



Submission to the Independent Review of Hate Crime Legislation in Northern Ireland

April 2020

Summary

- **CAJ welcomes the opportunity to respond to the Independent Review of Hate Crimes Legislation in NI, led by Judge Murrinan.** Tackling incitement to hatred, in accordance with international human rights standards, has been an area of priority focus for CAJ and the Equality Coalition. CAJ campaigned for an independent review into the legislation, which was agreed by former Justice Minister Claire Sugden in 2017. CAJ sits on the Core Expert Group of the independent review. This submission is in response to the consultation running from January to April 2020;
- CAJ advocates **strengthening the current legislation dealing with Incitement to hatred in line with international human rights standards.** Such revised legislation would cover hate expression on protected grounds that is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination *and* occurs in a public context. Reference to the existing safeguards balancing EHCR rights (including free expression) through the Human Rights Act, can be made in law, which along with the careful formulation of the offence would negate the need for additional defences (including the existing 'dwelling' defence);
- CAJ recognises the strengths and weaknesses, and benefits and risks associated with different hate crimes models. On balance **CAJ advocates for an aggravated offences model covering the full range of offences** (with the fall back to a 'basic' non aggravated offence). The formulation should (continue to) encompass circumstances when the offender demonstrates hostility on a protected ground around the time of the offence. In relation to the motivation test we would support the option in the consultation paper of expanding grounds to encompass hostility, bias, prejudice and contempt. This is instead of a 'because of' type test which would broaden scope to encompass vulnerability rather than hate;
- We would advocate for **specific safeguards in hate crimes legislation** to prevent the risks of 'equality being turned on its head' and provisions being used as a tool against marginalised protected groups. In particular, provisions setting out the purpose of the legislation as being to tackle incitement to hatred and crimes of a racist, sectarian, homophobic, and disablist nature (and additional protected grounds), and definitions of such terms (including sectarianism) in line with international standards would assist in preventing abuse of the provisions. Concurrent to such provision could be a programme of work to continue to tackle institutional racism and other forms of institutional prejudice in relation to the criminal justice system. Such work could in itself be key to the successful operation of hate crimes legislation;
- In relation to **adding protected grounds** (in addition to retaining existing grounds concerning racism and sectarianism, homophobia and disabilism), CAJ supports the proposed addition relating to gender and gender identity (through indicators of 'sex' and 'transgender identity') to tackle misogyny and transphobia. In addition we are also providing a separate submission in relation to an evidence base to add 'age' to hate crimes legislation, with particular reference to children and young persons;

- We recognise the growing problem of the use of use of ***hate speech and crime online***, and concur with the need to ensure offences related incitement, intimidation and harassment on a protected ground are formulated in a manner that effectively captures online usage. In addition, we also recognise the importance of powers to remove hate expression and other material online constituting a hate crime given the continued harm it causes. Whilst recognising the non-devolved nature of legislative powers we support reform to ensure duties on internet companies to take reasonable steps to remove such material, including the potential for NI-specific provisions;
- Equally, alongside the issue of online abuse, we concur with the need to **tackle hate expression physically from public space**, as detailed in the consultation document. We would propose this is taken forward by way of a statutory duty on public authorities to take *reasonable steps* to remove expression of a racist, sectarian, homophobic, transphobic, disablist and misogynist nature from public space. In general, this would encompass a duty on public authorities (including the Housing Executive and associations) to take steps to remove such hate expression from their own property, and specifically apply to Councils in the exercise of their existing powers to remove and obliterate graffiti, placards, notices etc and to the Department of Infrastructure in relation to its existing powers regarding roads and street furniture. Where necessary the PSNI can support other public authorities in discharge of these functions. This encompass such hate expression the content of which is *per se* racist (etc) and expression which is likely in light of all the circumstances to constitute hate expression on a protected ground;
- In relation to **broader related legislative provisions**, CAJ supports the proposal for **consolidated legislation** to cover all of the recommended areas within the remit of the Review. We also support the proposed **strengthening of legislation that focuses on public harassment and threats of violence** relating to protected grounds. We would urge careful formulation to prevent the risk of abuse of such provisions (e.g. to limit legitimate protests against corporations). We would also like to ensure the relevant harassment etc. offences cover duties under international standards including the (UN) Istanbul Convention (as regards public sexual harassment), UN CEDAW (including harassment accessing abortion services), and the Belfast/Good Friday Agreement (sectarian harassment); as well as the full implementation of related duties in Article 4 of UN ICERD (relating to racist organisations and activities) and ensure compliance with duties under the UNCRPD (disability related prejudice) and the Framework Convention for National Minorities (protective measures) in part through addressing ancillary reform of 'good relations' type duties on public authorities;

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About CAJ

The Committee on the Administration of Justice (CAJ) is an independent human rights NGO with cross community membership in Northern Ireland and beyond. It was established in 1981 and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its international human rights obligations.

CAJ has a track record of working on interventions to combat sectarianism, other forms of racism, homophobia, transphobia, misogyny and other manifestations of hate on protected grounds. Our work has always been grounded in international human rights standards, including the UN and Council of Europe treaties ratified by the UK that are legally binding on public authorities in Northern Ireland (NI).

Much of this work has been taken forward with the Equality Coalition, the network of over 90 equality NGOs and trade unions that is co-convened by CAJ and UNISON, and covers a full range of protected equality grounds relevant to the hate crimes review.

In recent years CAJ and the Equality Coalition have taken forward a considerable body of work focusing on 'incitement to hatred' in NI as a priority area. This included advocating for a review of the current 'incitement to hatred' legislation under the Public Order (NI) Order 1987. A commitment to review the legislation was then made in early 2017 by former Justice Minister Claire Sugden MLA. This led to the current Hate Crimes Review led by Judge Desmond Marrinan.

This submission is a response to the 2020 consultation by the Hate Crimes Review.¹

The work in recent years by CAJ and the Equality Coalition has informed our response to the review. This includes a number of the published products that have resulted from this work, including:

- McVeigh, Dr Robbie 'Sectarianism: The Key Facts' (Equality Coalition, 2020)²
- Equality Coalition 'Defining Public Duties to Tackle Incitement to Hatred whilst Respecting Freedom of Expression: Reviewing the Legal & Policy Framework – Report of Conference Held in October 2017' published 2019³
- McVeigh, Dr Robbie 'Incitement to Hatred in Northern Ireland – Research Report' (Equality Coalition, 2018)⁴
- CAJ Shadow Report to the UN Committee on the Elimination of all forms of Discrimination against Women (CEDAW) on the UK's 8th Periodic Report (2019)⁵
- CAJ Shadow Report to the UN Committee on the Elimination of All Forms of Racial Discrimination on the 21-23 Periodic Reports of the UK (2016)⁶

¹ <https://www.hatecrimereviewni.org.uk/>

² <https://caj.org.uk/2020/02/17/sectarianism-the-key-facts/>

³ <https://www.equalitycoalition.net/wp-content/uploads/2019/10/Countering-incitement-to-hatred-report-HIGH-RES.pdf>

⁴ <https://caj.org.uk/publications/reports/page/2/>

⁵ <https://caj.org.uk/2019/02/04/submission-to-the-un-committee-on-the-elimination-of-all-forms-of-discrimination-against-women-cedaw-on-the-uks-8th-periodic-report/>

⁶ <https://caj.org.uk/2016/07/01/s457-caj-uncerd-21-23-periodic-reports-uk/>

- CAJ Submission the Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities, UK 4th Report (2016)⁷
- McVeigh, Dr Robbie *'Expert Paper Sectarianism in Northern Ireland: Towards a Definition in Law'* (Equality Coalition, April 2014)⁸

CAJ is also working on a forthcoming report on the duties of NI public authorities to intervene to remove hate expression from public space. This has involved roundtables and engagement with public authorities.

The evidence from this, and the above materials has informed the content of this report and the conclusions reached by CAJ as to legislative reform of hate crimes legislation. These materials have been made available to Judge Marrinan and the Hate Crimes Review team who we are aware have worked diligently in consideration of a large volume of material. CAJ is also represented as a member of the Core Expert Group of the Review. This has also proved a vital forum for consideration of expert evidence.

The purpose of this submission is therefore largely to set out CAJ's position on questions posed by the consultation and the construction of legislation rather than to further provide an additional evidence base.

⁷ <https://caj.org.uk/2016/03/02/caj-to-fcnm-for-the-protection-of-national-minorities-on-the-4th-report-of-the-uk/>

⁸ www.equalitycoalition.net/wp-content/uploads/2012/11/Sectarianism-in-Northern-Ireland-Towards-a-definition-in-Law-April-2014-Unison-logo.pdf

1. Consolidated legislation, purpose and safeguards

Consolidation

- 1.1 We support the proposal put forward in the consultation document that provisions be consolidated in one piece of overarching hate crimes legislation.⁹
- 1.2 As set out in this response we would consider the essential elements of consolidated legislation to cover:
 - I. Overview clause, interpretation, protected grounds
 - II. Revised Incitement to Hatred provisions
 - III. Revised Aggravated Offences provisions
 - IV. Revised offences covering public harassment etc
 - V. Statutory duties to remove hate expression in public space
 - VI. Amendments to other relevant provisions
- 1.3 We would understand the benefits of consolidation as including providing clarity to the overarching purpose of the legislation; the simplification assisting its application in practice; the utility of unified shared concepts across the different provisions (to for example mitigate against the complex mismatch in legislation of terms relating to sectarianism alluded to in the consultation report.)

Purpose & Safeguards

- 1.4 We would recommend that the first part of consolidated legislation includes overview and general interpretation clauses, and that 'purpose' type clauses are included in each Part setting out the primary objectives of the offences.
- 1.5 We advocate for legislation that strengthens incitement to hatred provisions in line with international standards and on balance believe an aggravated offences hate crimes model is the best option.
- 1.6 We are however, conscious of the need to ensure provisions are tightly defined and include safeguards to prevent abuse. Learning at home and in other jurisdictions demonstrates the risk both that vaguely drafted provisions can be used to 'turn equality on its head', and perversely be deployed against the protected groups they are primarily designed to protect. Equally there is a risk the legislation, unless tightly defined, could be used for collateral purposes such as the suppression of legitimate protest.
- 1.7 Specifically we see merit in the addition of overview clauses that set out the general purpose of the Act and safeguards.¹⁰
- 1.8 Reference can be made in such clauses to the existing safeguards provided by virtue of the Human Rights Act 1998 (HRA). The HRA sets out existing protections grounded in the rights in the European Convention of Human Rights (ECHR) which include Article 10 on Freedom of Expression and the

⁹ Chapter 17, question 66.

¹⁰ For an example of such clauses see [sections 1 & 2 Investigatory Powers Act 2016](#).

concurrent limitations on free expression to protect the rights of others (such as under Article 8 on rights to private life).¹¹

- 1.9 In our view such a direct connection to the framework provided by the HRA (which already obliges all other legislation to be interpreted and given effect compatibly with ECHR rights)¹² removes the need for any further ‘free expression’ defences within the legislation. In particular, we would agree with the proposal to remove the recently added qualification to the existing local incitement to hatred legislation stating criticism of same-sex marriage in itself is not to be taken as incitement.¹³ We view this provision as both legally redundant but also counter to the purpose of hate crimes legislation insofar as it may be interpreted as a green light for specific homophobic discourse. We also see no need for an express freedom of expression defence for persons criticising particular religions or religious beliefs. Such a defence is contained in the English & Welsh legislation¹⁴ but not its Northern Ireland equivalent. We consider that the framework of reference to the HRA sufficiently covers this issue.
- 1.10 We would also agree with the proposal to remove the ‘private dwelling’ defence from incitement to hatred provisions, that among other matters is a relic of the pre-digital age. Our recommended formulation (that is taken from international standards) that incitement to hatred must occur ‘*in a public context*’ makes such a defence redundant.
- 1.11 The consultation document proposes a working definition of ‘hate crime’ should be framed as “*acts of violence, hostility and intimidation directed towards people because of their identity or perceived ‘difference’*”.
- 1.12 Whilst we see merit in this formulation as *part* of a basis for a definition, key academic definitions of hate crimes have emphasised the subordinate power differential inherent in hate crimes.¹⁵ We would therefore advocate for an

¹¹ It has been established that there are positive obligations under Article 8 ECHR to tackle racist expression (in the NI context this would include sectarian discourse (which is considered a form of racism by both the UN and Council of Europe anti-racism treaty bodies). In addition, the European Court has held that sexual orientation and gender identity are protected by Article 8. (see for example in relation to positive obligations for intervention to protect against actions that include being subjected to racist expression *Asku v Turkey* (app no 4149/04, 41029/04) 15 March 2012, and *Király and Dömötör v. Hungary*, 2017. In relation to sexual orientation and gender identity falling within the ambit of Article 8 see *Bensaid v UK* (Application no. 44599/98) [47]).

¹² <http://www.legislation.gov.uk/ukpga/1998/42/section/3>

¹³ [Public Order NI Order 1987, Art. 8\(2\)](#) inserted (13.1.2020) by The Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019 (S.I. 2019/1514), regs. 1(2), 142(b) (with regs. 6-9);

¹⁴ s29J in the Public Order Act 1986, as inserted by the Racial and Religious Hatred Act 2006 “Protection of freedom of expression: Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.”

¹⁵ See definition by Barbara Perry: “[Hate crime is] intended to reaffirm the precarious hierarchies that characterise a given social order. It attempts to re-create simultaneously the threatened (real or imagined) hegemony of the perpetrator’s group and the ‘appropriate’ subordinate identity of the victim’s group.” Perry, Barbara. (2001) *In the Name of Hate: Understanding Hate Crimes*. 1st Edition. New York: Routledge, cited by ENGENDER having been described by James Chalmers and Fiona Leverick as one of the most “commonly

explicit link with the definition to the protected grounds and their underpinning ideologies to mitigate against the risk of lay or reverse application.¹⁶

- 1.13 Provisions in the legislation could explicitly link both its purpose and the protected grounds to hate crime (and incitement to hatred) grounded in racism, sectarianism, misogyny, disablism, transphobia and homophobia. These terms can be defined in the legislation in accordance with international standards, increasing legal certainty.
- 1.14 This would mean, for example that protected grounds such as sexual orientation and gender could be explicitly linked respectively to the concepts of homophobia and misogyny, reducing the risk that the legislation is turned on its head in practice. This submission will elaborate on the practicalities of giving such terms expression in the legislation. This would also provide a basis for the explicit inclusion of a definition of sectarianism within the legislation to end the vague and ambiguous nature of this concept in law and its link to differential and limited protected grounds across the current legislative hate crimes framework.
- 1.15 The tight definition of key terms in relation to *incitement to hatred* offences such as *'hatred'* or *'hostility'* can also assist in providing legal certainty over the interpretation of such concepts. To assist determinations of the threshold for 'incitement to hatred' over protected freedom of expression the legislation can defer to contextual tests which have been codified in international standards, either directly or through providing for secondary provision, such as a Code of practice. At present, as alluded to in the consultation document, there is only very limited official policy guidance available to police and prosecutors in interpreting the incitement (stirring up hatred) offences.

Interpretation (definition of key terms)

- 1.16 An 'interpretation' clause is where definitions of key concepts used within legislation are set out. We can find definitions designed for legislation of many of the key concepts alluded to above in international standards.
- 1.17 For example the UN Rabat Plan of Action, which draws on Principle 12 of the Camden Principles on Freedom of Expression and Equality (Camden

quoted academic definitions" (Chalmers, James, and Fiona Leverick. (2017) A Comparative Analysis of Hate Crime Legislation. Scottish Government) in *ENGENDER - Making Women Safer in Scotland: The Case for A Standalone Misogyny Offence*, November 2019.

¹⁶ The above definition could be augmented and qualified to refer to such acts "on the basis of the protected grounds" with particular reference to acts underpinned by racism, sectarianism, homophobia, misogyny, transphobia and disablism (with the interpretation clause defining such concepts). For an example the UN Committee for the Elimination of Discrimination Against Women (CEDAW) has linked violence against women to the ideological context as follows: "*The Committee regards gender-based violence against women to be rooted in gender-related factors such as the ideology of men's entitlement and privilege over women, social norms regarding masculinity, the need to assert male control or power, enforce gender roles, or prevent, discourage or punish what is considered to be unacceptable female behaviour. These factors also contribute to the explicit or implicit social acceptance of gender-based violence against women, often still considered as a private matter, and to the widespread impunity for it.*" CEDAW general recommendation No. 35 (2017) on gender based violence against women (paragraph 19).

Principles) to provide definitions of terms such as hatred and hostility as follows (in relation to incitement to hatred offences):

The terms 'hatred' and 'hostility' refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group.¹⁷

- 1.18 The Council of Europe European Commission against Racism and Intolerance (ECRI) instrument on hate speech provides definitions of a number of key concepts.¹⁸ This includes concepts related to protected grounds, for example, gender, sexual orientation and gender identity:

“gender” shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men;

“sexual orientation” shall mean each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender;

“gender identity” shall mean each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modifications of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerism;¹⁹

- 1.19 A number of the ‘hate’ ideologies linked to protected grounds are also defined in the ECRI standard including homophobia, transphobia and racism:

“homophobia” shall mean prejudice against, hatred towards, or fear of homosexuality or of people who are identified or perceived as being bisexual, gay, lesbian or transgender;

“transphobia” shall mean prejudice against, hatred towards, or fear of transsexuality and transsexual or transgender people, based on the expression of their internal gender identity;

“racism” shall mean the belief that a ground such as “race²⁰”, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons;

- 1.20 Although the ECRI standards does not provide a definition of *misogyny* a definition of sexism is provided for in other Council of Europe instruments,

¹⁷ The Camden Principles on Freedom of Expression and Equality, Article XIX, April 2009.

¹⁸ ECRI General Policy Recommendation No. 15, explanatory memorandum, paragraph 7.

¹⁹ This latter definition of ‘gender identity’ in ECRI Recommendation 15 is drawn from the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

²⁰ The ECRI standards qualifies the use of the term ‘race’ as follows: “Since all human beings belong to the same species, ECRI rejects theories based on the existence of different “races”. However, in this Recommendation ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to “another race” are not excluded from the protection provided for by the legislation.”

albeit this comprehensive definition is long to be adapted for legislation.²¹ Engender in response to the Scottish hate crimes consultation by Lord Bracadale defined misogyny succinctly as “*systems or actions that deliberately subordinate women and reflect the actor’s understanding that women are not their equals.*”²²

Sectarianism

- 1.21 The primary treaty bodies dealing with anti-racism at United Nations and Council of Europe level (to which the UK is a party) have both stated that sectarianism in Northern Ireland should be treated as a specific form of racism.²³ This has also been advocated by the NI Human Rights Commission who have also stated that “*This does not mean that sectarianism should not*

²¹ Recommendation CM/Rec(2019)1 ‘Preventing and Combating Sexism’ adopted by the Committee of Ministers of the Council of Europe 27 March 2019: Appendix to Recommendation: “For the purpose of this Recommendation, sexism is: *Any act, gesture, visual representation, spoken or written words, practice or behaviour based upon the idea that a person or a group of persons is inferior because of their sex, which occurs in the public or private sphere, whether online or offline, with the purpose or effect of:*

- i. violating the inherent dignity or rights of a person or a group of persons; or*
- ii. resulting in physical, sexual, psychological or socio-economic harm or suffering to a person or a group of persons; or*
- iii. creating an intimidating, hostile, degrading, humiliating or offensive environment; or*
- iv. constituting a barrier to the autonomy and full realisation of human rights by a person or a group of persons; or*
- v. maintaining and reinforcing gender stereotypes.*

‘Gender Stereotypes’ are further defined in reference to the Council of Europe Gender Equality Strategy 2018-2023, Strategic objective 1 as: “*Gender stereotypes are preconceived social and cultural patterns or ideas whereby women and men are assigned characteristics and roles determined and limited by their sex. Gender stereotyping presents a serious obstacle to the achievement of real gender equality and feeds into gender discrimination. Such stereotyping can limit the development of the natural talents and abilities of girls and boys, women and men, their educational and professional preferences and experiences, as well as life opportunities in general.*”

²² Engender. (2018) Additional Submission by Engender to the Independent Review of Hate Crime. Engender.

²³ In 2011 the UN Committee on the Elimination of all Forms of Racial Discrimination made clear that “*Sectarian discrimination in Northern Ireland [...] attract[s] the provisions of ICERD in the context of “intersectionality” between religion and racial discrimination*” (paragraph 1(e) UN Doc CERD/C/GBR/18-20, List of themes on the UK). Later in the same year the Council of Europe Advisory Committee on the Framework Convention for National Minorities directly addressed the approach in the predecessor draft strategy to *Together* raising concerns that the Committee “*finds the approach in the CSI Strategy to treat sectarianism as a distinct issue rather than as a form of racism problematic, as it allows sectarianism to fall outside the scope of accepted anti-discrimination and human rights protection standards*”. *Third Opinion on the United Kingdom adopted on 30 June 2011 ACFC/OP/III(2011)006*, paragraph 126. The UN Committee on the Elimination of all Forms of Racial Discrimination stated its position following representations from the Northern Ireland Human Rights Commission. The Commission had raised concerns that “*policy presenting sectarianism as a concept entirely separate from racism problematically locates the phenomenon outside the well-developed discourse of commitments, analysis and practice reflected in international human rights law*” and hence was not harnessing this framework to tackle sectarianism. The Commission elaborated “*This risks non-human rights compliant approaches, and non-application of the well-developed normative tools to challenge prejudice, promote tolerance and tackle discrimination found in international standards. In particular, it seriously limits the application of ICERD to Northern Ireland, and therefore obligations on the state to tackle sectarianism along with other forms of racism.*” Northern Ireland Human Rights Commission, ‘Parallel Report on the 18th and 19th Periodic Reports of the United Kingdom under the International Convention on the Elimination of All Forms of Racial Discrimination’ (ICERD), paras 17-23.

continue to be individually named and singled out just as other particular forms of racism are, for example, anti-Semitism or Islamophobia” ²⁴

- 1.22 A definition of sectarianism can therefore be defined as a specific form of racism in Northern Ireland drawing on the above ECRI definition of racism, with nearly all the same listed grounds (except colour) being relevant namely: ‘race’, language, religion, nationality or national or ethnic origin.²⁵ Such grounds are largely already covered in the current incitement to hatred legislation which covers: *religious belief, colour, race, nationality (including citizenship) or ethnic or national origins*. The only missing indicator from the ECRI definition is that of ‘language’ as an ethnic indicator, we consider the addition of language to be necessary in NI for the reasons set out in the consultation document.²⁶
- 1.23 Whilst the category of ‘political opinion’ is used in relation to sectarianism in anti-discrimination legislation we concur with the approach to date that this is not appropriate for incitement to hatred and hate crimes legislation capturing expressive behaviour, as it risks criminalising protected political freedom of expression. There have already been examples here whereby criminal proceedings for stirring hatred up offences have been wrongly considered in relation to expression critical of NI political parties or their policies.²⁷
- 1.24 As alluded to in the consultation document NI’s first ‘hate crimes’ type legislation – the Prevention of Incitement to Hatred Act (Northern Ireland) 1970 - was explicitly introduced to deal with sectarian incitement to hatred (and also covered other forms of racism). We consider the approach in the Criminal Justice NI No 2 Order 2004 of only considering sectarian aggravation in relation to the grounds of ‘religious group’ as clearly too narrow an indicator to fully cover sectarianism.
- 1.25 The commitment to defining sectarianism in law set out in the TEO T:BUC strategy remains outstanding and can be taken forward in consolidated hate crimes legislation. The T:BUC strategy itself alludes to sectarianism as *“threatening, abusive or insulting behaviour or attitudes towards a person by*

²⁴ NI Human Rights Commission ‘*Parallel Report to the Advisory Committee on the Third Monitoring Report of the United Kingdom on the Framework Convention on National Minorities*, February 2011 paragraph 59.

²⁵ CAJ and the Equality Coalition have previously advocated that Sectarianism be defined in law as a specific form of racism, drawing on the ECRI definition. The Institute of Conflict Research (ICR) has also provided the following definition of Sectarianism, that defines the concept in reference to a specific form of racism: *“Sectarianism should be considered as a form of racism specific to the Irish context. Sectarianism is the diversity of prejudicial and discriminatory attitudes, behaviours and practices between members of the two majority communities in and about Northern Ireland, who may be defined as Catholic or Protestant; Irish or British;”*

²⁶ Consultation document, paragraph 13.18.

²⁷ This includes the contention that burning of a political party poster in itself constitutes incitement to hatred on a protected ground. An example relates to a LGBT rights protestor at the 2017 Belfast Pride Parade holding a “F*ck the DUP” placard, with the PSNI on the basis of complaints subsequently initiating criminal proceedings and questioning under caution the woman holding the placard. This included investigation under the ‘stirring up hatred’ provisions in the 1987 Order despite the incident clearly not relating to any of the protected grounds listed in the legislation; the PPS rightly consequently decided not to prosecute, citing a failure to meet the evidential test for an incitement to hatred offence “because the message was not directed towards a group of persons defined by religious belief, disability, race, sexual orientation, colour, nationality or ethnicity.” See <http://www.irishlegal.com/11011/woman-will-not-prosecuted-f-dup-placard/>.

reason of that person's religious belief or political opinion; or to an individual as a member of such a group."²⁸ This is not a definition *per se* of sectarianism but rather a reference to a limited interpersonal manifestation of sectarianism, that appears to have been copied and adapted from provisions specifically to cover sectarian chanting in what became the Justice NI Act 2011. It is too narrow and has limited protected grounds to cover manifestations of sectarianism in hate crimes legislation.

- 1.26 The use of the above indicators also distinguishes the concept of 'sectarianism' (i.e. a specific form of racism found in NI and other parts of the world) from the other meaning of sectarianism in law (in reference to political or other, e.g. trade union, factionalism.)²⁹
- 1.27 Our recommendation therefore is that Sectarianism is defined within the interpretation clause of consolidated legislation as a specific form of racism in NI, drawing on the relevant protected grounds in the Council of Europe standard.

Intersectionality

- 1.28 We would consider it essential that the legislation deals with intersectional incitement to hatred and aggravated hate offences. This could be dealt with in legislation by provisions making clear capture when the offence is committed on 'one or more' of the protected grounds.³⁰ This would ensure capture of for example, of a harassment offence that is both racist and homophobic, without a bizarre choice having to be made to go with one of the grounds, or a situation whereby a threshold is only met because of the combination of the two protected grounds.

Post legislative scrutiny and Implementation

- 1.29 We would also support provisions obliging periodic *post legislative scrutiny* of the effectiveness of the legislation after set periods of a number of years by a competent independent body, such as the Criminal Justice Inspection NI. A link should also be made to the independent human rights advisor function of the Policing Board.
- 1.30 We are conscious that the criminal law alone is one element in tackling the ideological underpinning of hate offences. Other public authorities have key roles, including but not limited to the education system, in combating hate expression and related matters.
- 1.31 We are also conscious of the need to combat institutional prejudice across the protected grounds from within the criminal justice system, both in general but also to make the application of consolidated hate crimes legislation effective by decision makers. Whilst part of this work may be outside the scope of legislation, we would urge consideration is given to a duty under the legislation for the Department of Justice to issue a Code of Practice, drawing

²⁸ The Executive Office '*Together: Building a United Community Strategy*', published on 23 May 2013.

²⁹ For an example of the second type of usage see Article 18 of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1992.

³⁰ A potential legislative model for doing so is found in the prospective provisions on dual characteristics in [section 14 of the \(GB\) Equality Act 2010](#), with reference to discrimination across protected grounds.

on international best practice that, among other matters, sets out guidance and provisions for training on such matters.

2. Addition of Protected Grounds

Context of addition of protected grounds

- 2.1 Both the existing NI Incitement to Hatred offences (Public Order NI Order 1987) and aggravated sentences legislation (Criminal Justice NI no2 Order 2004) explicitly cover protected grounds that capture racist, sectarian, homophobic and disablist offences. In practice, the PSNI also records transphobic hate incidents.
- 2.2 The Terms of Reference for the Hate Crimes Review specially asks the review to consider whether gender and other characteristics should be added.
- 2.3 We concur with the view that new grounds should not be added on a hypothetical basis but where there is both support in international standards and an existing evidence base in relation to the harms in a particular category. This is not least to ensure the addition of new grounds meet the ECHR test of constituting a pressing social need.³¹
- 2.4 As referenced later we consider the protected characteristics in relation to aggravated offences motivated by *hatred* etc. against a particular group, rather offences committed due to the actual or perceived *vulnerability* of a particular group (a 'because of' type test.)

Present indicators: homophobia and disablism

- 2.5 At present indicators covering offences relating to homophobia and disablism are fairly straightforward covered by the protected grounds of sexual orientation and disability respectively.

Present indicators: racism and sectarianism

- 2.6 At present the following indicators are used in relation to the 'stirring up hatred' offence that cover indicators of racism and sectarianism in NI: "*religious belief, colour, race, nationality (including citizenship) or ethnic or national origins*". As alluded to in an earlier section these indicators match international standards, save that 'language' should also be added. All of the indicators, except 'colour', are relevant to sectarianism and all of the indicators (including religious belief) are relevant to other forms of racism.
- 2.7 The present distinction between a restricted concept of racial group and religious group (aimed at racism and sectarianism respectively) in the NI aggravated sentences legislation is restrictive and problematic at a number of levels. It inappropriately limits indicators of sectarianism to 'religious group' rather than other relevant indicators such as nationality. It also creates ambiguity regarding the inclusion of other forms of racism (such as those targeted at Jews, Sikhs and Muslims) where religion is an ethnic indicator. We therefore advocate new legislation adopts "*religious belief, colour, race, nationality (including citizenship) or ethnic or national origins, or language*" as the relevant indicators.

³¹ For criminal offences which involve some form of 'expression' (words or behaviour in incitement to hatred type-offences, but also aggravated offences on matters such as harassment), will fall within the ambit of freedom of expression under ECHR Article 10(1) and hence restrictions (either permissive or duties to restrict) will require justification under Article 10(2). This brings in the proportionality test including the grounds of being a necessary restriction in a democratic society responding to a 'pressing social need'.

Present indicators: transphobia

- 2.8 The PSNI presently records transphobic hate crimes and incidents. In doing so the PSNI is presumably reliant on the existing protected ground of 'sexual orientation'. Whilst this is not technically correct as 'gender identity' and 'sexual orientation' are separate categories in international standards, perpetrators of transphobic abuse rarely make a distinction. There is a close relationship, and often perpetrator confusion, between homophobic and transphobic abuse.
- 2.9 Whilst recognising the initiative from the PSNI to seek to combat transphobic hate the present legislative situation is unsatisfactory and subject to challenge by a perpetrator that transphobic abuse cannot be read into the existing legislation. We would therefore suggest that the indicator of *transgender identity* is added to the list of indicators.
- 2.10 We note the category of transgender identity is already used in legislation in Scotland and also England and Wales. The definition in England (from 2003) is limited and dated. The more recent definition in Scotland (2009) is broader (and includes intersex).³² We would urge the concept of transgender identity in NI legislation is updated and defined with reference to international standards in relation to gender identity and transphobia.

Additional Indicator: misogyny

- 2.11 We consider there is a considerable evidence base of the widespread occurrence of gender-based hate expression against women. This includes incitement to hatred and other crimes based on hatred of women as a group. This includes the alarming amount of online material. Evidence of this is included in the consultation document and our own aforementioned reports to this end.
- 2.12 There is a pressing social need to deal with incitement to hatred and hate crimes based on hatred against women. We therefore support the addition of gender as a protected category, with an explicit interpretive link to misogyny. The relevant protected category in present anti-discrimination law to do this is 'sex'.
- 2.13 We also consider it is important to ensure related offences can effectively deal with specific issues of misogynistic conduct that can reach a criminal threshold. This could be dealt with in part by amended offences on harassment and other provisions that can fall to be aggravated offences. Further recommendations on this, drawing on instruments such as CEDAW and the Council of Europe Istanbul Convention are alluded to in section 4.

Additional groups: age

- 2.14 The consultation document considers the question of the addition of 'age' as a protected ground with reference both to older persons and also children & young persons. We would consider 'age' should be added as a protected ground in

³² The consultation document sets out (paragraph 8.33-4): ... in Scotland, the term 'Transgender identity' is defined in Section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009as: (a) Transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c.7), changed gender; or (b) Any other gender identity that is not standard male or female gender identity; ... England and Wales utilises a dated and, arguably, equally problematic definition of transgender in Section 146 of the CJA 2003 where the term is defined as including: "References to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment".

reference to either or both where there is an evidence base relating to a pressing social need to do so. This would be evidence relating to criminal offences being committed motivated by *hatred* etc. against older persons and/or children & young persons as a group, and also whether there is an evidence base of hate expression consisting of incitement to hatred against either group.

- 2.15 We note the arguments provided in the consultation document for the inclusion of older persons as a protected category and also the conflicting arguments set out there and elsewhere that such inclusion would be unhelpful or even counterproductive. We would urge this matter is dealt with on the basis of as to whether there is a substantive evidence base of crimes (or incitement) based on *hatred* of older persons as a group, that emerges through the consultation exercise and broader work of the review. Discussions on protecting older persons in particular in our experience have tended to conflate and confuse hatred and vulnerability.
- 2.16 In relation to an evidence base for the inclusion of age with particular reference to children and young persons, CAJ with the Equality Coalition facilitated a meeting of the children and young persons sector to discuss the issue with Judge Marrinan and the review team. A tailored submission in relation to an evidence base for the inclusion of age with reference to incitement/offences motivated by hatred etc. of children and young persons will be provided separately to the review.

3. Formulation of ‘incitement to hatred’ provisions

- 3.1 As detailed below, legislation outlawing incitement to hatred is required by international human rights standards. As detailed in the consultation paper NI’s first legislation to this end – the Prevention of Incitement to Hatred Act – dates back to 1970. The legislation was reformed in 1981, removing the restrictive requirement to prove intent, and again in 1987.
- 3.2 As evidenced in the consultation paper there appears to be wide consensus that the operation of the present legislation is unsatisfactory for both protected groups and the criminal justice system. We support therefore revising and strengthening the legislation in line with international standards.

Proposed formulation of revised Incitement of Hatred Offence

- 3.3 We would advocate that the offence is reformed and modelled on the requirements of international human rights standards, in particular the regional Council of Europe standard, as set out in the ECRI Hate Speech standard.³³
- 3.4 As such we would suggest the offence is constructed as follows:
- A dedicated Part of the legislation covers a revised offence known as the “Incitement to Hatred Offence”;³⁴
 - A provision should be included to explain that the particular purpose of the Incitement to Hatred Offence is to sanction hate expression that is racist, sectarian, homophobic, transphobic, disablist or misogynist that is of a more serious character to constitute incitement to hatred on a protected ground;
 - The formulation of the offence shall capture expression that is:
 - Hate expression on a protected ground; and
 - it is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination, and
 - the use concerned occurs in a public context.”
 - In accordance with the ECRI standard, Hate Expression shall mean “the use of one or more particular forms of expression – namely, the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well any harassment, insult, negative stereotyping, stigmatization or threat of such person or persons and any justification of all these forms of expression based on a protected ground.”
 - Protected grounds for the incitement to hatred offence should cover: religious belief, colour, race, nationality (including citizenship), ethnic or national origins, language, sexual orientation, disability, sex and transgender identity.³⁵

³³ ECRI General Policy Recommendation No. 15 on Combating Hate Speech Adopted on 8 December 2015, CRI(2016)15.

³⁴ For an example of naming of an offence, see the recent provisions on the “Domestic Abuse Offence” in c1(4) of the [Domestic Abuse and Family Proceedings Bill \(as introduced\) into the Northern Ireland Assembly](#).

³⁵ See discussion also subsequently in this submission on the category of age.

- For the avoidance of ambiguity and to build on existing practice, a provision should make clear that the Incitement to Hatred offence encompasses the matters covered by the existing legislation, including the various forms of conduct listed (words or behaviour, publication etc.); that the offence includes conduct that ‘stirs up hatred’ or ‘arouses fear’; and that the offence encompasses conduct either when committed with intent to incite hatred or that having regard to all the circumstances hatred will likely be incited.
- A provision should set out that the Incitement to Hatred offence should be interpreted compatibly with Convention Rights, and in proceedings interpreting the Offence due regard be paid to ascertaining whether the threshold of the offence rises to international human rights standards³⁶ including in particular the ‘threshold tests’ provided for under:
 - ECRI General Recommendation 15 (on combatting hate speech) paragraph 16, explanatory memorandum.
 - CERD/C/GC/35 General Recommendation 35, (Combating racist hate speech), paragraph 15.
- Sets out the criminal sanction for the Offence, and does not require consent of the DPP (given the existing evidential and public interest tests for prosecution are already codified);

3.5 Consideration should also be given, in this part or in the broader bill, to the addition of specific related offences. This includes capturing all of the duties under Article 4 ICERD. These duties include the sanctioning of organisations that incite racial discrimination and the participation of individuals in such organisations. In Northern Ireland such a provision would cover sectarian as well as other forms of racism. As set out in the consultation document (at para 11.8) the NIHRC has already found the legislative gap problematic to this effect. (The requirements of ICERD Article 4 and other UN standards are set out below). There are also relevant offences under the EU Council Framework Decision (2008/913/JHA) relating to publicly condoning, denying or grossly trivialising crimes of genocide, war crimes and crimes against humanity.³⁷

³⁶ For an example of legislation that defers to parts of international treaty provisions see the references to CEDAW in the [NI \(Executive Formation etc\) Act 2019](#), or the references to the Belfast (Good Friday) Agreement, in the Northern Ireland Act 1998 ([e.g. s43\(c\)](#)).

³⁷ Council Framework Decision (2008/913/JHA) of 28 November 2008, Article 1:

Offences concerning racism and xenophobia

1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:

- (a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;
- (b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;
- (c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;

Aiding or incitement to discrimination by public authorities

- 3.6 There are also specific provisions in Article 4 of ICERD that State Parties “*Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.*” The “*provision of any assistance to racist activities, including the financing thereof*” is also to be prohibited.
- 3.7 At present respective Northern Ireland legislative provision in this area only covers sectarianism and does not extend to other forms of racism or aiding or inciting discrimination on other protected grounds.
- 3.8 Section 76 of the Northern Ireland Act 1998 makes it unlawful, *inter alia*, for a public authority to aid or incite another person to discriminate. Section 76(1) provides:
- It shall be unlawful for a public authority carrying out functions relating to Northern Ireland to discriminate, or to aid or incite another person to discriminate, against a person or class of person on the ground of religious belief or political opinion.*
- 3.9 Section 76 then provides that unlawful acts contravening this provision are actionable in court, regarding damages, injunctions etc. The provision does not apply to any act that is already unlawful or otherwise exempted by virtue of anti-discrimination law.³⁸
- 3.10 We advocate consideration that the Section 76 provision making it unlawful for a public authority to ‘aid or incite’ another person to discriminate is extended across the protected grounds in anti-discrimination law, and also covers the promotion of discrimination.
- 3.11 This is a civil rather than a criminal provision but is ancillary to the broader purpose of outlawing incitement to discrimination, and assists with compliance with ICERD and other international obligations.
- 3.12 The next section elaborates on the scope of treaty based obligations in some detail, including the question of the ‘threshold test’ between incitement to hatred and protected free expression.

(d)publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

2. For the purpose of paragraph 1, Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.

3. For the purpose of paragraph 1, the reference to religion is intended to cover, at least, conduct which is a pretext for directing acts against a group of persons or a member of such a group defined by reference to race, colour, descent, or national or ethnic origin.

4. Any Member State may, on adoption of this Framework Decision or later, make a statement that it will make punishable the act of denying or grossly trivialising the crimes referred to in paragraph 1(c) and/or (d) only if the crimes referred to in these paragraphs have been established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only.

³⁸ Specifically in relation to sectarianism the Fair Employment and Treatment NI Order 1998 (s76(4)).

International human rights obligations

3.13 The Council of Europe European Commission against Racism and Intolerance (ECRI) defines “hate speech”, for the purposes of its own international standard as:

... the use of one or more particular forms of expression – namely, the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well any harassment, insult, negative stereotyping, stigmatization or threat of such person or persons and any justification of all these forms of expression – that is based on a non-exhaustive list of personal characteristics or status that includes “race”, colour, language, religion or belief, nationality or national or ethnic origin, as well as descent, age, disability, sex, gender, gender identity and sexual orientation.³⁹

3.14 It is this ECRI ‘Hate Speech’ standard, as well as UN standards, that the above proposed formulation for an incitement to hatred offence draws on.

3.15 The concept of hate speech itself is not restricted to verbal speech but encompasses broader expression, including written expression online expression, public displays, and conduct e.g. gestures.⁴⁰ *Incitement to hatred* is a subset of hate speech, the distinction is important as it is hate speech that constitutes incitement that is to be subject to criminal responsibility. The ECRI standard states:

The relevant factors for a particular use of hate speech to reach the threshold for criminal responsibility are where such use both amounts to its more serious character - namely, it is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination - and the use concerned occurs in a public context.⁴¹

3.16 UN standards also reiterate this distinction, which is drawn upon in our suggested formulation of incitement to hatred offences. It does not mean that other forms of hate speech cannot or should not be subject to sanction (such as civil or administrative penalty or restrictions on display), but that is distinguished from criminal sanctions. The UN Rabat Plan of Action states:

Under international human rights standards, which are to guide legislation at the national level, expression labelled as “hate speech” can be restricted... States are also obliged to “prohibit” expression that amounts to “incitement” to discrimination, hostility or violence...⁴²

³⁹ ECRI General Policy Recommendation No. 15 on Combating Hate Speech Adopted on 8 December 2015, CRI(2016)15 paragraph 9.

⁴⁰ As above paragraph 11 reads: “Expression” is understood in the Recommendation to cover speech and publications in any form, including through the use of electronic media, as well as their dissemination and storage. Hate speech can take the form of written or spoken words, or other forms such as pictures, signs, symbols, paintings, music, plays or videos. It also embraces the use of particular conduct, such as gestures, to communicate an idea, message or opinion.

⁴¹ As above, explanatory note paragraph 173.

⁴² *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.* [Rabat Plan of Action]Conclusions and recommendations

- 3.17 A similar distinction is made by the UN anti-racism committee (ICERD).⁴³ The UN Rabat Plan of Action (on combatting incitement to hatred) sets out general principles that a 'clear distinction' should be made between:
- 1) Expression that constitutes a criminal offence;
 - 2) Expression that is not criminally punishable but may justify a civil suit or administrative sanctions;
 - 3) Expression that does not give rise to criminal, civil or administrative sanctions but still raises a concern in terms of tolerance, civility and respect for the rights of others.⁴⁴
- 3.18 For an example of what is meant by restrictions on display: a public transport company may refuse to carry adverts on its busses that are homophobic (e.g. adverts stating that gay persons can be 'cured'.) This restriction is accepted even if such expression is deemed to fall *below* the criminal threshold of *incitement to hatred*. This scenario occurred where Transport for London banned such advertisements further to its *good relations* duty to combat homophobic discourse. Objections to the ban on the basis of restricting religious free expression were dismissed by the courts.⁴⁵ Planning law or graffiti removal powers could also restrict, or provide for the removal of displays that constitute general hate expression, that fall short of incitement to hatred.⁴⁶ These issues are dealt with in last section of this submission.
- 3.19 Robust definitions of key terms are recommended by the UN Rabat Plan of Action, and hence are part of our recommendations for framing legislation to ensure both legal certainty and that the offence is used for its intended purpose. The Rabat Plan of Action itself draws on the Camden Principles to provide definitions of key terms.⁴⁷

emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012, paragraph 14.

⁴³ CERD/C/GC/35 General Recommendation 35, (Combating racist hate speech), paragraph 12. "The Committee recommends that the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity."

⁴⁴ Rabat Plan of Action, paragraph 19, recommendations.

⁴⁵ Core Issues Trust v Transport for London.

⁴⁶ For example, domestically, the powers under the Clean Neighbourhoods and Environment Act (Northern Ireland) 2011, in relation to graffiti and fly posting. This includes qualified powers to issue 'Defacement Removal Notices' (DNR) when a council is satisfied that a "a relevant surface in the district of the council has been defaced by graffiti or any poster or placard" (which does not have planning permission) AND that the "defacement is detrimental to the amenity of that district or is offensive" the concept of 'offensive' is defined in Departmental Guidance as directly relating to hate expression: 'Offensive' applies where graffiti is (or is perceived to be) racially offensive, hostile to a religious group, sectarian in nature, sexually offensive, homophobic, depicts a sexual or violent act or is defamatory. Offensive graffiti should be prioritised for speedy removal...(Department for Environment "Guidance for District Councils on Sections 31 to 35 of the Clean Neighbourhoods and Environment Act (Northern Ireland) 2011, Paragraph 2.6)

⁴⁷ The Camden Principles on Freedom of Expression and Equality, Article XIX, April 2009. *Principle 12: Incitement to hatred*

3.20 The Rabat Plan of Action is centred around the duties under Article 20 of the UN International Covenant on Civil and Political Rights (ICCPR) that “*Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*”. The term *incitement to hatred* is used as short hand to encompass this duty in the Rabat document. The ICCPR offence which is interpreted as requiring intent can be seen as a minimum floor, as other standards to which the UK is a party go further, including ICERD. The current law in Northern Ireland at present does not require proof of intent, rather an offence is committed if there is either intent or “having regard to all the circumstances hatred is likely to be stirred up” etc. and we advocate this formulation is maintained.⁴⁸

3.21 The UN ICERD Committee further elaborates on the meaning of *incitement* in the context of incitement to hatred on racial grounds:

Incitement characteristically seeks to influence others to engage in certain forms of conduct, including the commission of crime, through advocacy or threats. Incitement may be express or implied, through actions such as displays of racist symbols or distribution of materials as well as words. The notion of incitement as an inchoate crime does not require that the incitement has been acted upon, but in regulating the forms of incitement referred to in Article 4 [ICERD], States parties should take into account, as important elements in the incitement offences, in addition to the considerations outlined [...] above, the intention of the speaker, and the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question...⁴⁹

3.22 Incitement to hatred on protected grounds should not be confused with more generic *incitement* offences, for example legislation to prevent ‘incitement to violence’. Separate provisions outlawing incitement to violence are currently found in Northern Ireland in offences of encouraging or assisting crime under Part II of the Serious Crimes Act 2007, which repealed earlier common law offence of ‘incitement to commission of another offence’.⁵⁰

12.1. All States should adopt legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (hate speech). National legal systems should make it clear, either explicitly or through authoritative interpretation, that:

i. The terms ‘hatred’ and ‘hostility’ refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group.

ii. The term ‘advocacy’ is to be understood as requiring an intention to promote hatred publicly towards the target group.

iii. The term ‘incitement’ refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.

⁴⁸ See for example Article 9 of the Public Order (NI) Order 1987 on the “Use of words or behaviour or display of written material” which provides that:

9.—(1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—

(a) he intends thereby to stir up hatred or arouse fear; or

(b) having regard to all the circumstances hatred is likely to be stirred up or fear is likely to be aroused thereby.

⁴⁹ CERD/C/GC/35 General Recommendation 35, (Combating racist hate speech), paragraph 16 (citing also Human Rights Committee general comment No. 34, para. 35; Rabat Plan of Action, para. 22.)

⁵⁰ Serious Crime Act 2007, sections 44-49 (offences) and section 59 (abolition of common law offence).

- 3.23 Obligations to combat, and outlaw, ‘incitement to hatred’ are found in a number of binding and ‘soft law’ UN and Council of Europe instruments. As alluded to above Article 20 of the (UN) International Covenant on Civil and Political Rights (ICCPR), provides that: “*Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*”. Within Council of Europe human rights system Article 6(2) of the Framework Convention for the Protection of National Minorities provides that state parties will:
- ...undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.
- 3.24 The ECRI standard urges states to:
- ...take appropriate and effective action against the use, in a public context, of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it through the use of the criminal law provided that no other, less restrictive, measure would be effective and the right to freedom of expression and opinion is respected...
- 3.25 The ECRI standard also provides for the removal of all financial and other forms of support by public bodies from organisations engaged in hate speech (or who fail to sanction it by its members) with a provision to proscribe such organisations if they are engaged in incitement.⁵¹
- 3.26 There are a range of relevant duties under Article 4 of the UN International Convention on the Elimination of all Forms of Racial Discrimination (ICERD). Article 4 provides that “*States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form*”. It then provides that State parties like the UK “undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination” in a manner compliant with the broader human rights framework. Article 4 then includes the following specific provisions, that State Parties:
- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

⁵¹ ECRI General Policy Recommendation No. 15, paragraph 10 & 9.

3.27 The ICERD Committee has elaborated on the scope of duties under Article 4.⁵²

The 'threshold' question – incitement to hatred v protected free expression

- 3.28 Both protecting freedom of expression and prohibiting incitement to hatred have long been complementary aims of international human rights standards. The question that has been posed is how the boundary between the two is drawn i.e. the need to protect freedom of expression on the one hand and restrict or sanction hate expression on the other, including the question of criminal sanction for incitement to hatred.
- 3.29 As crude ideal types there has historically been on the one hand the United States of America model which gives greater primacy to free speech save when a very high 'clear and immediate danger' type threshold is met. On the other hand, there is the model which gives greater primacy to restricting expression where necessary to suppress racist ideology and expression, a model more favoured in those European states which faced occupation by the Nazis. The UK historically has more reflected the former model. This is illustrated by its lodging and maintenance of an 'interpretive declaration' to Article 4 of ICERD. However, this declaration does not prevent the UK, or any of its constituent parts legislating to strengthen their respective domestic legislation, it merely states that the UK feels that the provisions of ICERD do not *oblige* it to do so (although the UN ICERD Committee takes a different view that the provisions are of mandatory character).
- 3.30 The question of drawing the boundary between protected freedom of expression on the one hand and prohibiting advocacy of ethnic and religious hatred on the other has been debated internationally and locally for some time.
- 3.31 ECHR jurisprudence has also long made clear that free expression is protected when it '*shocks, offends or disturbs*'⁵³ or is capable of 'creating a feeling of uneasiness in groups of citizens or because some may perceive them as disrespectful.'⁵⁴ But it draws a distinction between this and expression which '*spreads, incites, promotes or justifies hatred based on intolerance*'⁵⁵ or matters such as '*the promotion of discrimination or ethnic division*'⁵⁶

⁵² The Committee has set out that State Parties "are required by its terms to adopt legislation to combat racist hate speech that falls within its scope" and recommends that "declare and effectively sanction as offences punishable by law" the following: (a) All dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means; (b) Incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin; (c) Threats or incitement to violence against persons or groups on the grounds in (b) above; (d) Expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination on the grounds in (b) above, when it clearly amounts to incitement to hatred or discrimination; (e) Participation in organizations and activities which promote and incite racial discrimination. The CERD Committee also recommends that "public denials or attempts to justify crimes of genocide and crimes against humanity, as defined by international law, should be declared as offences punishable by law, provided that they clearly constitute incitement to racial violence or hatred. The Committee also underlines that "the expression of opinions about historical facts" should not be prohibited or punished." CERD/C/GC/35 General Recommendation 35, (Combating racist hate speech), paragraph 13-14.

⁵³ *Handyside v UK* 1976[49]

⁵⁴ *Vajnai v. Hungary* (2008) [57].

⁵⁵ *Erbakan v Turkey* (1999)[57].

⁵⁶ *Vona v Hungary* (application no. 35943/10), (2013) [66]

- 3.32 ECHR Article 10 includes the ‘rights of others’ as one of its grounds for legitimate restriction. The rights of others includes other ECHR rights. It has been held under Article 8 of the ECHR (right to private and family life) that there is, under certain circumstances, a positive duty on the state to protect persons from racist expression⁵⁷, providing both permissive powers and duties on the state to intervene to protect the rights of others in a number of contexts. In one case in the context of anti-Roma protests organised by right-wing groups in predominantly Roma neighbourhoods, in which a woman and her child had been subject to racist abuse, the Court reiterated the positive obligations under Article 8, including circumstances where there are duties to protect an individual from the acts of another.⁵⁸
- 3.33 The ECHR case of *Vona v Hungary* also related to anti-Roma marches, in this instance by the far-right Magyar Gárda grouping. The European Court cited the domestic judgments which regarded Magyar Gárda as having “*created an anti-Roma atmosphere by verbal and visual demonstrations of power*” and held that public authorities are entitled to take restrictive measures “if the right to freedom of assembly is repeatedly exercised by way of intimidating marches involving large groups” and the measures are necessary to avert large-scale, coordinated intimidation related to the advocacy of racially motivated politics. The Court held, particularly when ethnic groups are singled out, the state can protect the right of targeted groups to live without intimidation. The Court emphasized that although there was no actual violence at the march, its paramilitary nature was problematic given as this meant the group’s discriminatory message was “accompanied by the physical presence of a threatening group of organized activists” and hence that it was capable of “conveying the message to those present that its organizers had the intention and the ability to have recourse to a paramilitary organization to achieve their aims, whatever they may be.” The Court contextualized this threat by reference to the historic context of the group’s association with past racist violence, and held that paramilitary demonstrations, accompanied by racist discourse, “must have an intimidating effect on members of a racial minority.” The Court considered that the repeated organization of the rallies was capable of intimidating others and affecting their rights and it elaborated that this was “notably given the location of the parades” which had been held in proximity to Roma populations. *Vona* referenced a concept emphasized in the domestic courts that Roma residents were a ‘captive audience’ of the parades and, given their locations they “had not been in a position to avoid [their] extreme and exclusionary views”. Ultimately the court upheld that the decision of the domestic authorities to outlaw the group had not breached Article 11 ECHR.⁵⁹
- 3.34 The emerging jurisprudence therefore points to a manner in which relevant standards could be codified to protect the rights of others in such circumstances, without becoming a further mechanism for the undue restriction of legitimate protests and expression. This risk and important distinction is explicitly recognized by CERD who state that:

⁵⁷ *Aksu v. Turkey* [GC], application nos. 4149/04 and 41029/04, § 58, ECHR 2012.

⁵⁸ *R.B. V. Hungary* (no. 64602/12) 12 April 2016 [99]

⁵⁹ *Vona v Hungary* (application no. 35943/10), (2013)

The Committee observes with concern that broad or vague restrictions on freedom of speech have been used to the detriment of groups protected by the Convention. States parties should formulate restrictions on speech with sufficient precision, according to the standards in the Convention as elaborated in the present recommendation. The Committee stresses that measures to monitor and combat racist speech should not be used as a pretext to curtail expressions of protest at injustice, social discontent or opposition.⁶⁰

- 3.35 There have been considerable related international developments in recent years in codifying a threshold for intervention test for ‘incitement to hatred’.
- 3.36 This includes the test provided for within the UN Rabat Plan of Action. The ICERD Committee has issued General Recommendation 35, which also codifies a threshold test. The ECRI standard on combating hate speech, codifies in its explanatory notes a threshold test. This excludes matters such as ‘satire or objectively based news reporting and analysis’ from hate speech and provides a contextual test. The issue of a requirement of ‘intent’ to prove hate speech has been subject to considerable discussion and is provided for in the Rabat Plan of Action but not the ICERD or ECRI recommendation. The ECRI recommendation states that whilst ‘intent’ might be clearly present in some circumstances but may not always be easy to demonstrate – particularly when coded language is used, and sets out that the risks of relevant acts being incited depends on specific circumstances.
- 3.37 The ECRI standard sets out a number of key considerations, namely in the ECRI recommendation the need to consider:
- (a) the context in which the hate speech concerned is being used (notably whether or not there are already serious tensions within society to which this hate speech is linked);*
 - (b) the capacity of the person using the hate speech to exercise influence over others (such as by virtue of being a political, religious or community leaders);*
 - (c) the nature and strength of the language used (such as whether it is provocative and direct, involves the use of misinformation, negative stereotyping and stigmatisation or otherwise capable of inciting acts of violence, intimidation, hostility or discrimination);*
 - (d) the context of the specific remarks (whether or not they are an isolated occurrence or are reaffirmed several times and whether or not they can be regarded as being counter-balanced either through others made by the same speaker or by someone else, especially in the course of a debate);*
 - (e) the medium used (whether or not it is capable of immediately bringing about a response from the audience such as at a “live” event); and*
 - (f) the nature of the audience (whether or not this had the means and inclination or susceptibility to engage in acts of violence, intimidation, hostility or discrimination).*

⁶⁰ CERD/C/GC/35 General Recommendation 35, (Combating racist hate speech), paragraph 20.

- 3.38 A similar test is set out by the ICERD Committee, this relates to the qualification of forms of conduct as criminal offences and specifically to the qualification of dissemination and incitement as offences, for which the Committee considers that the following contextual factors should be taken into account:
- *The content and form of speech: whether the speech is provocative and direct, in what form it is constructed and disseminated, and the style in which it is delivered.*
 - *The economic, social and political climate prevalent at the time the speech was made and disseminated, including the existence of patterns of discrimination against ethnic and other groups, including indigenous peoples. Discourses which in one context are innocuous or neutral may take on a dangerous significance in another: in its indicators on genocide the Committee emphasized the relevance of locality in appraising the meaning and potential effects of racist hate speech.*
 - *The position or status of the speaker in society and the audience to which the speech is directed. The Committee consistently draws attention to the role of politicians and other public opinion-formers in contributing to the creation of a negative climate towards groups protected by the Convention, and has encouraged such persons and bodies to adopt positive approaches directed to the promotion of intercultural understanding and harmony. The Committee is aware of the special importance of freedom of speech in political matters and also that its exercise carries with it special duties and responsibilities.*
 - *The reach of the speech, including the nature of the audience and the means of transmission: whether the speech was disseminated through mainstream media or the Internet, and the frequency and extent of the communication, in particular when repetition suggests the existence of a deliberate strategy to engender hostility towards ethnic and racial groups.*
 - *The objectives of the speech: speech protecting or defending the human rights of individuals and groups should not be subject to criminal or other sanctions.⁶¹*
- 3.39 The CAJ recommendations for the reformulation of the ‘incitement to hatred’ offence are therefore grounded in the above international standards and our experience in this area in Northern Ireland.

⁶¹ CERD/C/GC/35 General Recommendation 35, (Combating racist hate speech), paragraph 15.

4 Formulation of Hate Crimes aggravated and related offences

4.1 The consultation document seeks views on a range of matters in relation to hate crimes offences including:

- Whether Northern Ireland should adopt hate crimes legislation based on an aggravated offences model rather than current provision dealing with enhanced sentencing;
- How a hate crimes model should be formulated in relation to the test that a crime had been committed on the basis of hostility on a protected ground;
- Whether a hate crimes model should cover a small number of particular offences, a broader range or all offences;
- Whether a series of related ancillary offences be introduced, such as provisions on harassment, that themselves could be aggravated 'hate crimes' offences.

Hate Crimes model for NI: aggravated offences or enhanced sentences

4.2 CAJ recognises the strengths and weaknesses, and benefits and risks associated with different hate crimes models. On balance, CAJ advocates for an aggravated offences model covering the full range of offences.

4.3 We agree this should be formulated in a manner to ensure that an alleged offence can still be convicted in lower or higher courts of the 'basic' offence if the aggravated offence cannot be proven.⁶²

4.4 We do not think an enhanced sentences model is required alongside an aggravated offences model.

4.5 This position is based on the current assessment, as summarised in the consultation document, in relation to the functioning of both systems. This pertains to the greater degree of effectiveness emerging regarding the aggravated offences model, as opposed to a model of aggravated sentences that has had very limited effect in Northern Ireland for around 15 years, and been beset with problems. Procedurally, the ability of the court to deal with the hostility aggravation as a substantive element of the proceedings rather than a post-trial judicial decision, and the deterrent effect of being convicted of an aggravated hate offence are also benefits.

4.6 We remain cognisant of the limitations and critiques of the hate crimes model and the risks of improper usage of 'equality being turned on its head' and hate crimes provisions being used as a tool against marginalised protected groups. To this end we would like to see the model implemented with specific safeguards, as set out in section 1. This encompasses the purpose of the provisions being clearly stated and linked to the protected grounds and their underpinning hate ideologies (racism etc.) and the clear definition of key terms in line with international standards.

⁶² For example if a 'racist assault' cannot be proven an offender could nevertheless be convicted of an 'assault' where proven. At present under the English and Welsh system a Crown Court (but not a Magistrates court) can return an alternative verdict of guilty of the non-aggravated form of the offence (see para 5.10 of the consultation document). The consultation document, at paragraph 7.8. indicates this should not be a particular difficulty in Northern Ireland.

Hate Crimes Model: formulation of motivation test

- 4.7 The current models (in NI and England and Wales) rely on a two limbed test. First, the offender could demonstrate towards the victim, in or around the time of the offence, hostility based on the protected ground (for example by using homophobic language during an assault). The second test is where the offence was *motivated* (wholly or partly) by *hostility* due to a protected ground. The term hostility is not defined.
- 4.8 The consultation document seeks views as to whether hostility in the second limb should be augmented to include other hate motivation indicators that have been used elsewhere. This would involve adding the concepts of ‘bias’, ‘prejudice’ (or ‘bigotry’) and possibly ‘contempt’ to what is presently hostility. We concur with the arguments in the consultation document that this is beneficial and would like to see the motivation limb of the test augmented to offences motivated (wholly or partly) by ‘hostility, bias, prejudice or contempt’ relating to a protected ground. Notably the term contempt is used in the ECRI definition of racism.
- 4.9 Another proposal considered is to augment the two limbed test with a third limb whereby it becomes an aggravated offence if the victim was subject to the crime ‘because of’ their membership of a protected group. For example, if the victim was targeted because they were elderly or a man (if age and sex respectively are included). This would therefore not require hatred, for example, of the elderly as a group, but could constitute an aggravated offence for broader (stereotypical) reasons of perceived vulnerability. We do not support this change as it moves away from the purpose of hate crimes legislation. Vulnerability can and should be dealt with by alternate provisions for sentencing that take into account the vulnerability of the victim.

Hate Crimes model: scope of offences

- 4.10 At present the NI ‘aggravated sentences’ model under the 2004 Order covers the potential for increased sentences in relation to offences in general. By contrast the Aggravated Offences model in England and Wales covers specifically four categories of offences. These are namely offences covering:
- Assaults (including ABH/GBH);
 - Criminal damage;
 - Public Order Offences (fear of violence; public harassment;)
 - Harassment offences (repeated harassment/stalking etc)
- 4.11 In relation to the question as to whether an aggravated offences model should be restricted to these offences or cover a broader range or potentially all other criminal offences, we would advocate on balance for a model that covers all offences.
- 4.12 As alluded to in the consultation document there are presently no equivalent offences in Northern Ireland to the aggravated public order (fear of violence and public harassment) and stalking offences. The question is posed in the

consultation as to whether such offences (largely contained in the Public Order Act 1986) should be introduced in Northern Ireland.

Additional related offences: proposals from review

- 4.13 The consultation document seeks views on adding, (potentially amended) versions of the current offences in Sections 4, 4A and 5 of the Public Order Act 1986. These offences do not extend to Northern Ireland, nor are there equivalents, but are among the core listed ‘aggravated offences’ in the English and Welsh hate crimes legislation. In summary these offences cover ‘*threatening, abusive, insulting words or behaviour -or signs or other visible representation*) that:
- (s4 Fear or Provocation of Violence): cause a person to believe immediate violence will be used against them or another person; or provoke immediate violence etc.
- (s4A Intentional harassment, alarm or distress): intentionally cause a person harassment alarm and distress
- (s5 Harassment, alarm or distress) is likely to cause to person within sight and sound harassment, alarm or distress.⁶³
- 4.14 The first two offences can carry a prison sentence up to six months, or a fine, the latter a lesser fine. As aggravated offences (i.e. when these offences are committed manifesting or motivated by hatred etc. towards a protected group) the offences would carry an additional penalty.
- 4.15 The consultation document notes that such offences would need updating to work for the online world (amending public order elements, requirements to be present at time of offence etc.)
- 4.16 It is also suggested as with other harassment offences, the ‘hate’ element should be included in the definition of the offence (namely that the defendant was motivated by or demonstrated hostility on the basis of the protected characteristics).⁶⁴
- 4.17 The language in these harassment offences could also be updated as at present it refers to harassment, *or alarm or distress*. This is redundant because alarm or distress tend to be part of the definition of harassment.
- 4.18 A similar position is taken in relation to the offences of harassment under the Protection from Harassment legislation.⁶⁵ This legislation also contains provisions on putting a person in fear of violence. At present it is limited as it requires harassment to occur more than once (‘a course of conduct’) and relates to harassment targeted at a specific victim rather than generalised hate, and is not tied to protected groups. The consultation document proposes updating such offences so that a ‘hate’ element on protected grounds is added and modernising amendments to ensure the offence would apply to online behaviour.

⁶³ [Public Order Act 1986](#) (England and Wales)

⁶⁴ Consultation document paragraph 12.54.

⁶⁵ Consultation document paragraph 12.31, The [Protection from Harassment Act 1997](#) (England and Wales); and [Protection from Harassment \(Northern Ireland\) Order](#) 1997.

- 4.19 We concur with this approach and support the addition of such amended versions of the above offences in the manner proposed.
- 4.20 As noted in the consultation document there is also an offence of *stalking* in the Protection from Harassment legislation that does not apply in Northern Ireland.⁶⁶ There are now proposals to introduce such an offence.
- 4.21 In relation to additional relevant offences in this area there is a specific offence of harassment of an individual at or in the vicinity of their home that *does* apply in NI.⁶⁷
- 4.22 There is also a NI specific offence of ‘intimidation’ whereby it is an offence to unlawfully cause ‘*by force, threats or menaces, or in any way whatsoever*’ a person to leave their home, employment, to terminate a person’s employment or ‘refrain from doing any act’.⁶⁸
- 4.23 We advocate such provisions should also be modernised and subject to hate motivation criteria.

Additional related offences: international standards, treaty based duties

- 4.24 The case for modernising and augmenting the above offences and related matters we believe is strengthened by the framework of international human rights standards, including treaty based duties. The part of this submission on ‘incitement to hatred’ provides further detail of the scope of a number of standards.
- 4.25 This includes reference to Article 6(2) of the Framework Convention for the Protection of National Minorities Within Council of Europe human rights system which provides that state parties will:
- ...undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.
- 4.26 There are also a number of provisions relevant to harassment in treaty-based standards. This includes the provisions of the Istanbul Convention on Violence Against Women.⁶⁹ Articles 34 and 40 deal with stalking and sexual harassment respectively:

Article 34 – Stalking

Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, is criminalised.

Article 40 - Sexual harassment

Parties shall take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a

⁶⁶ <http://www.legislation.gov.uk/ukpga/1997/40/section/2A?view=extent>

⁶⁷ [s42A Criminal Justice and Police Act 2001](#).

⁶⁸ [§1 Protection of the Person and Property Act \(Northern Ireland\) 1969](#)

⁶⁹ <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210>

person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction.

- 4.27 It should be noted that as well as offences, some provisions provide for civil remedies for unlawful conduct, as is the case with the protection from harassment legislation.
- 4.28 Further to the ruling of the inquiry into abortion law in Northern Ireland by the UN CEDAW committee, they recommended the adaptation of a harassment provision to:
- ...protect women from harassment from anti-abortion protestors by investigating complaints, prosecuting and punishing perpetrators.*⁷⁰
- 4.29 The adoption of such provisions is a legally binding duty on the NI Secretary of State in domestic law.⁷¹ This can be taken forward by a number of potential provisions, such as legislation establishing ‘exclusion zones’ around abortion services. Another potential legislative measure would be to amend the aforementioned legislation preventing harassment at a person’s home to also include protection against harassment of women accessing abortion services.
- 4.30 In general, UN CEDAW (in relation to gender-based violence against women and girls) has noted “*with particular concern the inadequacy of laws and policies to protect women in Northern Ireland*” and has called for implementation of the provisions of the Istanbul Convention.⁷² This is in addition to general duties on states to take all appropriate measures to prevent acts which result in gender-based violence against women.⁷³ Such acts would encompass gender-based incitement to hatred, harassment, intimidation and threats of provocation of violence against women as a group.
- 4.31 Other UN treaties such as the UN Convention on the Rights of Persons with Disabilities (UNCRPD) also contain relevant provisions. These can include duties around combatting “*stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life*”.⁷⁴ Whilst not relating directly to criminal offences such matters are relevant to the broader legal framework (largely, and with significant limitation) legislated for under the ‘good relations’ type duties.⁷⁵ These places positive action duties on public authorities to tackle the prejudice and attitudes that provide the ideological grounding for hate offences.

⁷⁰ Report of the Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/C/OP.8/GBR/1) published on 6 March 2018.

⁷¹ S9 [Northern Ireland \(Executive Formation etc\) Act 2019](#).

⁷² CEDAW [Concluding observations on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland](#), Adopted by the Committee at its seventy-second session (18 February–8 March 2019).

⁷³ [CEDAW general recommendation No. 35 \(2017\) on gender based violence against women](#) (para 24(2b))” ... States parties will be responsible if they fail to take all appropriate measures to prevent as well as to investigate, prosecute, punish and provide reparation for acts or omissions by non-State actors which result in gender-based violence against women...”

⁷⁴ [UNCRPD, Article 8\(1b\)](#)

⁷⁵ Including the General Duty in [s49A of the Disability Discrimination Act 1995](#)

- 4.32 In relation to sectarianism there is the duty under the Belfast/Good Friday Agreement (a legally binding treaty in international law) in relation to the:
...the right to freedom from sectarian harassment⁷⁶
- 4.33 This provision is subject to limited legislative provision and could be given effect through the adoption of the suggested updated harassment offences, linked to relevant protected grounds. At present there is NI Justice legislation covering ‘sectarian chanting’ at major sporting events – along with chanting which is ‘threatening, abusive or insulting’ ‘by reason of’ one of the protected grounds in the current incitement to hatred legislation.⁷⁷

Additional related offences: recommendations

- 4.34 In summary, we support the proposed addition of modernised versions, with a ‘hate’ component, of the offences under the Public Order Act 1986 covering fear of violence, intentional harassment, and public harassment, along with modernised provisions from the Protection from Harassment NI Order. The revised provisions could be incorporated into consolidated ‘hate crimes’ legislation.
- 4.35 As alluded to above we also advocate for similarly amended legislation to cover the offence of ‘intimidation’, the addition of offences of stalking, and harassment of a sexual nature (as required by the Istanbul Convention), provisions to prevent harassment of women accessing abortion services, and the provisions ensuring the implementation of the GFA “right to freedom from sectarian harassment.”
- 4.36 The Terms of Reference of the Hate Crimes Review include provision to provide recommendations on: *How any identified gaps, anomalies and inconsistencies can be addressed in any new legislative framework for Northern Ireland ensuring this interacts effectively with other legislation guaranteeing human rights and equality.*
- 4.37 To this end we would also wish to draw attention the broader positive action duties on public authorities to promote understanding and tackle the prejudice that provides the ideological grounding for hate offences. The effective implementation of such measures provides a strong preventative base for hate crimes.
- 4.38 In addition to the specific ‘good relations’ duties on local government to combat racism etc.⁷⁸, and the general public sector duties to promote positive attitudes etc. to persons with disabilities⁷⁹, the main duty is the ‘good relations’ duty under Section 75(2) of the Northern Ireland Act 1998. This places a duty on designated public authorities, in carrying out functions in relation to Northern Ireland, to (without prejudice to the duty to promote equality of opportunity

⁷⁶ Rights, Safeguards and Equality of Opportunity, paragraph 1.

⁷⁷ s37 of the Justice Act (Northern Ireland) 2011 outlawed, with a fine, ‘sectarian chanting’ at major sporting events along with chanting of an ‘indecent nature’ and chanting which “consists of or includes matter which is threatening, abusive or insulting to a person by reason of that person's colour, race, nationality (including citizenship), ethnic or national origins, religious belief, sexual orientation or disability”. The term sectarian chanting was not ultimately defined in the legislation.

⁷⁸ [Art 67 Race Relations NI Order 1997.](#)

⁷⁹ [s49A of the Disability Discrimination Act 1995](#)

under s75(1)) “*have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group*”.

4.39 However, as noted in the consultation document unlike the counterpart duty in Great Britain (under s149 of the Equality Act 2010) where the good relations duty is defined as in particular concerning ‘*tackling prejudice and promoting understanding*’ across all protected grounds, the term ‘good relations’ is not defined in the Northern Ireland Act. Regarding an interpretation in international standards, the Council of Europe have stated that “*Promoting good relations between different groups in society entails fostering mutual respect, understanding and integration while continuing to combat discrimination and intolerance.*”⁸⁰

4.40 There has been significant criticism from Council of Europe treaty-bodies about the interpretation of the good relations duty in Northern Ireland. The Advisory Committee on the Framework Convention for National Minorities has referred to interlocutor reports of the ‘good relations’ duty appearing “*on several occasions to take priority over wider equality and minority rights initiatives, which were blocked on grounds that they would lead to ‘community tensions’*” and elaborated that:

This would be due to the fact that, unlike the rest of the country, Northern Ireland does not interpret the ‘good relations’ duty as including a duty to tackle racism, including sectarianism. Instead, the lack of proper definition allows this notion to be used rather as a ‘tool’ to set aside politically contentious issues, such as legislating on the Irish language, and to justify a “do-nothing” attitude, eventually based on ‘perceptions’ rather than objective criteria. The Advisory Committee reiterates its opinion that the concept of ‘good relations’ apparently continues to be substituted for the concept of intercultural dialogue and integration of society, which would include other national and ethnic minorities present in the region, and regrets that this is used to prevent access to rights by persons belonging to these minorities. [85]⁸¹

4.41 The Committee recommended that “*The authorities should begin to implement the ‘good relations’ duty as provided for under the Northern Ireland Act 1998 in a manner that does not run counter to the equality duty and that does not prevent access to rights by persons belonging to all national and ethnic minorities.* [89]”⁸²

4.42 We have long recommended such reform and, once properly defined, that the good relations duty extends to all protected non-discrimination grounds rather than being restricted to sectarianism and other forms of racism. Stalled NI single equality legislation may have been a vehicle to take forward proper codification of the good relations duty. The amendment could be taken forward in consolidated hate crimes legislation. This would help ensure the criminal law provisions become a measure of last resort.

⁸⁰ [ECRI General Recommendation no 2 \(revised\), explanatory memorandum](#), para graph 21

⁸¹ <https://www.coe.int/en/web/minorities/-/united-kingdom-publication-of-the-4th-advisory-committee-opinion>

⁸² <https://www.coe.int/en/web/minorities/-/united-kingdom-publication-of-the-4th-advisory-committee-opinion>

5. Online application

Online abuse and the scope of the review

- 5.1 Given the exponential growth of hate expression online it is of the utmost importance hate incitement and 'hate crimes' legislation is formulated in a manner which covers online activity effectively. We understand that at present the majority of proceedings the PPS considers for stirring up hatred offences relate to online activity. We are also mindful that for victims the removal of the offending material can be as, if not more, important to them than the apprehension of the guilty party. Hate expression also by its nature creates collective as well as individual victims.
- 5.2 The terms of reference of the hate crimes review make clear that hate crime and abuse that takes place online are included. A qualification is added that the intention is that the Review will not duplicate matters in the UK Government response to the Home Affairs Committee report on online abuse in the context of telecommunications legislation being a 'reserved matter'.⁸³ The consultation document alludes to the April 2019 *Online Harms White Paper*.⁸⁴
- 5.3 The relevance of this is that proposed NI hate crimes legislation (including any consolidated bill) would be introduced into the Northern Ireland Assembly. Criminal justice legislation, including 'incitement to hatred' provisions, offences around harassment, intimidation, and provisions for aggravated offences, fall within the legislative competence of the Assembly by virtue of being 'transferred' matters. 'Reserved' or 'Excepted' matters⁸⁵ are those matters usually legislated for at Westminster. *Telecommunications* is a 'reserved matter'.⁸⁶ This does not mean that the Assembly cannot legislate on telecommunications matters. The Assembly can do so provided there is consent from the Secretary of State.⁸⁷
- 5.4 Therefore in relation to hate crimes legislation emerging from the review dealing that captures online hate, the Assembly can legislate on criminal justice provisions that capture online hate (e.g. incitement to hatred, aggravated offences relating to harassment, intimidation etc.) However,

⁸³ "To consider whether existing hate crime legislation represents the most effective approach for the justice system to deal with criminal conduct motivated by hatred, malice, ill-will or prejudice, including hate crime and abuse which takes place online." & "Given that telecommunications legislation is a reserved matter, and the commitments made in the UK Government recent response to the 14th report from the Home Affairs Select Committee Session 2016 to 17, on Hate crime: abuse, hate and extremism online, our intention would be that the review would not include consideration of any issues related to online hate crime that would duplicate this."

⁸⁴ HM Government (2019) *Online Harms White Paper* CP 57 London: HMSO

⁸⁵ Set out in Schedules 2 & 3 of the Northern Ireland Act 1998.

⁸⁶ Paragraph 29 of Schedule 3 Northern Ireland Act 1998.

⁸⁷ s8 Northern Ireland Act 1998. A provision that deals with an excepted matter is also not outside the legislative competence of the Assembly if it is ancillary to other provisions in the bill (or previously enacted provisions) that deal with reserved or transferred matters. S6(2)(b) Northern Ireland Act 1998,

measures engaging ‘telecommunications’ powers, which may capture legislation such as the Communications Act 2003, or proposals to create a regulatory body compelling internet service providers to remove hate expression, are likely to require the approval of the Secretary of State.

Amendments of Incitement to Hatred, harassment and other ‘hate crimes’ provisions

- 5.5 We agree with the proposals in the consultation document to modernise incitement to hatred and harassment legislation (much of which dates back to the 1980s and pre-digital age) to ensure it is fit for purpose to also capture online activity.
- 5.6 We also urge this exercise is undertaken with the other related offences (e.g. other harassment and intimidation offences) that are highlighted in the previous section of this submission.
- 5.7 This would include modifications referenced in the consultation document to deal with the question of: jurisdiction (i.e. where the material is downloadable, even if uploaded elsewhere for example to capture material viewed e.g. Strabane but uploaded in Donegal); the definition of the word ‘publication’ to ensure it explicitly captures material that is uploaded or posted online (in a public context) and the modification of the ‘dwelling’ defence where material is presented in a private home towards ‘a public context’ provision.
- 5.8 We consider that such offences are better placed to provide more effective protection against online hate expression (with due safeguards against misuse to suppress protected free expression) than the existing offences in the Communications Act 2003. This act, at section 127, makes it an offence to send a ‘grossly offensive’ message through a public electronic communications network. This offence is vaguely drafted and not linked to protected grounds.

Proposals for the regulation of online hate expression

- 5.9 The consultation document reflects on the UK Governments’ *Online Harms* White Paper, and its recommendations about a new ‘duty of care’ on internet companies to take reasonable steps to keep users safe and prevent harms as a consequence of online activity on their services. Compliance with this duty will be overseen by an independent regulator who will issue codes of conduct and have enforcement powers, including powers to issue fines. In general, internet companies will be required to remove material that is considered ‘harmful’. Such legislation would apply to Northern Ireland.
- 5.10 The consultation document however rightly reflects on concerns with the UK proposals. This includes the lack of distinction in the White Paper between hate crimes and hate speech. The latter is barely mentioned and hence there is a lack of consideration of matters covered elsewhere in this paper such as the ‘public context’ and threshold tests for hate expression.
- 5.11 At paragraph 12.28 the consultation document states “*From the point of view of this consultation, the important point to note here is that there does appear to be an appetite for holding internet companies responsible for some of the*

hate that appears on their platforms. Whilst the role of SMCs is beyond the remit of this review, when analysing the current provisions for holding individual perpetrators responsible for what they post online, it is important to bear in mind that the legislation does not have to solve all the problems of online hate, and that SMCs are likely to play a central role in regulating this area in the future. It will, therefore, become important to make a distinction between the types of hate speech which are serious enough that individuals who use that speech should be held liable, and hate speech which is not serious enough to incur personality liability, but which is harmful enough that it should not be published online.

- 5.12 This distinction is similar to the codification in the UN Rabat Plan of Action (on combatting incitement to hatred) alluded to earlier in this submission that sets out general principles that a ‘clear distinction’ should be made between:
- 1) Expression that constitutes a criminal offence;
 - 2) Expression that is not criminally punishable but may justify a civil suit or administrative sanctions;
 - 3) Expression that does not give rise to criminal, civil or administrative sanctions but still raises a concern in terms of tolerance, civility and respect for the rights of others.⁸⁸
- 5.13 We advocate for duties on internet companies to regulate and remove harmful hate expression (as defined by ECRI) on a protected ground. This should be the case even when the hate expression does not reach the criminal threshold for incitement to hatred (although may in certain contexts engage other offences related to harassment or intimidation).
- 5.14 We are conscious of the boundaries between transferred and reserved legislation. However, it appears that the approach of the UK Government may be too limited to deal with the harms of online hate expression in Northern Ireland, which has an added paramilitary context. We therefore urge the review to explore the feasibility of a Northern Ireland specific model regarding the regulation of online hate that could be included in any consolidated hate crimes legislation (with required consent of the Secretary of State).⁸⁹

⁸⁸ Rabat Plan of Action, paragraph 19, recommendations.

⁸⁹ As this would be complimentary or go beyond the UK’s proposals it would not appear to duplicate them and hence be within the Reviews Terms of Reference.

6. Removal of hate expression from public space

- 6.1 The consultation documents dedicates space to the important issue of the removal of hate expression physically in public space, in addition to the aforementioned discussion on the removal of such material online.
- 6.2 The Review is particularly engaged to the extent such items may constitute criminal conduct (incitement to hatred but also aggravated offences concerning intimidation, harassment, criminal damage etc. or more generic technical offences such as 'trespass' or other offences relating to third parties placing materials constituting hate expression on the property of others).
- 6.3 In such circumstances a context exists whereby there are significant evidential difficulties in identifying suspects, and the removal of the material in question to prevent ongoing harm becomes paramount to victims (who in the case of hate expression encompass the targeted group.) The question also arises, as it does online, as to the need to take action against hate expression that does not reach a criminal threshold.
- 6.4 There are particular problems with racist, sectarian and homophobic hate expression in public space. This includes locally the context of:
 - Graffiti or slogans otherwise displayed that advocate genocide against the nationalist or unionist communities (Kill all Taigs, Kill all Huns, etc.); or racist and homophobic incitement (e.g. housing for 'locals only' 'Roma out' 'No Blacks' 'Gays out' etc. messages);
 - The burning items in the context will represent a protected group including migrants and LGBT (Polish/other migrant community and Rainbow flags), items that in the context collectively represent the nationalist community (Celtic shirts, rosary beads, effigies etc.);
 - The placing of flags or other items on lampposts in particular contexts including those that are racist hate expression per se (e.g. Nazi, confederate, apartheid South Africa flags) or paramilitary or other items placed in a context to constitute sectarian or racist intimidation of persons from taking up or remaining in housing;
- 6.5 The likelihood of incitement or intimidation on protected grounds occurring is exacerbated by the paramilitary context of such expression. This context has also contributed to a situation whereby there is little policy or due intervention by public authorities to address public hate expression, despite an existing array of relevant powers and duties. There is also a tendency to confuse and conflate the above issues with broader policy questions in relation to flags and bonfires that do not relate to hate expression. For example, the issue of paramilitary flags placed outside a new housing development will be treated as a generic 'flags' issue rather than an issue of sectarian expression and intimidation, and risks therefore falling under a default policy of non-intervention). There is consequently no overarching strategic policy or duty in relation to combatting hate expression in public space.
- 6.6 We therefore urge that the review considers the recommendation of a statutory duty on relevant public authorities to take reasonable steps to

remove hate expression from their own property and, where it engages their functions, broader public space.

- 6.7 This duty would have two limbs with both a content and context based provision to capture material that is inherently hate expression (e.g. racist language) or material or behaviour that would constitute hate expression on a protected grounds in light of its context and circumstances. This would include when the expression constitutes intimidation or harassment on a protected ground (e.g. paramilitary or national flag placed solely on the lamppost of the only ethnic minority family in a street). There should be no requirement that such hate expression is manifest within likely sight and sound of its target group given the incitement effect such expression can have. (i.e. the display of KAH in a predominantly nationalist area or KAT in a predominantly unionist area, should not be tolerated on the grounds that persons from the target community are unlikely to see it. Such policy approaches have been taken to date and are concerning.)
- 6.8 There are a number of strengths in framing such a duty specifically around hate expression, not least the signal power of such an offence in raising awareness that such expression will not be tolerated, and the consequent potential to deter offender behaviour. Put bluntly, even racists don't like being called out as racists (as evidenced by statistics in the consultation document on the low level of guilty pleas to racially aggravated offences compared to the guilty pleas for the 'basic' related offence.) There are therefore significant benefits to explicitly framing hate expression, as hate expression, in law.

Proposed formulation of statutory duty to remove hate expression in public space

- 6.9 The statutory duty would relate to an existing suite of powers and be formulated as follows:
- Statutory duty on relevant public authorities to take reasonable steps⁹⁰ to remove expression of a racist, sectarian, homophobic, transphobic, disablist and misogynist nature (collectively hate expression) from public space;
 - Hate expression to be defined in line with the ECRI standard. For the purposes of the offence, hate expression of a racist, sectarian, homophobic, transphobic, disablist or misogynist *nature* to be defined as:
 - Where the content of the material or conduct in relation to it would be considered by a reasonable person in light of circumstances as hate expression on a protected ground;

⁹⁰ For examples of duties framed around a public authority taking reasonable steps see: [Para 1\(1\)a schedule 3 Justice Act 2004 re DoJ duties to take reasonable steps to ensure court security](#); [Article 8\(1\) of Roads NI Order 1993 re Dfl duty to maintain all roads](#);

- Where the context of the placement of the material or expressive behaviour in question in light of all the circumstances would be likely constitute hate expression, including intimidation or harassment, on a protected ground;
- The duty would apply to public authorities in general in relation to their own property (including the Housing Executive and housing associations);
- The duty would also specifically apply to public authorities in the exercise of existing functions particularly district councils in the exercise of their existing powers to remove and obliterate graffiti, placards, notices etc. and to the Department of Infrastructure in relation to its existing powers in relation to roads and street furniture. Where necessary the PSNI would support other public authorities in the exercise of the duty;
- There would not be a requirement that such expression occur within sight and sound of a target group.

The present legal and policy framework

6.10 As alluded to elsewhere in this document there are positive duties on public authorities further to human rights standards to intervene to tackle hate expression. These include the positive action obligations under Article 8 of the ECHR in relation to material containing hate expression, and the duty under the Framework Convention for National Minorities to protect persons from hostility as a result of their ethnic, cultural, linguistic or religious identity. Domestically there are also the good relations and equality duties (under Section 75 NIA, including procedural duties under equality schemes), and the duties under racial and disability discrimination legislation; and the general duties on the police to intervene to prevent the commissioning of criminal offences.⁹¹

6.11 In relation to powers of Councils under Article 18 of the Local Government (Miscellaneous Provisions) (NI) Order 1985 (as amended by the Clean Neighbourhoods and Environment Act (Northern Ireland) 2011), district councils have powers to “remove or obliterate”:

- any **graffiti** which, in the opinion of the council, is detrimental to the amenity of any land in its district;
- **any placard or poster** which is displayed in its district and which, in the opinion of the council, is so displayed in contravention of [Planning regulations]⁹²

⁹¹ Under s32 Police NI Act 2000 and the common law – see the 2017 UK Supreme Court case of *DB v the PSNI* that related to weekly unnotified loyalist flags marches in late 2012 and 2013 past the nationalist Short Strand area of east Belfast where the PSNI had contended they had no legal power to intervene. The Supreme Court found otherwise, holding that in light of non-notification being a criminal offence, the PSNI’s duty to prevent the commissioning of offences provided a power to intervene.

⁹² This power does not cover items displayed within a building or land owned by another public authority.

- 6.12 Councils can also issue notices to persons identified as having displayed such materials to require its removal within two days and recover costs when not removed.
- 6.13 There are further powers under the Clean Neighbourhoods and Environment Act (Northern Ireland) 2011, in relation to graffiti and fly posting.⁹³ This includes powers to issue 'Defacement Removal Notices' (DNR) when a council is satisfied that a "a relevant surface in the district of the council has been defaced by graffiti or any poster or placard" (which does not have planning permission) AND that the "defacement is detrimental to the amenity of that district or is offensive" the concept of 'offensive' is defined in Departmental Guidance as directly relating to hate expression:
- 'Offensive' applies where graffiti is (or is perceived to be) racially offensive, hostile to a religious group, sectarian in nature, sexually offensive, homophobic, depicts a sexual or violent act or is defamatory. Offensive graffiti should be prioritised for speedy removal...⁹⁴
- 6.14 There are powers to issue notices on persons responsible for the surface requiring removal within 28 days. If DNR is not complied with Councils can remove or otherwise remedy the defacement. The powers relate to most surfaces on public land.
- 6.15 Councils under the same Act have powers to issue fixed penalty notices for graffiti and fly posting, but these powers exempt offences motivated by racial or religious hostility.⁹⁵ Councils also have a number of prosecution powers over graffiti and 'fly posting' in relation to relevant offences under road traffic and planning legislation.⁹⁶
- 6.16 Under Article 87 of the Roads (Northern Ireland) Order 1993 any person who (without lawful authority) "paints or otherwise inscribes or affixes any picture, letter, sign or mark" on the surface of a road or upon any tree, structure or other works in or on a road, commits an offence punishable by a fine. The Department has powers to remove any of the above items (and recover reasonable costs from responsible persons) and serve removal notices. The powers of the Department have been characterised as covering to 'street furniture' such as lampposts which are part of the property of the public authority. Under the Article 33 of the Road Traffic Regulation (Northern Ireland) Order 1997 it is also an offence to intentionally 'interfere' or cause damage to a traffic sign.
- 6.17 Under Article 84(2) of the Planning (Northern Ireland) Order 1991 there are also powers vested in the Department to require the removal of 'advertisements' being in conflict with planning regulations, and relevant

⁹³ "'graffiti' includes painting, writing, soiling, marking or other defacing by whatever means,"

⁹⁴ Department for Environment "Guidance for District Councils on Sections 31 to 35 of the Clean Neighbourhoods and Environment Act (Northern Ireland) 2011, Paragraph 2.6

⁹⁵ Section 26 (2) But an authorised officer shall not give a notice under subsection (1) if the officer considers that the commission of the relevant offence was motivated (wholly or partly) by hostility— (a)towards a person based upon that person's membership (or presumed membership) of a racial or religious group, or (b)towards members of a racial or religious group based on their membership of that group.

⁹⁶ See DoE 'Graffiti and Fly-posting Offences Prosecution Powers' guidance

offences for not doing so. There are also powers in relation to regulating ‘advertisements’ vested in Councils.

6.18 At present there is no overarching strategic policy on dealing with hate expression in public space. CAJ has surveyed district councils and no council had a specific policy on the matter. Few councils also had any written policy regarding the exercise of their specific powers and, insofar as information was available there seemed to be considerable variance in the exercise of these powers. The Department for Infrastructure also had no policy in relation to the removal of hate expression within the exercise of its powers.

6.19 The following table sets out the policy response to CAJ of the 11 district councils.

Council	Written Policy to intervene to remove public hate expression?	Policy regarding power to remove graffiti/fly posters?	Policy on power to issue defacement removal notices?	Policy on power to issue fixed penalty notices?	Statistics available as to the use of the powers?	Any other policy or procedure
Antrim and Newtownabbey Borough Council	No	No	No	No	No	Reference to DAERA guidance regarding graffiti prosecution.
Ards and North Down Borough Council	No	Yes “Policy and Procedure for Removal of Graffiti”	Yes (same as graffiti policy)	No	Yes – Graffiti removal: 2018- 2019: 82 2015-2018: 75	No
Belfast City Council	No	Yes, “Fly-posting and graffiti offences under The Local Government (Miscellaneous Provisions) NI Order 1985 as amended by The Clean Neighbourhoods and Environment Act (NI) 2011.”	Yes (same as graffiti policy)	Yes (same as graffiti policy)	Yes- Graffiti removal: 2016-17: 316 2017-18: 394 2018-19:360 2019-present: 246 ⁹⁷	No

⁹⁷ Note that Belfast City Council also breaks down the designation of graffiti Contentious (C) and non-Contentious (NC). 2016-17: 222 (C), 94 (NC) 2017-18: 255 (C), 139 (NC) 2018-19: 214 (C), 146 (NC) 2019- present: 128 (C), 118 (NC).

Armagh City, Banbridge and Craigavon Borough Council	No	Yes "Clean Neighbourhoods Enforcement Policy"	Yes-same policy	Yes-same policy	Yes, council cleaned up 'hate graffiti' 6 times in last three years	Yes – "Graffiti Removal Scheme"
Causeway Coast and Glens Borough Council	No	Draft policy on fly posting offenses, unpublished.	No	No	Yes – "20 recorded complaints in last 3 financial years"	Yes: 1) Follows DAERA guidance on graffiti/fly posing prosecution 2) PSCP "Graffiti Programme Procedural Guidance Document"
Derry City and Strabane District Council	No	Yes – unwritten. A working group has been established to consider the issue.	No	No	Yes. Graffiti removal: 2017-18: 6 2018-19: 6 2019-20: 9	No
Fermanagh and Omagh District Council -Enniskillen Office	No	No	No	No	No	Reference to Council Complaints procedure
Lisburn and Castlereagh City Council	No – reference made to Council by-laws addressing individual behavior	Possibly unwritten. Council stated that they "take action" upon public referrals and complains.	No	No	Yes, fly-posting/graffiti: 2016-17: 30 2017-18: 34 2018-19: 48	Referral made to statistics held by PSNI regarding sectarian/homophobic incidents.
Mid and East Antrim Borough Council	No	An unwritten "response initiative" to respond to sectarian and hate crime graffiti ⁹⁸	No	No	Yes, all graffiti removed (not necessarily hate): 2017: 9 2018: 5 2019: 5	No

⁹⁸ "Mid and East Antrim PCSP has a response initiative which allows us to respond in good time to sectarian and hate crime graffiti - these are responsive initiatives carried out in partnership with PSNI and other statutory partners such as NIHE, the community and land owner rather than any specific statutory power which we are discharging."

Mid Ulster District Council Dungannon	No ⁹⁹	No ¹⁰⁰	No	No	No	Reference to council's complaints procedure.
Newry, Mourne and Down District Council	No	Unwritten ¹⁰¹	No	No	No	No

6.20 We would urge the recommendation of the above statutory duty in order to provide for a more consistent policy approach, legal certainty and above all, necessary intervention to remove hate expression in public space in NI.

⁹⁹ "Mid Ulster District Council does not have a documented policy/procedures specifically referring to intervening in tackling hate expression in public space or Council property. Councils remit only extends to its property and public space within its remit. Should such an instance present itself council staff will consider accordingly and the council's complaints procedures enacted, if required. Expressions of hate are a matter for the Police Service of Northern Ireland <https://www.psnipolice.uk/crime/hate-crime/reporting-a-hate-crime/> to investigate should a member of public interpret an issues being an expression of hate in line with the definition of hate."

¹⁰⁰ "Whilst there is no separate council policy document regarding the removal of graffiti, the council agreed through its Environment Committee that council would trial the removal of all offensive graffiti across the district by the council after requesting permission from the surface owner, if on private property. Graffiti would be removed by the council on council owned property and requests made to other public bodies in the event of graffiti being on their structures."

¹⁰¹ "Council Policy is to promptly remove any graffiti or posters from its own property eg walls, litterbins ,railings .The Council will also refer any enquiries relating to flyposting and graffiti to other statutory bodies eg NIHE and Transport NI , with expectation that they will arrange for removal from their property. With respect to graffiti and flyposting on privately owned property. Officers may assess the content of any such graffiti/flyposting and will encourage property owner to remove and/or with assistance from voluntary groups and other groups such as Chambers of Commerce. Should Officers/Council consider that the content of any such graffiti is offensive, the Council may seek permission from the property owner to remove such graffiti." "Removal of graffiti and posters in the Council area is undertaken in accordance with the Clean Neighbourhoods and Environments Act (Northern Ireland)2011. No issue of significance has been raised by Tidy NI with respect to graffiti or Flyposting in the Newry Mourne Down Council District as part of their annual Cleaner Neighbourhood Report, due to Council approach in these areas."