relevant equality needs. The Brown case developed four principles. I will just highlight the first two principles, which are relevant to this Committee. The first principle is that, when a public authority makes decisions that do affect, 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. The second principle is that 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 of our section 75 here. It involves a conscious and deliberate approach to policymaking and needs to be thorough enough to show that due regard has been paid before any decision is made.

Having read through the completed EQIA, NICEM is not satisfied that it is comprehensive. In our view, the EQIA has been only partially completed, as it does not recognise the potential adverse impact on certain groups, such as ethnic minorities, because the Department claims that it does not hold any information on its administrative system. It is not uncommon, not only for this Department but

for many Departments, to use the screening process, arguing that there is no information in the system, and then they screen out the policy. The same issue always arises.

Moreover, the EQIA highlights only whether there is any differential impact on certain groups. The limited data set used by the Department for Work and Pensions (DWP) model could not take into account the specific circumstances in Northern Ireland. In effect, there is no data set from Northern Ireland to demonstrate that there is no differential impact, nor does it address the equality goals as highlighted in the first principle under the Brown case.

We are deeply concerned that, 12 years after the implementation 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 or other policies, which, as the Committee is well aware, will have wide-reaching impact on every section of the community.

I will now turn to the use of available data sources. The data collection under the EQIA process should also take into account all other available data and research, both within and outside the Department, but the Department fails to do so. As a matter of fact, under the Racial Equality Strategy for Northern Ireland 2005-2010, the Department published its action plan to implement the six aims of the strategy. 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. Although the race strategy expired in 2010, if you look at Assembly debates and Question Time, you can see that the race strategy is still ongoing. A new revised strategy is under way and will, we hope, come out early next year.

In the 2006 action plan on the race strategy, the Department for Social Development (DSD) is also aware of the language barriers that affect ethnic minority people accessing public services. The action plan states that DSD:

*"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 second point of the action plan states:

*"The Child Support Agency and the Social Security Agency will continue to identify the need to produce specific information and advice leaflets in a variety of languages other than English".*

As a matter of fact, they know that language is a key barrier for ethnic minorities. I have not seen any mention in the EQIA of that.

The 2006 action plan also highlighted many actions to be taken forward by the Northern Ireland Housing Executive (NIHE). 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 new migrant communities — from different sources, as well as the Housing Executive's own data on the breakdown by ethnic origin of position 1 applicants in social housing in local government districts, as well as the waiting lists in the same districts. The latest update is from February 2012. You can see that there is a lot of information available to be used.

In July 2011, the Office of the First Minister and deputy First Minister (OFMDFM) launched guidance for monitoring racial equality for all public authorities, which was the outcome of the inter-departmental working group, including DSD, led by OFMDFM. In short, DSD did not even try to use other sources of data and/or research, or talk to its own race champion to fill the gap in its data for this Bill. This failure amounts to the due regard duty not being discharged.

I now turn to the potential and imminent differential impacts on race. First, the language barriers that restrict ethnic minority access to public services are commonly recognised by all public authorities, including DSD. The justification that the policy applies to all groups — regardless — will, potentially, become indirect discrimination against an ethnic group who could not comply with the requirements. In this regard, the new online computerisation that will implement the Bill falls far short of the EQIA, as the only group recognised is that of older people, despite the fact that there are no statistics on age. How on earth can they realise that elderly people have a problem but not ethnic minorities?

The language barrier also impacts on the uptake rate of entitlements in the current benefit system. Our benefit system is so complex for a non-national to understand that it can cause a lot of difficulty for someone applying without help or advice. We also envisage that, when the new universal credit

(UC) system is put in place in 2014, as proposed, there will be a big challenge to communicate the changes to ethnic minority claimants who cannot speak any English.

Secondly, the proposal for the administration of universal credit takes as its point of departure the assumption that all claimants have a bank account. That is not necessarily the case for ethnic minorities, particularly for European Economic Area (EEA) nationals on jobseeker's allowance (JSA). Under the current anti-terrorism law, persons wishing to open a bank account must have resided in the UK for at least six months and must have proof of a residential address, such as a tenancy agreement or utility bill with the name of the applicant. Therefore, the requirement for a bank account would delay access to entitlements for minority communities.

Thirdly, we are concerned that the EQIA did not identify the negative impact on ethnic minority women. The payment of the new universal credit to the main earner following the joint claim and joint assessment will leave ethnic minority women without any income. It is not uncommon in the ethnic minority community for women to be perceived as having a subordinate role in the family unit.

Fourthly, members of ethnic minority communities may also have other protected characteristics, known as multiple identity. We must acknowledge that the Department has statistics based on a claimant's gender, marital status, dependants and disability under the current welfare benefit entitlements. We must not have a situation in which an ethnic minority disabled woman with no English skills and with dependent children might have more disadvantage than a local woman in a similar situation. Moreover, the current data set is one size fits all. There are different disadvantaged groups within each data set, according to their status and their multiple identity status. Regrettably, the completed EQIA does not take into account or consider the issue of multiple identities, which may lead to a claimant being in a further disadvantaged position.

The continuing economic downturn means that the impacts on the new migrant community are enormous, particularly former A8 and current A2 nationals. Therefore, it is critical that due regard is paid to the section 75 equality of opportunity duty.

I will now pass over to my colleague Karen, who will address the equality framework and the compatibility of specific provisions with EU law.

**Ms K McLaughlin:** Thanks, Patrick. At the outset, I would like to state that NICEM accepts that it is legitimate for Governments to lay down requirements for access to the welfare system and, indeed, to reform that system. However, as mentioned in our briefing paper, and of particular relevance to this Committee, is the fact that the right to social security is a recognised human right that is enshrined in a number of human rights instruments. The principles of equality and non-discrimination underpin such instruments, as well as underpinning the EU legal order. I will briefly sketch out the relevant equality requirements under those systems.

According to article 5 of the United Nations International Convention on the Elimination of All Forms of Racial Discrimination, state parties are required to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone to equality before the law in the enjoyment of economic and social rights, such as the right to social security. Moreover, article 1 of protocol 1, coupled with article 14 of the European Convention on Human Rights (ECHR), provide that individuals should not be discriminated against in asserting their right to social security. In EU law, article 34 of the EU Charter of Fundamental Rights enshrines the right to social security, and non-discrimination is enshrined in article 21. Equality is also enshrined in articles 2 and 3 of the Treaty on the European Union. Article 18 of the Treaty on the Functioning of the European Union prohibits the discrimination of citizens of the EU on the basis of nationality.

In EU secondary law, 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. That concept of discrimination includes direct and indirect discrimination as well as harassment. I will come back to some examples of where the Welfare Reform Bill may give rise to direct and indirect discrimination.

Finally, it is important to bear in mind that social security is an area of co-ordination in EU law that is governed by regulations 1408/71 and 884/2004. The principle of equality of treatment is enshrined in article 4 of regulation 884/2004. That is outlined in the note that you received from the AIRE Centre in London.

As mentioned in the briefing paper, the Welfare Reform Bill is enabling legislation, and the key tenets of the proposals will be set out only in the regulations. However, there is one particular provision that,

we believe, constitutes direct discrimination and is unlawful under EU law. That is paragraph 7 of schedule 1, which provides the power to treat EU nationals differently from British or Irish citizens. That is also mentioned in the Advice on Individual Rights in Europe (AIRE) Centre's briefing paper.

It is also possible to envisage instances in which the welfare reform proposals may give rise to indirect discrimination. Indirect discrimination will have the effect of making it more difficult for minority communities to access the benefits to which they are entitled. In our submission to the Committee for Social Development, the manager of the Belfast Migrant Centre outlined the current issues with the administration of the benefits system, which make it increasingly difficult, and sometimes impossible, for migrants to access their entitlements. One such example, which Patrick touched on, is the administration of the universal credit system online. As minorities may not be able to get a bank account, that would place them in a situation of indirect discrimination.

Social security is an area of co-ordination in EU law, and there are issues with the right to reside test that is used currently. Again, that is mentioned in the AIRE Centre's briefing paper. The European Commission has instituted infringement proceedings against the UK. As a result, if we compare the proposals in the Welfare Reform Bill in Northern Ireland with what has taken place in Great Britain and look at the regulations produced there, AIRE Centre has outlined two instances in which there could be a multiple discrimination issue on the grounds of nationality and disability, as well as issues relating to the habitual residence and right-to-reside test. On that note, I pass back to Patrick to finish.

**Mr Yu:** We have outlined our situation. We are only one of the nine section 75 groups. I will stop now to answer any questions from members.

**The Chairperson:** Thank you both very much.

**Mr McDevitt:** If I may summarise, you are saying that the Bill, as currently drafted, is potentially discriminatory against people from an ethnic minority background.

**Ms K McLaughlin:** Yes, schedule 1, paragraph 7 in particular, because it gives the power to make regulations that would treat EEA nationals differently from British or Irish citizens.

**Mr McDevitt:** Let us look at some of the specific provisions in the Bill. Would the proposed childcare changes, for example, have a disproportionate, or potentially disproportionate, impact on someone from an ethnic minority or migrant background?

**Ms K McLaughlin:** That goes back to Patrick's point that the EQIA did not cover ethnic minorities because it was claimed that there was no data, even though people have to state where they come from when they apply for a payment. So it is difficult to assess the impact. We argue that, because of the barriers to migrants accessing the benefits system, there would be an adverse impact. However, the Department has failed to carry out the equality impact assessment.

**Mr McDevitt:** So is it fair to say that you cannot say that the changes in childcare are not discriminatory; you cannot say that the change from disability living allowance (DLA) to the personal independence payment (PIP) is not discriminatory; and you cannot say that the changes in housing benefit are not discriminatory?

**Mr Yu:** As I said, it is the Department's duty to demonstrate that. Our role is to provide supplementary information. As we have argued many times, the Department claims that it does not have any information and uses that fact to rubbish everything else.

In our submission, we look at two aspects. One is whether the equality duty under section 75 is fulfilled. A lot of our concerns relate to the EQIA. The EQIA is only one document, which is submitted by the Department to supplement its argument. In our view, the EQIA is not comprehensive; it excludes other groups. Also, if you look at the EQIA in more detail, you will see that it uses UK statistics instead of statistics from Northern Ireland. It states that there will be no impact, but it does not give any detail. For example, it compares those with disabilities with those who do not have disabilities. However, within disability, people have different situations: physical disability, mental or physical impairment or disability and other types of disability. So, within each subset, there are a lot of differences among a disadvantaged group. I do not see how the EQIA demonstrates that it has used the equality goal to fulfil that requirement. That is why, in our view, the Department has failed the due regard test.

**Mr McDevitt:** So you are saying that the Department has failed in its duty to provide a proper EQIA and has particularly failed in its duty to provide a proper EQIA for people from a minority ethnic background.

**Mr Yu:** Yes.

The second aspect is equality law. In our submission, we are absolutely clear that the Bill deliberately infringes on EEA citizens. A specific part of the Bill is very clear about the change. Karen described in detail how that contravenes different parts of EU law. I raise the same concern that we raised with the Social Development Committee. Any infringement of EU law will make the Bill void. So we need to see the consequences.

**Lord Morrow:** Thank you for your presentation. Your paper states that the whole benefit system is complex. I say this respectfully: it is complex for us all. Ask any MLA sitting round the table, and they will tell you that it is mighty complex for even those of us who are supposed to be very fluent in English and understand these things. Your paper uses "may" but does not use "shall". That tells me that you have a doubt. It states:

*"Simply just to publish leaflets in foreign languages and the use of interpreters might not necessarily discharge all the duties under section 75."*

So you are not saying that it is de facto.

**Mr Yu:** I am not agreed with your proposition. First, I am not a judge. The judge clearly has the power, but I do not have that authority. As I said at the beginning, our role is to supplement information given to the Committee, and the main one that polices section 75 is the Equality Committee. It has the authority to decide whether that is infringed. In our view, this is one of the factors that will have a huge impact on ethnic minorities. That is why we use the words "might" or "may" instead of "shall". We do not have that authority.

**Ms K McLaughlin:** Just to pick up on the point about the system being complex, that refers more to the issue of EU law coming into play when you talk about minorities having access to the welfare system here. With regard to EU law, you have the problems that are well documented about the right to reside test. The UK is undergoing infringement proceedings by the European Commission because of its misapplication of the right to reside test and the habitual-residence condition. So that is what makes it more complicated for EEA nationals to access the benefits that they are entitled to.

**Lord Morrow:** You use the argument that it is not enough just to issue a leaflet in your language. You say in your submission that that is not sufficient. I agree that that is not sufficient, but is there not advice out there? We are always seeking advice on these issues from the professionals and from people who know the intricate details. Is that not available to you also?

**Mr Yu:** No; you need to look at the operation in context. In the past seven years in particular, the ethnic composition has totally transformed since the addition of the EEA countries. Now, one Polish community is equivalent to all the ethnic minorities added together. You can also see that the number of welfare claimants from the EU is increasing dramatically. We understand that because we see those people in our migrant centre and deal with a lot of those cases daily. A lot of those people do not understand the benefit system. Not only do they not understand the benefit system, they find the application form difficult if it is not in their language. There are also a lot of complex EU rights and entitlements. They do not know whether they are caught under this one or that one. That makes it more complex, and they come to ask for our help. They cannot get any help when they go to the local Citizens Advice Bureau (CAB), because they do not have an interpreter, and they do not have an interpreter because they do not have the costing. Whether you are Polish, Lithuanian or whatever, that is the difficulty if you do not have the language.

When we addressed the Committee for Social Development, we highlighted the fact that, at the moment, most of the EU benefit cases are being delayed by at least eight to 12 months when people renew their application: for example, when someone renews their housing benefit or family credit. There is a system now that will have an impact. I can give an example. We have a case involving a wife who has moved from another country to avoid domestic violence against her and her children. She came here to look for a job. The system excluded her at the beginning because it is so complex.

She did not understand the different requirements under different parts of EU law. That is only one example.

We also have a case involving a family with children whose benefit payments have been delayed and who, as a result, have become homeless. Having said that, the benefits system will pay them back retrospectively, but, at this time, the family is experiencing destitution and homelessness with their children. This issue is not a rarity on the ground.

**Lord Morrow:** Will the move to universal credit, which will replace the range of benefits, simplify things?

**Ms K McLaughlin:** EU law creates a complication here; I mentioned regulation 883/2004. Some benefits, which will be subsumed under universal credit under that regulation, are so-called special non-contributory benefits. In that scenario, jobseeker's allowance, for example, is set up to give the EU citizen some kind of support in the intervening time after he or she has lost a job or is looking for jobs in another EU member state. I envisage some problems if that is not teased out before the Bill goes ahead. That is also referred to in the AIRE Centre's note.

**Lord Morrow:** I will leave it there, Chairperson. Thank you.

**Mr Brady:** Thank you very much for your presentation. I have just a few questions. In your briefing you say:

*"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".*

It would be really difficult to see how you could do a comprehensive EQIA if that data is not available.

**Mr Yu:** It is a partial EQIA, not a comprehensive one.

**Mr Brady:** You would expect that with legislation such as this, which is going to have such an impact, you would cover all your bases. If you are going to do a proper EQIA [*Inaudible due to mobile phone interference.*]

**Mr Yu:** Yes. They should follow the duty set out in section 75, the right one rather than the wrong one. When we appeared before the DSD Committee we raised the seriousness of this. As I said, we support the use of Standing Order 35.

**Mr Brady:** I have a couple more questions. The first is about habitual residents. [*Inaudible due to mobile phone interference.*] It is not just about people who are coming from abroad. It is also about people who were born here, lived here and went to work in America or Australia and came back, who have to show that they are habitually resident. There is an issue there, obviously. That problem is going to increase because of the nature of welfare reform as it stands at the moment. Even in case law there is no specific definition of how long you have to be here to be habitually resident. Some offices could say that you need to be here a week, while others could say three weeks.

The Social Security Commissioners have said that the longer you are here, the more habitually resident you become. It is very arbitrary, and it seems to me that if that is not addressed, it will become even more arbitrary.

Karen, you also mentioned people who are entitled to work in Britain or here and can get contributory benefits. There was a case in England involving a woman who became pregnant and who was able to work only up to 12 weeks before the baby was born and had no access to any benefit. There was a tragic end to that case, and that has been documented. That kind of thing is increasingly likely to happen under the proposed legislation.

Finally, do you envisage a lot of legal challenges under European Union legislation if this Bill goes through as it stands?

**Ms K McLaughlin:** As I mentioned, there are infringement proceedings based on the current application of the right to reside. Those infringement proceedings were issued on foot of a case in the



UK Supreme Court called Patmalniece, which is also referred to in the AIRE Centre document. If the right-to-reside test were to become more stringent, or, as we mentioned in our briefing to the Social Development Committee, there were some murmurs of putting in place a two-year time period for the habitual residence condition, it has already been decided in Luxemburg that those things infringe EU law, so, undoubtedly, there would be more legal challenges.

The problem about legal challenges, as I mentioned already, is that it is too late for the individual claimants at that stage. Legal challenges cost a lot of money, and non-governmental organisations (NGOs) have limited resources to support people, so we could also envisage a situation where more people are falling into a state of destitution, and that would have implications under article 3 of the European Convention on Human Rights in respect of inhuman and degrading treatment.

I want to follow up on what you said in relation to the Human Rights Commission (HRC) and the application of that and link that with what Lord Morrow mentioned earlier about the complexity of the system. That is what we were getting at when we mentioned the complexity of the system. It is that added dimension of EU law. There is very little legal expertise in that particular area. We are concerned that if this wide power to make regulations, as set out in paragraph 7 of schedule 1, goes ahead in its current form, it could lead to a massive raft of people falling into this power, and, undoubtedly, it would have detrimental impacts on migrants seeking access to the benefits that they are entitled to under EU law.

**Mr F McCann:** I have a couple of questions. One of the points that Lord Morrow raised is about universal credit. There is a myth that it will make everything easy, but, by the time you get universal credit, 30 benefits will have been amalgamated and cut to pieces, and the damage will have been done before you even get the launch of universal credit.

Your paper states:

*"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."*

Can you elaborate on that?

**Mr Yu:** In relation to the duty, as I said, it is very clear. Going back to the principle that I highlighted in the Brown case, it might be better to read it again.

*"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."*

In the Brown case, it is about the EQIA being incomplete or not being as comprehensive as it should be. They fail different groups. We have nine groups, and, in respect of each group, it needs to demonstrate that it does not have any differential impact or, if they have differential impact, any mitigating factor that they need to consider. In our view, they did not go through it as thoroughly as they should.

**Ms K McLaughlin:** I will pick up on the universal credit point. We need to go back to first principles and look at what each benefit has been set up for. Under universal credit, they are all being subsumed under a work-related payment, but a number of different payments have been set up for different reasons to deal with different situations, such as disability payments, for example. We mentioned the access issues with the universal credit system. If everything is going to be online, we mentioned the issues with the bank accounts and the fact that that will put minorities in an indirect discrimination scenario. Again, I will reiterate the point on EU law in that there is a piece of EU legislation here that cannot be circumvented. It will probably result in some kind of negotiations or hammering out of how the legislation will impact on regulation 883/2004. However, under that regulation, article 4 applies an equal treatment principle. That legislation has not seemed to feature anywhere in any of the discussions. Perhaps that is due to the fact that the social welfare system has been developed in a legal vacuum of sorts, without paying attention to equality, human rights and EU requirements.

**Mr F McCann:** On the question of the Brown case, what you are saying is that, with regard to welfare reform, there is a clear breach of equality legislation. The other issue is that, when the EQIA was

being done, was information sought from any ethnic minority groups? Were they invited to sit down to look at possible difficulties that may arise with the Bill?

**Mr Yu:** I highlighted in some detail that there are different sources of information, including their own Department. It is not uncommon with civil servants, in different Departments, for the left hand not to know what the right is doing or vice versa. This is a classic case of that. There is a race champion who is at assistant secretary level. He also co-ordinates other policies. Also, he is aware that, under the action plan, the language barrier is a key issue. I have no idea why this issue did not flare up in any process, either during the internal policy review or the policy development process. That, as you know, is one of the issues.

You should also look at the other sources of information. I mentioned the Housing Executive, which is a Next Steps agency. As I mentioned, the Housing Executive delivers a lot of action plans for the Department under the race equality strategy. The Department could have the monitoring data. Therefore, why does it not have it?

I can give you some examples. Even though NICEM is a small organisation, when we do our casework, our monitoring data can generate different types of information on benefits, for example, around nationality or ethnicity, so it is quite simple. Also, OFMDFM already benchmarks the standard; we know that it is very difficult. Over the 12-year period, all the Departments, including OFMDFM, deliberated on race and then we held them to the benchmark. The most complex area, using ethnic monitoring, is health and social care, in particular in a hospital. We set up a project on ethnic monitoring, and we worked with the five trusts, the Department and OFMDFM. We are piloting the testing under the hospital system, the patient administration system and the childcare handbook. We looked at how people went through the whole system. I think that the testing of the system is working. In the future, and in a year's time, all the information on section 75 groups could be available through same system.

It is a joint project involving different Departments. In most cases, each Department has a lot of information, but the issue is about whether the policymaker, in developing the policy, gets all the data rather than just picking and choosing information. They need the totality of the data.

**Mr F McCann:** I was just asking Mickey something about benefits. Obviously, the whole system is sanction-led. With regard to the migration of people, especially people with ethnic minority backgrounds, from benefits into work-related groups under the Department for Employment and Learning, have any discussions taken place with ethnic minority groups to ask for their assistance with people suffering from mental illnesses and other illnesses that would be a part of these work-related groups under welfare reform?

**Mr Yu:** At the moment, there is a disjointed approach by Departments. We raised that issue using not only this platform but the racial equality panel and other forums. I try to bring it back to the fundamental issue of the importance of monitoring data. If we do not have any monitoring data, how will each Department benchmark to promote equal opportunities? If you do not have such data, how do you set a baseline? If you are here in year 1, and you would like to change a policy, you cannot do so because you do not have any data. Why exactly does OFMDFM put everything back to square one when monitoring data is so important? That highlights exactly my point: 12 years on, the majority of Departments — DSD is only one of many Departments — do not capture all that monitoring data.

**Ms McGahan:** This may have been touched on earlier when you said that language is a key barrier. I know that to be the case because I have represented people from the foreign national community at tribunals. For form-filing, what I find is that they are asked which language they speak and are then provided with interpreters. Do you find that to be satisfactory? From what I can see, I think that it is OK, and I have represented people's views at tribunals. Do you feel that that is inadequate? Can something more be done?

**Mr Yu:** An interpreter is crucial during an interview with an applicant or in another process, because they speak the same language as the applicant and understand them. The last time we were at the Committee for Social Development, we raised our concern about people with disabilities and the fact those applicants do not want to burden an interpreter. Sometimes, an interpreter may not be doing a good job, but the applicant does not want to challenge them, so they just listen to the interpretation and then perform what the doctor asks them to do. Language is only part of the bigger jigsaw that really affects the outcome. Using interpreters to translate does not mean that you can discharge all the duty; you need to find ways to mitigate the effect and improve the system.

**Ms McGahan:** As I said, I have represented people with disabilities and have sat down with interpreters, and what we have found is that it is all about how your condition affects you. Medical evidence is nearly secondary; that is my reading of it. I have spoken to interpreters and relayed that to them, and they have then relayed that to the person with a disability. You cannot put words in people's mouths either.

**Ms K McLaughlin:** In that case, the issue was that there was no interpreter there. The person was asked, "Do you have difficulties communicating?", and they said no because they could speak English, but they had a disability. We mentioned that case at the Committee for Social Development. Mickey, you may remember that the Belfast Migrant Centre manager mentioned it.

**Ms McGahan:** I was talking about language being a barrier as something separate from a disability.

**Ms K McLaughlin:** It is about understanding the language, if you know what I mean. When a person with a disability who is from an ethnic minority background is asked in English whether they have difficulties communicating, they make think they are being asked whether they have difficulty communicating in English.

**Ms McGahan:** But you are asking that directly in the forms *[Inaudible due to mobile phone interference.]*

**Ms K McLaughlin:** That was just one example of a case we had. We can provide you with the details if you want. As I said, we mentioned it at the Committee for Social Development.

**The Chairperson:** We have a paper from the AIRE Centre? What is the status of the AIRE Centre? Is it an internationally recognised organisation?

**Mr Yu:** The AIRE Centre is one of the very few experts in EU law in the United Kingdom. It is not unfamiliar with Northern Ireland. It came to Belfast in 1997 or 1998, and I was one of the many people who listened to it talk about how to view the law in light of human rights protection in EU legislation. It has been here a number of times to run different training courses. However, it is like any other voluntary sector body. It is registered as a company and with the Office of the Immigration Services Commissioner (OISC) so it can provide wide legal advice on immigration.

**Ms K McLaughlin:** It was a third-party intervener in the Patmaliece case in the UK Supreme Court that I mentioned earlier. It represents clients at the European Court of Human Rights in Strasbourg and the Court of Justice of the EU in Luxembourg.

**The Chairperson:** OK. I am nearly sorry I asked. *[Laughter.]*

**Mr Yu:** It has real expertise in the field. It is one of our key partners and that is why we invited it to give us expert evidence.

**The Chairperson:** I am really convinced about it now.

The advice in its paper is very definite about everything. Most of the presentations that we have had so far have are pretty much in terms of "maybe" rather than "shall", "will" or "must". The AIRE Centre's opinions are very clearly stated. *[Inaudible due to mobile phone interference.]* I want to ask you about habitual residence. Is there a definition of habitual residence, first of all?

**Ms K McLaughlin:** No. As Mickey said earlier, there is no definition. The concept of habitual residence comes from a Court of Justice of the European Union judgement — the Swaddling judgement — which set out five factors. However, it is a very subjective test, which is to do mainly with your links to the country. As Mickey said, it is not just about other EEA nationals who are not from Britain or Ireland; it is also about people who have left the country. You might be talking about young migrants who go to Australia but come back after a number of years and are unable to fulfil the habitual residence condition.

**Mr Brady:** Just on that point —

**The Chairperson:** I have to go in a minute, Mickey.

**Mr Brady:** It is about habitual residence. It needs to be borne in mind that that was introduced by the Tories in 1995. Peter Lilley was, I think, the then Secretary of State for Work and Pensions. It was a xenophobic reaction, if you like, to keep foreign nationals out and prevent them getting benefits. However, based on my experience as an advice worker, I can say it has affected more local people who have gone away and come back. The definition is totally arbitrary; there is nothing specific about it.

**Mr Weir:** I appreciate what Mickey said. Legally, does the fact that it also affects local people who have gone away for a while mean that it is actually EU compliant because it means that it applies irrespective of your country of origin?

**Mr Brady:** No. That is the issue. That has not been tested. I am not saying that it does not affect huge numbers of other people, but in my experience, it affects local people who come back.

**Mr Weir:** Yes, Mickey, that is the exact point. If it affected only people from outside Britain and Ireland, I would have thought that it could be fairly easily struck down under EU law. However, it is hitting people who have gone away and have come back.

**Ms K McLaughlin:** In the Patmalniece case in 2011 the Supreme Court held that it is indirectly discriminatory. That is why there has been a referral to the Court of Justice of the EU.

**The Chairperson:** I have to go in a minute or two, so I just want to make one wee point. If this thing is so clearly discriminatory and has, apparently, been tested, why is it still in the UK Welfare Reform Bill?

**Ms K McLaughlin:** That is a question we would love to hear the answer to. The fact is that infringement proceedings are being taken against the UK. There are infringement proceedings in other areas of law as well. It is not uncommon that they continue to make them. We urge this Committee to ensure that the Northern Irish system does not infringe EU law.

**The Chairperson:** It is up to the Assembly, I suppose. I find it hard to think that we would depart from the wording of UK legislation, which was passed in the full knowledge of all that is contained in the paper. It would be a big thing for us. I appreciate that it is not just a matter of breaking parity or changing the wording. I cannot imagine why the UK Parliament would have passed legislation that is clearly against EU conventions and which is discriminatory. Why on earth would they do that? Somebody is wrong here.

**Ms Karen McLaughlin:** Are you questioning whether the provision is or is not discriminatory or whether it infringes or does not infringe EU law?

**The Chairperson:** I guess that that is the question. Is the AIRE Centre right or wrong?

**Ms K McLaughlin:** That is the evidence that we put forward to the Committee for Social Development; it is also the evidence from the UK Supreme Court in the Patmalniece judgement, which held that it was indirectly discriminatory. It is only in the past few years, with increased migration patterns, that this area of law has been tested to any degree. The question of why the UK Parliament would have included that provision is a fair one, but there are many challenges to domestic legislation that infringes EU law.

**The Chairperson:** Is our Bill significantly different from the regulations that applied under existing legislation?

**Ms K McLaughlin:** Schedule 1(7) gives the power to make regulations. That power explicitly states that EEA nationals would be treated differently. That is the provision that we have the most concern with because, as I have said, this is a piece of enabling legislation. The detail will be in the subsequent regulations, which have not yet been drafted in Northern Ireland; we can only go by what has happened in GB, since the enabling legislation is a mirror image. That is our concern: the power that would directly treat people differently.

**The Chairperson:** I have to excuse myself for a few minutes for a question.

*(The Deputy Chairperson [Mr Swann] in the Chair)*

**Mr Weir:** Just in relation to those two points, I mean, first of all we are talking about enabling legislation, I mean, it surely, ultimately, then would be the regulations potentially that would be an infringement on that. That would be where the problem would ultimately lie, with the regulations, if I am right.

**Ms K McLaughlin:** Yes. However, this gives the power —

**Mr Weir:** Giving the power to do something — it is actually the regulations that would be potentially — which is not what is before this Committee. The other thing —

**Ms K McLaughlin:** It is giving the power; therefore it should be got rid of.

**Mr Weir:** With respect on it, giving the power to do something and the actual infringement occurring by way of the regulations, the regulations are not in front of this Committee.

**Ms K McLaughlin:** Yes, but it would directly discriminate against —

**Mr Weir:** Well, maybe a degree of that, but what I was going to say on it was surely the point in terms of if we are looking around the issue of infringement proceedings, and obviously that is an issue that will have to be determined by Europe in terms of the incompatibility. Infringement proceedings would be against the UK as a whole, I presume, on that basis, in which case, ultimately, if, arising out of that, there was a direction effectively that the law needed to be changed, it would then have to be changed for the whole of the UK. So in one sense, you know, we should either be either fully in or fully out in that regard, you know. If it is not incompatible, then we are in the same position with an unchanged position with the rest of the UK; if it is incompatible, then fresh changes would have to be made across the UK. Is that not the case?

**Ms K McLaughlin:** Infringement proceedings are ongoing; I was not saying that there would be —

**Mr Weir:** I am not doubting that. What I am saying is that if the infringement proceedings basically then determined that the UK is in breach and has to make a change, that change would have to apply across all of the UK. Is that right?

**Ms K McLaughlin:** On the basis of the application of the habitual resident's condition and the right to reside test. However, those are separate from schedule 1(7), which we recommend be deleted.

**Mr Weir:** Well, with respect on it, that, presumably, is mirroring what is there in the rest of the UK, the paragraph 7.

**Ms K McLaughlin:** It is the exact same. However, it goes back to the power of the regulations: Northern Ireland will draw up its own regulations.

**Mr Weir:** Karen, without —

**The Deputy Chairperson:** Could you address your remarks through the Chair?

**Mr Weir:** Sorry, through the Chair, I was going to say without rehearsing the argument again about regulations and the power of it, if this is a direct lift from the legislation that is being applied across the rest of the UK, what I am saying is clearly if there is an argument over breach of EU law, and consequently infringement, the position surely then should be that either it is illegal across all of the UK or it is not illegal anywhere, in which case actually the action that should be taken is if it is deemed to be incompatible, an infringement, and the UK is then ordered to change that, it should then be changed across the whole of the UK rather than unilateral action being taken in Northern Ireland.

**Mr Yu:** We need to draw a distinction between the infringement proceeding on the habitual resident tests and schedule 1(7), as the former will impact upon the latter. The Welfare Reform Bill also relies upon certain tests. If they find that there is an infringement proceeding, which means that, because of this, the whole Bill —

**Mr Weir:** I am saying, Patrick, that surely the logic should apply throughout. If we have said that paragraph 7 is identical across the whole of the UK, either for all of the UK it is wrong or it is not wrong at all.

**Ms Karen McLaughlin:** Yes, but the Northern Ireland Administration has the power to make this legislation, so this is —

**The Deputy Chairperson:** That is the point. It is our look at the Northern Ireland Bill.

**Mr Weir:** I appreciate that. However, what I am saying is that if a change needs to be made on the basis of what is a European Bill, that change will have to be ordered across the UK, rather than across simply a part of it. I think it would be foolish, on any social security matter, to simply go it alone on the basis of a concern that something might be, as opposed to it being proved wrong in the courts.

**The Deputy Chairperson:** Let us move on slightly. May I ask whether the concern that was raised by the AIRE Centre was raised with the Westminster Committee with regard to welfare reform?

**Ms Karen McLaughlin:** We have not seen that concern, as such.

**Mr Yu:** We do not know whether they have put forward this view to Westminster. We only asked them to give us certain advice on a particular area, so there is *[Inaudible.]* part of the expert evidence to help in the process.

**Ms Karen McLaughlin:** We made that point to the Committee for Social Development a month ago.

**Mr F McCann:** I wanted to raise this point when Trevor was here because he more or less argued that every law is a good law; however, history has taught us that that is not the case. Mickey mentioned Peter Lilley's xenophobic approach to new laws; we are still living with the consequences of that. That is what much of this debate is about.

I cannot understand Peter's point: regardless of whether it is done in Westminster or here does not really matter —

**Mr Weir:** Through the Chair, the point that I was making on it is that the reasoning is that this should be struck down because it is incompatible with the EU position. This is an identical position throughout the UK. So, logically, from a court point of view, either it should not apply anywhere in the UK or alternatively it is compatible —

**Mr F McCann:** If it is a bad law —

**The Deputy Chairperson:** I am sorry, Fra, but let us not have an argument across the table.

**Mr Brady:** Sorry, through the Chair, I am not sure about Peter's rationale. What he seems to be saying is: why do we have a devolved Bill? Why is it a devolved matter? Surely, the issue that we are dealing with is the Bill as it applies here. I have been listening to a great deal of evidence for some time and it seems to me to be the whole issue. We are here to decide whether the Bill complies with human rights and equality; and that is because there are conditions that pertain here in the North that are totally different from those that pertain in the south-east, north-west or the north-east of England. That is our function here, whatever happens across the water. Look at what the AIRE Centre said: it is dealing with observations on the Welfare Reform Bill (Northern Ireland) and regulations pursuant to the Bill, not the Bill that has gone through the British Parliament.

**Mr Weir:** Through the Chair, I am making a separate point. *[Interruption.]*

**The Deputy Chairperson:** Members, please.

**Mr Brady:** Sorry.

**Mr Weir:** Through the Chair, if the argument is that a particular thing is in breach of EU law, if the law is identical, it is either in breach everywhere, or not in breach at all.

**Mr Brady:** Many points have been made about when the regulations come along. We are dealing with enabling legislation. What flows from that enabling legislation are the regulations, so if the enabling legislation is not right, the regulations will not be right. I am not sure whether you would agree with that. It is predicated upon the enabling legislation; otherwise there is no point in having that enabling legislation. We can only deal with the here and now; we cannot talk about what might be required by the EU in the future.

**The Deputy Chairperson:** Members, we will move on. Will we send this to the Assembly's Legal Services for their opinion?

**Mr Weir:** I assume that some of this will have been considered. It is my understanding that, next Tuesday, the Social Development Department is due to respond to the evidence that has been given. I think that the Department should be given the first opportunity to, at least, comment on the compatibility and legal compatibility of any of those things, and it may well be that it covers that.

**Mr Brady:** Departmental officials are advocates of the Bill; they are not giving us an objective view of the legislation. They are selling the Bill. The chief executive of the Social Security Agency is selling the Bill. They are administrators; with respect, they are not policy-makers.

**The Deputy Chairperson:** I accept that point.

**Mr Weir:** All I am suggesting is we get, in terms of the issues that are raised, because there may also be, today or later or Monday —

**The Deputy Chairperson:** All the issues that have been raised are being forwarded.

**Mr Weir:** My understanding is that they are due to come back to us next Tuesday. I am not precluding anything from being checked. If we need something to be checked legally, it can be checked at that stage. I am saying that it is appropriate that we at least allow the Department to respond first so that we get a complete picture of things, and, if we are not satisfied with things, there will be an option to take further legal advice.

**Mr Elliott:** The Department will respond to all the issues. We may or may not agree with what the Department says, but it is up to us to form a view. As Peter said, we can get legal guidance at a later stage if we find it necessary to do so. I assume that there may be a number of issues on which we will need legal guidance.

**The Deputy Chairperson:** Members have no more questions for the witnesses. Patrick and Karen, I thank you for your contributions. You started a bit of a debate. Thank you for your time.