

Dealing with hate expression in public space in Northern Ireland

*Public authorities' duties and practice towards
removing racist, sectarian, homophobic, and other
hate expression from public space*

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Executive summary

The status quo

- Hate expression, and particularly racist and sectarian expression, remains prevalent in public space in Northern Ireland and causes significant harm to the communities it is targeted at. Through the intimidation it conveys, it is also a significant contributor to housing segregation, the tackling of which is regularly highlighted as a policy priority. Sectarian graffiti advocating genocide has become normalised. There is a concerning tendency of visible racist hate expression in public space. Hate expression targeting the LGBT community and women also occurs in public space.
- Despite the high profile of the issue and the experiences of targeted groups, the problem of sectarian, racist, homophobic and other hate expression in public space is rarely expressly dealt with or otherwise referenced in relevant strategic policy.
- Despite the involvement of elements of paramilitarism in hate expression being the *express reason* as to why public authorities are reluctant to intervene to remove items, it is particularly striking how the various assessments of paramilitary activity in recent years have overlooked or disregarded this issue. The resultant Executive Action Plan on tackling paramilitarism contains no proposed action that engages tackling hate expression.
- Despite engaging their powers and functions, the most relevant public authorities including the PSNI, Department for Infrastructure, NIHE and most councils do not have formal written policies, developed through due process, that expressly set out how they will deal with hate expression in public space. This is either as a standalone provision or as part of a broader policy approach.
- Such public authorities have nevertheless informally developed policy approaches as to how to deal with hate and other forms of expression. None have been subject to the mandatory process of equality screening. The PSNI and the Department for Infrastructure have subjected their policies to review and have made commitments to assess equality impacts that have not been taken forward to date. In general, a significant amount of decision making by public authorities in relation to the removal of items is inconsistent and unclear.
- The PSNI has framed its policy approach as to whether to intervene and remove items in a manner which accommodates those most likely to create public disorder. This policy stance is eerily reminiscent of RUC decision making under public order legislation on parades prior to the establishment of the Parades Commission. When moving the Public Processions (NI) Bill the NIO Minister, Tony Worthington MP, in addition to stressing that “*the rule of law must prevail*”, criticised the previous approach as having “*contained a perverse incentive by making it possible for the group that threatened to create most mayhem to get what it wanted.*”¹
- There are issues with the way in which the PSNI has interpreted relevant criminal offences relating to hate expression. It is also fair to say that the removal of hate expression is not a policing issue alone. This is particularly the case when the items in

¹ <https://api.parliament.uk/historic-hansard/commons/1997/dec/18/public-processions-northern-ireland-bill>

question are on the property of another public authority or otherwise engage their functions.

- Also problematic are policy approaches by public authorities including the Department for Infrastructure and Housing Executive that condition the removal of items subject to ‘community agreement’. This is not to criticise what is often very difficult on-the-ground work, or to discount the benefits of community dialogue and engagement and broader work to tackle prejudice and promote understanding. However, as a matter of policy, rather than process, it would be inappropriate for policy to contain a precondition that the removal of hate expression will only take place with the ‘permission’ of others. Public authorities are bound by human rights duties to tackle racist, sectarian and other hate expression regardless of whether there is support for such material.
- Hampering the tackling of hate expression is its conflation with the broader and separate issues of political expression through flags and bonfires and that of paramilitary expression. This has the effect that policy on dealing with hate expression in public space can be essentially ‘parked’ in the absence of progress on these broader issues.
- Whilst we have noted more activity in relation to graffiti removal by councils, few also have formulated policy that specifically addresses the prioritisation of removing graffiti, placards and other similar materials when they constitute hate expression.
- The Equality Coalition’s *Incitement to Hatred in Northern Ireland* research report was critical of a general approach of tolerance of hate expression in public space. Whilst there has been some movement in recent years, the concerns largely remain the same.
- We are familiar with the argument that intervention may either antagonise protagonists into disorder or lead them placing even more items. This position tends to stress that intervention may make matters worse, at least in the short term, and current approaches ‘keep a lid’ on broader paramilitary activity. However, things will not get better unless there is a change of approach: the existing proliferation of hate expression has a very harmful effect on those communities it is targeted against. We support the recommendation of the *Incitement to Hatred* report for a move away from non-intervention towards zero tolerance. This will involve the separation and naming of hate expression from broader issues of expression, to ensure it is delegitimised and a climate of zero tolerance is created.

Remedial action: “Time to cut the ‘Gordian knot’”

- It is welcome that the recommendation for a statutory duty on relevant public authorities to take “*all reasonable steps to remove hate expression from their own property and, where it engages their functions, broader public space*” has received such widespread support through the consultation exercise.
- Work will need to be taken forward on its precise formulation, and a Hate Crimes Act introducing such a statutory duty is unlikely to be on the statute book until at least mid-2023.

- In the interim, we urge relevant public authorities to amend and formally adopt as a matter of policy a commitment to *taking reasonable steps* to remove items when they constitute hate expression.
- This recommendation relates to policy on hate expression on the public authority's own property and broader relevant functions, including:
 - *PSNI*: duties to take 'executive action' when hate expression constitutes a criminal offence, and duties to provide support to other public authorities carrying out lawful duties in this area to ensure staff safety.
 - *Department for Infrastructure*: exercise of powers under Article 87 of the Roads Order to remove items from lampposts and other street furniture.
 - *Councils*: exercise of powers to remove graffiti, placards and similar items.
 - *Housing Executive*: removal of items from its own properties and land and in its role as social landlord.
- Interim steps we recommend include:
 - The adoption, by PSNI, Department for Infrastructure, NIHE and councils of written policies, through formal processes including equality screening, as to the steps that will be taken to intervene to remove hate expression.
 - A policy approach of separating and specifying (in standalone or within a broader policy) hate expression from other expression, factoring in the harms created by hate expression on targeted groups.
 - In order to assist in the distinction of hate expression on a protected ground from other forms of problematic or contested expression the adoption of the 'Content v Context model' and, in the case of the latter, accompanying questions outlined in this report.
 - The PSNI should discontinue policy approaches (on intervention to remove hate expression) that skew decisions expressly in favour of those most likely to create public disorder. This does not mean that broader human rights-based factors should not be part of considerations.
 - Public authorities including the Department for Infrastructure and Housing Executive should discontinue policy approaches that condition intervention in this area to 'community' approval.
 - Councils in particular should ensure that approaches to removing graffiti expressly prioritise hate expression. This includes slogans constituting racist, sectarian and homophobic (etc.) intimidation from housing and preventing the 'normalisation' of slogans advocating genocide (such as KAT/KAH).
 - The Department for Communities should amend local government legislation to remove the (apparently accidental) exemption for racist and sectarian material from council enforcement powers over graffiti and posters. This may also provide an opportunity to issue guidance or place duties on councils and the Housing Executive to take forward policy on taking reasonable steps to tackle hate expression in the interim.

I. Introduction

I.1 “Time to cut the ‘Gordian knot’” – the recommendation of the Independent Review of Northern Ireland Hate Crime Legislation

An independent review of hate crime legislation in Northern Ireland was committed to by then Justice Minister Claire Sugden MLA in 2017 and included in the then draft Programme for Government.

The Department of Justice on 6 June 2019 announced the appointment of the judge-led Hate Crime Review and, following extensive engagement and formal consultation, on 30 November 2020 Judge Desmond Murrin issued his final report.

Chapter 10 of the final report dealt with the issue of “Removing Hate Expression from Public Space”. This concluded with Recommendation 15 as follows:

There should be a clear and unambiguous statutory duty on relevant public authorities including Councils, the Department for Infrastructure and the Northern Ireland Housing Executive, to take all reasonable steps to remove hate expression from their own property and, where it engages their functions, broader public space.²

The report noted overall very strong support for this recommendation, which had been proposed in the public consultation exercise, particularly among organisational respondents and online individual respondents.³

The Hate Crime Review highlights the rationale behind the recommendation that:

Public displays of graffiti, that include hate crime slogans, tend to diminish respect for the law and treat hate crime as somehow respectable or acceptable. This may ‘normalise’ hate slogans and enhance the factor of fear within an individual or community. This is dangerous and unacceptable in society as fear engenders hatred and makes victims anxious and concerned about their own private safety and security.⁴

The Review further notes that whilst “in many cases it may prove impossible to apprehend an individual offender”, nevertheless “such manifestations of hatred raise important questions about the duties and powers of public authorities to remove such material.”⁵

The problems of current practice and background to the broader discussion on addressing the issue of hate expression in public space had been given a considerable airing at the Equality

² Department of Justice (December 2020), *Hate Crime Legislation in Northern Ireland: Independent Review*, Final Report (hereafter ‘Hate Crime Review’) para 10.76.

³ Hate Crime Review – paras 10.24-25: overall approval for the recommendation was 67%; with 88% of organisational respondents agreeing, and 84% of online respondents. In individual written responses support fell to 47%; however this should be taken in the context that many individual respondents in general “strongly opposed” hate crimes legislation *per se* (on free speech, particularly religious expression, grounds) – and issued responses that were “*remarkably homogenous in their views. With a few exceptions, individual responses were of a campaign-like nature in that comments contained within them were similar (in a few cases identical) and they comprised a limited range of key points.*” See Dr Arlene Robertson, in the Review report (pages 628 et seq.) “Analysis of Consultation Responses”.

⁴ Hate Crime Review, para 10.2.

⁵ Hate Crime Review, para 10.19.

Coalition's conference on public duties to tackle incitement to hatred, held in partnership with Queens University in October 2017.⁶

This conference, opened by former Justice Minister Claire Sugden MLA, started with a panel on the "Harms and Impacts of Hate Expression" reflecting on the experience of victims of homophobic, transphobic, racist, sectarian, disablist, and misogynist hate expression.⁷ The conference heard comparative international experience, and from the criminal justice institutions and PSNI, along with a presentation on a draft report by Dr Robbie McVeigh on incitement to hatred, and a panel including representatives of political parties. The learning from this, including recommendations for a statutory duty on the subject of tackling hate expression in public space, was detailed in CAJ's submission to the Hate Crime Review,⁸ and is further reflected upon later in this report.

The final research report by Dr McVeigh, *Incitement to Hatred in Northern Ireland*, was published by the Equality Coalition in April 2018.⁹ The Hate Crime Review cites the research findings in relation to removal of hate expression:

At present, there often appears to be a policy and practice vacuum in which no organisation is prepared to accept responsibility for removing materials – even when there is a broad acceptance that the materials are inciteful or unlawful.

The report calls for a 'radical overhaul' in relation to intervention, stating that "*the de facto toleration policy should cease... [and] executive action to remove offending materials should be prioritised.*" The report also highlights that toleration of such materials, in addition to facilitating criminality, also "*seems likely to be one of the key mechanisms through which areas become or are kept institutionally segregated.*" The Hate Crime Review quotes the following passage from the research:

There is a broad recognition across sectors that the approach needs to change. Essentially, the key intervention should be to change the terms of the debate and move from a 'toleration' towards a 'zero tolerance' policy on incitement to hatred.

This broad intervention should ensure that incitement to hatred is named for what it is and signal that it can no longer be tolerated. One clear element of this would be a new, integrated policy to remove instances of incitement to hatred as soon as they appear. The current 'buck-passing' between different agencies must stop and be replaced with an integrated response...¹⁰

⁶ *Defining public duties to tackle incitement to hatred whilst respecting free expression: reviewing the legal and policy framework*, Equality Coalition, QUB George Mitchell Institute, October 2017, conference report available at: <https://www.equalitycoalition.net/>

⁷ This panel was composed of Gavin Boyd, the Rainbow Project; Ellen Murray, Sail; Ola Sobieraj, Stronger Together Network; Anna Lo, former MLA and Director of Chinese Welfare Association; Dessie Donnelly, Participation and Practice of Rights; Dr Rachel Killean, School of Law, QUB, and chaired by Patricia McKeown, UNISON.

⁸ <https://caj.org.uk/2020/04/28/submission-to-the-independent-review-of-hate-crime-legislation-in-northern-ireland/>

⁹ McVeigh, Robbie (2018) *Incitement to Hatred in Northern Ireland* – Research Report (Equality Coalition) available at: <https://www.equalitycoalition.net/>

¹⁰ Hate Crime Review Final report – paras 10.24-25 citing McVeigh, work cited above.

The Hate Crime Review goes on to note that *“Such comments and conclusions are largely supported by the majority of respondents to the consultation paper and to the online survey, and this serves to emphasise their importance.”*¹¹

The Review Report highlights support from the PSNI for the law to be clarified, so that *“victims understand what avenues of redress and protection are available to them and to ensure clarity of ownership and responsibility to support prompt action by the relevant authority and relevant accountability.”*¹² It also highlights support from the Public Prosecution Service (PPS), which stated that *“Hate expressions should be removed as quickly as possible to avoid further harm and distress being caused to protected groups.”* The PPS was critical of the present ‘piecemeal approach’ across different public authorities and stated that the *“PPS consider that consistency of approach is required. The powers and duties in respect of the removal of the material should be clearly outlined and codified and the law strengthened to achieve that end.”*¹³

The Hate Crime Review also lists that ‘among other groups’ the following supported the recommendation: the Law Society of Northern Ireland, the Probation Board for Northern Ireland, the Northern Ireland Catholic Council of Social Affairs, Victim Support NI, the Equality Commission for Northern Ireland, the Northern Ireland Centre for Racial Equality, Sexual Orientation/Transgender Human Rights Groups, the Church of Ireland Church and Society Commission, the Belfast Jewish Community and a number of groups from the women’s sector.¹⁴

In addition, the Hate Crime Review also recorded a *“broad spectrum of agreement across the political parties”* citing submissions to the Review from Sinn Féin and the DUP. The DUP caveated its support to tackling material where *“malicious intent is evidenced and no reasonable defence provided”*, cautioning against *“unjustified pursuit of those expressing freedom of speech which does not incite or invite violence.”* The Housing Executive also sought more ‘in-depth analysis’ citing ‘issues of culture and freedom of expression’ and ‘undoubted sensitivity’ over how to operationally address hate expression.¹⁵

The Review reflected on hate expression in public space being among *“the most difficult areas for public bodies”* as well as the balance between free expression and enforcing the law. Judge Marrinan ultimately reflected on the *“overwhelming response to the consultation question on this issue”* and concluded that *“despite these practical and principled concerns, I am of the opinion that it is time to cut the ‘Gordian knot’ and produce a recommendation which can form the basis of reasoned debate when the issue of improving hate crime legislation is placed before the Assembly.”*¹⁶

The Equality Coalition subsequently met with the next Justice Minister, Naomi Long MLA, who expressed broad support for the recommendations of the Review, including in relation to new legislation. Given the preparatory work required and the limited time in the current Assembly mandate, it could be at least mid-2023 before legislation is enacted. The present report therefore also reflects on steps that can be taken by relevant public authorities in the interim.

¹¹ Hate Crime Review, paras 10.26.

¹² Hate Crime Review, paras 10.27.

¹³ Hate Crime Review, paras 10.28.

¹⁴ Hate Crime Review, paras 10.39.

¹⁵ Hate Crime Review, paras 10.40; 10.43; 10.50.

¹⁶ Hate Crime Review, paras 10.57 & 10.75

The work on this report was initiated in 2019 and paused in 2020 in the context of the COVID-19 pandemic, although initial learning and proposals from it were contained in a CAJ submission to the Hate Crime Review in 2020.

The research was completed in 2021 following engagement on a working draft. This included meetings at Assistant Chief Constable level with the PSNI, meetings with the Infrastructure and Communities Ministers and a range of follow up meetings with officials. Responses were also received from the Housing Executive, including engagement with the Chief Executive, with district councils facilitated by the Local Government Staff Commission, and with other stakeholders. We would like to express gratitude to all those who engaged with and contributed to the production of this report.

1.2 What is ‘hate expression’: terminology and concepts

This section provides a general explanation and illustrations of the key concepts used in this report. Our overall definition of hate expression is derived from the definition of hate speech recommended by the Council of Europe; speech which:

...entails 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, stigmatisation 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.¹⁷

Hate expression

- Hate expression refers to material or conduct that is either racist, sectarian, homophobic, transphobic, disablist, misogynist etc. (i.e. it must relate to one of the *protected grounds* in anti-discrimination and equality law).
- Hate expression is conceptually part of ‘hate speech’ but refers to other forms of expression and conduct that are not speech.
- The most serious forms of hate expression may constitute ‘incitement to hatred’ – a criminal offence – on the protected grounds (which in NI law currently are ethnicity, religion, disability and sexual orientation).

Deconstructing this, there are **three basic elements**:

First the definition refers to different forms of expression, with our focus being on physical manifestations in public space. This would encompass the messaging within graffiti, banners or slogans, the placement of particular materials, or even the burning of particular items.

Second, the expression in question involves the “advocacy, promotion or incitement” of hatred of “a person or group of persons, as well any harassment, insult, negative stereotyping, stigmatisation or threat of such person or persons and any justification of all these forms of expression”.

And, **third**, the expression in question must relate to a protected ground (personal characteristic or status) as set out above.

¹⁷ European Commission against Racism and Intolerance (2015), *ECRI General Policy Recommendation no. 15 On Combating Hate Speech* (Council of Europe), preamble; cited hereafter as ECRI GPR 15.

Public space

- The focus of this report relates to hate expression in physical public space rather than online in the digital world.
- Public space refers to streets, roads, buildings or other areas that are in sight of the public or a section of the public.
- The report does not focus on ‘speech’ in a public context (including chanting, singing etc.) but rather to physical forms of expression.

Not hate expression

- Material is not ‘hate expression’ just because it is ‘offensive’ to others.
- Freedom of expression protects material that may ‘shock, offend or disturb’ including forms of political and cultural expression.
- Hate expression must promote hatred *against a protected ground in equality law*, rather than a lay or generic concept of hate (*e.g. graffiti proclaiming hatred for Manchester United is not ‘hate expression’ – it is not racist or sectarian etc. – and supporters of Manchester United are not ‘protected groups’ in equality legislation*).
- Expression that merely attacks a NI political party is not ‘hate expression.’ This is not a protected ground.*

“Recognising also that forms of expression that offend, shock or disturb will not on that account alone amount to hate speech and that action against the use of hate speech should serve to protect individuals and groups of persons rather than particular beliefs, ideologies or religions.”

ECRI General Policy Recommendation No. 15, preamble

*‘Political opinion’ is a protected ground in anti-discrimination legislation, but not in relation to incitement to hatred and similar offences, to avoid capturing protected political free expression. If however the expression in question also attacks a group as a whole (on the basis of a protected ground) it will be hate expression (e.g. graffiti attacking a party that also states KAT/KAH; or the burning of political party posters alongside other items that represent a broader community as a whole.).

Other forms of expression that may engage the law

- Other forms of expression that may not be 'hate expression' on a protected ground may conflict with other areas of the law.
- This includes slogans making threats to kill or otherwise constituting incitement to violence.
- Expression 'encouraging support' for a paramilitary activity (under the Terrorism Acts).
- There are also the generic provisions of planning law, criminal damage etc.

Content v context

- **Content:** hate expression encompasses material that is *in itself* hate expression, for example graffiti using racist or homophobic language.
- **Context:** hate expression also encompasses material that is hate expression *in light of the context in which it is placed*.
- For example, a national flag is not hate expression in itself. However, when placed solely outside the house of the 'other' who moves into a street, or outside a new housing development as a form of racist and sectarian harassment and intimidation, it will be.
- Context also encompasses public conduct with particular materials – for example, the burning of a rainbow flag in public as homophobic expression or burning the flags of an ethnic minority community in a gesture of hostility towards that community.

"It is 5% what is said and 95% context."

Paul Giannasi, Head of the Cross-Government Hate Crime Programme, UK Ministry of Justice (MoJ)*

*Excerpt from a presentation on advice to police and prosecutors regarding incitement to hatred thresholds given by Paul Giannasi, Head of the Cross-Government Hate Crime Programme, UK Ministry of Justice (MoJ). The presentation can be found in full in Equality Coalition (2019) 'Defining Public Duties to Tackle Incitement to Hatred whilst Respecting Freedom of Expression: Reviewing the Legal and Policy Framework – report of conference held in October 2017'.

1.2.1 Why distinguish hate expression for intervention?

The purpose of distinguishing hate expression for duties to intervene relates to the harms it causes. Both in online and physical space the removal of the offending material could be more important to a targeted victim (whether individually or as part of a group) than the apprehension of an offender, in the context of the ongoing harm the continued presence of the material constitutes. The following is set out in the Council of Europe's European Commission against Racism and Intolerance (ECRI) General Policy Recommendation:

- The most serious forms of hate expression can be intended *“or reasonably expected to have the effect of inciting others to commit acts of violence, intimidation, hostility or discrimination against those who are targeted by it”*.¹⁸
- The ECRI standard also alludes to the role of hate expression in contemporary Europe *“undermining self-respect of the members of vulnerable groups”* as well as *“damaging cohesion”* and the failure to tackle it having *“adverse consequences both for those to whom it is specifically addressed and for society as a whole.”*¹⁹
- The ECRI, citing evidence from its monitoring role, sets out that persons in target groups *“...do not just suffer distress, hurt feelings and an assault upon their dignity and sense of identity. In addition, the use of hate speech also contributes to those targeted by it being subjected to discrimination, harassment, threats and violence as a result of the antipathy, hostility and resentment towards them that this use can engender or strengthen. Such attitudes and conduct can then lead to them feeling afraid, insecure and intimidated. Ultimately, the use of hate speech can lead to those targeted by it withdrawing from the society in which they live and even ceasing to be attached to its values. There has been concern, in particular, about the use of hate speech leading to the early dropping out of school of pupils, who then face problems in accessing the labour market and this in turn reinforces the separation of those concerned from society.”*²⁰
- The ECRI standard also emphasises that hate expression *“is also damaging for society as a whole”* due to the *“resulting climate of hostility and intolerance, together with a readiness to accept or excuse discrimination and violence, which is divisive, undermines mutual respect and threatens peaceful co-existence”*.²¹
- The ECRI Recommendation and other human rights standards emphasise that criminal sanctions (through the necessary outlawing of hate expression that constitutes ‘incitement to hatred’ on protected grounds) should not be the primary focus of action to countering hate expression. Rather, other forms of intervention are also needed; these can range from the removal of material to initiatives to tackle prejudice.
- The history of Europe has demonstrated the need for robust intervention, as expressed in the ECRI standard: *“What happened in the past remains a stark warning of the dangers posed by allowing bigotry, hatred and prejudice to flourish unchallenged.”*²²

¹⁸ ECRI GPR 15, preamble.

¹⁹ ECRI GPR 15, explanatory memorandum, paras 22, 29

²⁰ ECRI GPR 15, explanatory memorandum, para 28.

²¹ ECRI GPR 15, explanatory memorandum, para 30.

²² ECRI GPR 15, explanatory memorandum, para 32.

1.2.2 Terminology

The ECRI standard also provides definitions of a number of key concepts including:

- **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 “race”,²³ 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.

In relation to defining **sectarianism** 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.²⁴ This has also been advocated by the Northern Ireland Human Rights Commission, which has stated that:

*This does not mean that sectarianism should not continue to be individually named and singled out just as other particular forms of racism are, for example, antisemitism or Islamophobia.*²⁵

²³ The ECRI standard 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.”

²⁴ 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” (para 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”. AC FCNM, *Third Opinion on the United Kingdom* adopted on 30 June 2011, ACFC/OP/III(2011)006, para 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.

²⁵ NI Human Rights Commission (February 2011) *Parallel Report to the Advisory Committee on the Third Monitoring Report of the United Kingdom on the Framework Convention on National Minorities*, para. 59.

1.3 Hate expression in public space in Northern Ireland

1.3.1 Prevalence and examples

Hate expression in public space is a considerable problem in Northern Ireland. There will be examples of particular incidents and how they have been dealt with by public authorities throughout this report.

The most prevalent forms of hate expression that we have come across in the Northern Ireland context (in physical space) are forms of sectarian and other racist expression. This is followed by examples of homophobic expression. We have also come across instances of disablist, transphobic and misogynist expression (which are more prevalent online).

Whilst the ECRI definition cited above may be more complex, in simple terms what we are referring to is racist, sectarian and homophobic (etc.) expression in public space.

As reflected in the Hate Crime Review and the CAJ submission to it, we have sought to define and separate such hate expression into two categories centred on *content* and *context*. We therefore mean material or conduct of a racist, sectarian, homophobic, transphobic, misogynist, disablist nature (the protected grounds²⁶) in a public context where:

1. the **content** of the material itself would be considered by a reasonable person in the circumstances as hate expression on a protected ground; or
2. the **context** of the placement of the material or expressive behaviour in question in light of all the circumstances would be likely to constitute hate expression, including intimidation or harassment, on a protected ground.

Content based - Material that is hate expression per se in NI public context

- Graffiti or slogans etc. that advocate genocide against the Catholic, nationalist, Protestant or unionist communities (Kill all Taigs/KAT, Kill all Huns (KAH) etc.) or sectarian graffiti intimidating persons from housing ('Taigs out' etc.);
- Similar racist and homophobic incitement (e.g. 'houses for locals only', 'Roma out', 'No Blacks', 'No Muslims', 'Gays out' etc. messages);
- Misogynistic graffiti and slogans using pejorative and abusive language against women;
- Flags that almost always are used to incite racist hatred per se (in recent years the Apartheid South Africa flag, the Nazi flag and Confederate flag).

²⁶ These categories reflect the expanded protected grounds recommended by the Hate Crime Review. Under the current incitement to hatred legislation ethnicity, religion, sexual orientation and disability are covered.



Figure 1: Racist and sectarian graffiti in Skegoneill, North Belfast.

Photo taken (with permission) from Twitter:
<https://twitter.com/conormaskey/status/1329381783973064704>



Figure 2: "No Muslims" graffiti, Newtownabbey Greenway.

Photo: CAJ.



Figure 3: Sectarian graffiti, College Avenue, Belfast City Centre

Photo: CAJ



Figure 4: Flag of apartheid South Africa (the middle flag) erected on utility pole, Moneyslane, Co. Down

Photo: CAJ



Figures 5 & 6: KKK graffiti (left) and Swastika graffiti (right) drawn onto a wooden post located on a path near Mossley West Train Station, Newtownabbey.

Photo: CAJ



Figures 7: Antisemitic graffiti calling Covid-19 a 'scam' near Maghaberry, Co. Antrim.

Photo taken (with permission) from Twitter:
<https://mobile.twitter.com/SorchaEastwood/status/1344693745422381059>

1.3.2 Context based hate expression– a judgment call?

Ascertaining whether material is hate expression where it is *content* based is relatively straightforward (a swastika, KAT/KAH can rarely be anything else).

The Hate Crime Review commented on the proposed *context* ground in the following terms:

*This second ground would involve careful and measured judgement from a public authority. The precise legal formulation of such an important statutory duty will require detailed consideration but the suggested formulation offers a sound basis for such consideration.*²⁷

Ascertaining whether material or conduct constitutes hate expression due to its *context* does involve a greater judgment call that public authorities may be more reluctant to make. This is because it involves an official determination as to whether expression is sectarian, racist, homophobic etc. due to its context. That said, with the vast majority of examples of context-based hate expression we have seen in recent years during the development of this report, it has not been complex to make this determination. In most cases the determination is fairly obvious.

Context based - Examples of material that is hate expression in light of the context it is placed in.

- Flags (or other materials) placed in contexts to intimidate persons from or from taking up housing – for example, national or paramilitary flags placed at entrance to new housing estates or Union flags placed outside house of new ethnic minority residents.
- Paramilitary expression daubed on or near buildings used/associated largely by the ‘other’ community (churches and halls; schools; sporting organisations).
- The practice of burning items on bonfires that in the context will represent a protected group including migrants and LGBT (Polish/other migrant community and Rainbow flags), or items that in the context collectively represent the Catholic or nationalist community (Celtic shirts, rosary beads, effigies etc.).

The following questions may assist in determining if something is context-based hate expression:

1. Is the expression targeting a *protected group* (an ethnic minority group, unionist or nationalist community, LGBT community, women)?
2. In light of factors such as its location and timing: what is the likely motivation and what are the objectives of the expression?
3. What is the likely reach, harm and impact of the expression on persons in the protected group?

²⁷ Hate Crime Review, para. 10.79

In relation to the first question, it should be noted that a political party, or politicians, are not in themselves a *protected group*. In addition, political expression no matter how contested or partisan (including that which is conflict related or that may ‘shock, offend and disturb’ others) will not *in itself* be hate expression if it does not engage any protected ground. The definitions of key terms such as racist and sectarian expression also assists in providing a greater degree of legal certainty over what is captured by ‘hate expression.’

Items and conduct can also constitute hate expression in light of their motivation and impact. For example, there is a difference between national flags placed on main routes for 12 July, VE day, Easter etc., and those placed on a new housing estate where it is likely that they are positioned to deter or intimidate persons from ‘other’ groups taking up housing. The likelihood of expression inciting a threat is also a consideration.

The following section provides some further examples of contextual considerations.

Political expression and hate expression – context

At present there is a tendency for a variety of politically contentious forms of expression to be described as ‘hate’ expression without it relating to a protected ground. We are aware of items or actions that have been described as hate expression because they are found to be offensive by others, but they do not meet our criteria as they do not relate to protected grounds.

One example into 2019 was the proliferation of banners supporting ‘Soldier F’.²⁸ The erection of some banners led to calls for the PSNI to treat them as incitement to hatred.²⁹ However, the content of these banners typically constituted political expression rather than ‘hate expression’ in itself. The contextual *exception* to this would be if the banners were placed in a manner to constitute sectarian intimidation or harassment (e.g. where erected with paramilitary involvement or support to target the homes of nationalists). The PSNI in this instance does not appear to have treated the banners as a hate crime. (Less clear however is how by contrast the PSNI then came to treat the removal and destruction of a Soldier F banner as a ‘hate crime’.)³⁰

The placing of banners or other items on public property may of course engage other offences, but this is not necessarily ‘hate expression’. A further contextual example would be graffiti expressing support for a paramilitary organisation. This may not be hate expression in itself, but it may be if it is placed on, for example, a place of worship or school of an ‘other’ community where the purpose or effect is sectarian or racist intimidation and harassment.

Criticism of a political party or its policies is also not to be considered as ‘hate expression’ because it does not relate to a protected ground. One high-profile example relates to an LGBT rights protestor at the 2017 Belfast Pride parade holding a “Fuck the DUP” placard, with the PSNI, following complaints, initiating a criminal investigation and questioning the woman under caution. This bizarrely included investigation of the sign as an ‘incitement to hatred’ offence, despite the incident clearly not relating to any of the protected grounds listed in the legislation. The Public Prosecution Service consequently issued a decision not to prosecute,

²⁸ In reference to a former soldier charged with two murders during the 1972 Bloody Sunday massacre.

²⁹ For example, see: <https://www.irishnews.com/news/northernirelandnews/2019/05/08/news/soldier-f-support-banner-is-incitement-to-hatred-claim-1614911/>

³⁰ <https://www.belfasttelegraph.co.uk/news/northern-ireland/arrest-after-banner-backing-murder-charge-soldier-f-burned-in-lurgan-38154838.html>

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.”³¹ The distinction between political expression targeting policy or a party, and expression targeting a particular community covered by a protected ground, is an important one.

The burning of the placards of a political party on bonfires will not automatically constitute sectarian hate expression. A distinction can be made when the burning of items is in the context of their being a proxy for an entire community, which would constitute sectarian/racist hate expression. For example, the burning of a Sinn Féin poster on its own is unlikely to constitute sectarian hate expression, as it relates to a political party, not the Catholic or nationalist community. Yet the burning of such a poster alongside other items that are clear proxies for the Catholic or nationalist community would do so (e.g. Celtic shirts, rosary beads etc.) A further example of when expression on a bonfire moves beyond the political to constitute, in this instance, racist hate expression, was provided by Dr McVeigh at the Equality Coalition conference, as follows:

Then we have the case of Anna Lo, former MLA. In 2014, the slogan “Anna Lo Ate My Dog” was placed on a bonfire, alongside Alliance party election posters bearing her face. There was a personal element to this, but it is a clear case of incitement to hatred on the basis of race as well. On the one level you can read it as a political attack on an individual, an attack on a political party. However, because the slogan also references a racial stereotype, most people would recognise it as incitement to hatred on the basis of race.

This does not mean that the burning of party-political posters is, of itself, unproblematic in the local context. It does not necessarily mean that a public authority should not intervene if the conduct takes place on its property, or even with its funding. But a distinction should be drawn between this and sectarian or other racist hate expression where there is likely to be a greater onus to intervene.

This is also the case with other problematic expression that may not always relate to a protected ground (and hence not be ‘hate expression’ as defined here) but is nevertheless gratuitously offensive – for example, banners gloating about the killings of particular persons or placing such persons’ names on bonfires. Public authorities may also intervene to remove such expression.

One complex area relates to the burning of Tricolours or Union flags on a bonfire. At one level this is political expression, an expression of opposition to the jurisdiction of a state – or politically, opposition to republicanism or unionism in general. Such expression crosses the line where it is instead contextually targeting the community rather than state, policy or politics.

A straightforward example of where flag-burning crosses the line is the destruction of Polish flags on Eleventh Night bonfires, which are clearly in context racist expression against the Polish migrant community, rather than political expression of discontent at the Polish state or the policies of its government. The judgment call is more complex in relation to the burning of Tricolours or Union flags, as such actions are more likely to constitute political expression.

³¹ This includes the contention that burning of a political party poster in itself constitutes incitement to hatred on a protected ground. See <http://www.irishlegal.com/11011/woman-will-not-prosecuted-f-dup-placard/>.

However, the balance clearly tilts when the flag is burned alongside other items that individually or collectively represent a community rather than just a state or political party.

One example is provided by an internment bonfire in Derry in 2018 where a range of items including Union and Ulster Banner flags, and flags representing Donald Trump and the British Army, were placed to be burned. Whilst burning such items engages political expression, the presence and burning of a 'Welcome to the Fountain' sign (in reference to the mostly Protestant/unionist Fountain area of Derry) marked the display out as sectarian hate expression.³² The bonfire also had signs bearing the names of a number of police and prison officers who had been murdered in recent years.

Again, for the avoidance of doubt, this is not to say that political expression by burning national or other flags is to be encouraged, or that it does not damage reconciliation. A distinction still needs to be drawn between what is racist/sectarian etc. expression, and what is not.

There are examples of other types of expression that contain a mixture of content. Below, the slogan "No Irish Sea Border" is political expression. The message urging the targeting of Sinn Féin is not itself hate expression as it does not relate to a protected group – it is nevertheless incitement to violence, a criminal offence. The addition of "KAT" (Kill all Taigs) however marks the graffiti as sectarian hate expression.



Figure 8: Graffiti photographed on February 2021, Ahoghill, Co. Antrim

Photo taken (with permission) from Twitter:

https://mobile.twitter.com/mcguigan_philip/status/1366013584162099203

1.3.3 The paramilitary context

Paramilitary involvement in hate expression is manifest in a number of ways, and has largely shaped the present public sector response.

In other closely related policy areas, in particular as regards the involvement of elements of loyalist paramilitarism in racist intimidation from housing, we have witnessed a response

³² <https://www.mirror.co.uk/news/uk-news/republican-set-alight-bonfire-derry-13089040>

whereby paramilitary involvement tends to be downplayed.³³ Whilst at times there has been a similar reluctance to explicitly name paramilitary involvement with hate expression, and instead take refuge in codified general references to staff safety, the contention is even less sustainable in this policy area: the reluctance to intervene and remove hate expression is precisely grounded in the context of there being paramilitary involvement.

One of the problematic outworkings of this in policy terms is the practice of conflating the policy response to hate expression with much broader questions of flags and bonfires in general, where there is often a paramilitary context. This means in practice the issue of hate expression becomes ‘parked’ alongside the failure to address much broader issues.

As we shall see in the next section, a further impact is found in policy and practice being underdeveloped, unclear and often discussed behind closed doors.

The paramilitary context encompasses hate expression that is put up by, or with the blessing or protection of, paramilitary groups. There is also the accompanying element of real or perceived paramilitary threat behind such expression.

For example, racist notices or banners proclaiming that landlords should rent to ‘locals only’ have a much greater harmful impact when they are accompanied by a perceived paramilitary threat to tenants or property owners. This suggests that the expression may be followed through by actual assaults on ethnic minority tenants, fear of such attacks, or acts of discrimination by intimidated landlords.

There has also been at times a tendency to conflate *all* paramilitary expression with hate expression regardless of whether it would meet the definition and criteria set out above. We consider this problematic, not least as it again ‘parks’ the issue of dealing with the specific and pressing harms of hate expression, until much broader issues regarding public paramilitary-related expression – that encompass everything from murals to memorials – are addressed.

1.3.4 A question of balance?

In the initial discussions on this report some respondents were keen to ensure that we ‘balance’ examples of hate expression that are associated with unionism or nationalism. We have however found that it is at times not possible to do this (where a counter example does not appear to exist). In addition, providing for such a balance may in itself be both artificial and likely to constitute a significant distortion of present experience.

This report has not attempted to rigorously quantify all examples of hate expression but some preliminary patterns have been identified. Whilst there are many examples of sectarian graffiti (particularly KAT/KAH) targeted at ‘both’ communities, other forms of hate expression, including in particular racist expression, do tend to be more prevalent in mostly unionist

³³ For commentary see CAJ (July 2016) *Submission from the Committee on the Administration of Justice (CAJ) to the UN Committee on the Elimination of All Forms of Racial Discrimination on the 21st-23rd Periodic Reports of the UK*, paras 12-29. See also: <https://www.belfasttelegraph.co.uk/news/northern-ireland/exclusive-2000-households-forced-out-of-their-homes-paramilitaries-blamed-for-73-of-cases-37676384.html> and <https://www.thedetail.tv/articles/racist-intimidation-in-the-village-in-south-belfast-been-going-on-for-years>

areas. For example, the use of flags or other emblems or banners to intimidate persons from taking up housing also appears to overwhelmingly target Catholics and ethnic minorities.

There are probably a number of factors influencing this. These include the question of the active involvement of elements of non-transitioned loyalist paramilitarism in placing, endorsing and protecting hate expression. There is also the context of British far-right groups having organised in Northern Ireland within mostly unionist areas, including during the loyalist flags protests.³⁴ By contrast it does not appear that Irish far-right groups have gained any foothold in nationalist areas.

There are differentials in political leadership against hate expression. There are good examples of leadership from nationalist, unionist and ‘other’ parties, but also instances where hate expression has been excused or denied. For example, the then First Minister Peter Robinson queried whether it was racist to put up ‘houses for local people’ banners that had prevented a Nigerian man from taking up a home.³⁵ Councillor Dale Pankhurst’s widely reported claim that there was no sectarian motive to the intimidation of a Catholic family from a house in North Belfast came despite “ALL TAIGS OUT” being daubed on the front wall of the property.³⁶

In the summer months, when loyalist bonfires and parades are traditionally held, racist and sectarian incidents rise; until the pandemic they were around 80% higher in July than in the pre-summer months.³⁷ We might expect that incidents meeting our stricter definition of ‘hate expression’ broadly follow this pattern. While there are also republican bonfires in August (from which an example of hate expression is cited above), there are many fewer than the loyalist bonfires – although a higher number of bonfires does not of course mean more hate expression *per se*. It is important to distinguish between bonfires where there is hate expression, and the majority of bonfires where there is not.

1.3.5 The harms and impacts of hate expression on protected groups

In 2017, the Equality Coalition, in partnership with Queens University, held a conference on incitement to hatred in Northern Ireland. Conscious of the prevalence of hate expression in the local context, and that the voices of those groups subjected to discriminatory expression were not always prominent in the debate, the first panel of the conference consisted of inputs from representative groups on the ‘harms and impacts’ of such hate expression. This, and other inputs into the conference, focused on examples and implications of homophobic,

³⁴ See, for example (from 2004): <https://www.theguardian.com/uk/2004/jan/10/northernireland.race> and more recently <https://www.belfasttelegraph.co.uk/news/uk/scottish-loyalist-jim-dowson-who-stirred-flag-protest-is-now-leading-light-of-uks-far-right-36868289.html>

³⁵ See <https://www.bbc.co.uk/news/uk-northern-ireland-27899378> and <https://www.belfasttelegraph.co.uk/news/northern-ireland/first-minister-peter-robinson-in-u-turn-over-locals-only-race-row-30370144.html>

³⁶ <https://www.belfasttelegraph.co.uk/news/northern-ireland/dup-mans-tv-claim-attack-on-catholics-house-not-sectarian-while-camera-pans-past-sectarian-graffiti-was-bid-to-de-escalate-situation-37171062.html>

³⁷ See PSNI, *Hate Motivation by Month Pivot Tables 2004-2016* [<https://www.psni.police.uk/inside-psni/Statistics/hate-motivation-statistics/>] In the five-year period from 2012-2016 there is generally an average increase of around 25% from June to July. The July figure is on average around 80% higher than the average monthly figure from January-May each year.

transphobic, racist, sectarian, misogynist and disablist hate expression on persons in the target groups. The learning conveyed the seriousness of the problem of non-intervention leaving unchecked the harms of such discourse on vulnerable target groups, including creating an 'acceptable level' of hate expression.

The first speaker, Gavin Boyd of the Rainbow Project, focused on the connection between homophobic expression and the “*familiar pattern*” of it creating a climate leading to “*direct acts of homophobic intimidation, denigration or discrimination against the LGBT community*”. He said:

This behaviour manifests itself in many different ways, such as the presence of homophobic graffiti near someone’s home; name-calling in the street or other places; homophobic bullying in the school setting.

The harms caused by such acts can be immense and are the backdrop to high levels of anxiety, self-harm, and isolation for LGBT persons.

Often, the negative effects follow a familiar, incremental pattern – a downward spiral. For example, the placing of homophobic graffiti next to a home initially may lead to an individual becoming withdrawn and isolated, not wishing to leave their home. However, over time the anxiety induced by the graffiti can lead to other serious problems, such as self-harm.

The climate in Northern Ireland is different to anywhere else on these islands, with much higher levels of prejudice and, therefore, much higher potential for harm to be caused to lesbian, gay and bisexual individuals and trans individuals, as perpetrators rarely make a distinction between these groups. The risk of both incitement itself and subsequent incidents is much greater here than in other parts of the UK and Ireland.

These issues were echoed by Ellen Murray of Sail, emphasising the growing harms of incitement to hatred that was specifically transphobic:

The impact of transphobic incitement to hatred and associated violence on trans individuals and communities is often profound... There are many intersecting issues affecting trans populations; perpetrators don’t always distinguish between homophobia and transphobia, but there is a growing experience of specific transphobia in Northern Ireland as cultural competency and awareness of trans people increases.

Ola Sobieraj of the Stronger Together Network spoke on the harms of racist expression targeted at migrants. She highlighted the specific impacts of anti-migrant discourse linked to the Brexit campaign as having exacerbated existing problems:

Attitudes and perceived attitudes towards migrants and other minority groups have undergone a marked change since the Brexit referendum. Accompanying this has been an increase in racially motivated hate crimes, such as racist graffiti and the defacement of property. As a result, many migrants are living with a growing fear they will be attacked or deported. Many are experiencing a diminished feeling of belonging and are taking the result of the EU referendum very personally.

Anna Lo, former MLA and Director of the Chinese Welfare Association spoke of the impact of racist expression from a much earlier era:

When I first started to work with members of the Chinese Community in the 1980s, I was surprised to see the acceptance of the level of racism against them from within the community itself. The frequent harassment – the taunting, graffiti, attacks on their properties – and the lack of police prosecution had made many of them feel powerless. I remember when I first spoke out in the media regarding racism, I was told by some elders in the Chinese community to keep quiet.

... Incitement to hatred against ethnic minorities causes fear, anger and alienation in those communities. In some cases, it could lead to serious consequences.

Reference was also made to an escalation of attacks on migrants in 2014 when Anna Lo was Chair of the All-Party Group on Ethnic Minority Communities. The former MLA recalled that the situation was exacerbated by the sermon given by a pastor in the Whitewell Tabernacle in North Belfast:

Amidst the rising tension, Pastor James McConnell, in a Sunday sermon, described the Islamic faith as “heathen, satanic and a doctrine spawned in hell”. Such comments were echoed by a couple of other church ministers. Similarly, several DUP politicians also expressed public support for the preacher. I was incensed by Peter Robinson, the then First Minister of Northern Ireland who subsequently spoke in defence of the pastor. He added fuel to the fire by stating that he would only trust Muslims to “go down to the shop” for him and to give him the right change. We saw immediately after those comments several attacks on the Muslim community and people were really frightened. Church leaders and politicians are influential people and their negative comments against a minority could give legitimacy for some local people to target them.

This issue was also raised by PPR (Participation and Practice of Rights) in its testimony to the conference recounting the impact on two Muslim families in the locality.

In May 2014, Pastor McConnell and Peter Robinson said what they did about Muslims. Two Muslim families, who had been living in Tigers Bay for three months, appeared on the Stephen Nolan show in the aftermath of the comments to explain that they weren't Jihadis, but upstanding members of the community. Afterwards, their homes were attacked, their windows were broken, and they fled. One family went to live with friends in South Belfast. The wife in the other family was heavily pregnant and she and her husband spent most of the following week in the hospital, where she had their second child.

Whilst this issue relates to speech rather than physical expression in public space it is nevertheless indicative of the harms and impacts hate expression can have in the local context.

The harms and impacts panel also heard from Dr Rachel Killean from the QUB School of Law, in relation to gender-based hate expression targeted at women. Dr Killean noted that:

We find words such as “bitch”, “slut”, “tramp”, “cunt” that reduce women to animals or their body parts and are used so regularly in private and public that they rarely invite comment.

Such language and conduct rests on an inference about the about the inferiority of a person and the inferiority of the group to which that person belongs. She added: *“This sort of*

language reinforces and creates a position of inequality and accrues a sense of vulnerability and victimisation within a group.” Whilst it was the case that the majority of the alarming amount of contemporaneous gender-based hate expression occurs digitally, examples were given at the conference of such material physically in public space.

PPR in its input to the panel drew attention to paramilitary and political statements in north Belfast that underpinned the context in which housing inequalities have flourished.

Dr Robbie McVeigh raised numerous examples of sectarian hate expression and its impact. This included the ‘genocidal imperative’ of KAH/KAT graffiti. He drew attention to KAH graffiti having been daubed on public property near the UNISON office for many years, and spotting it again when returning to the office for meetings on his research.

I noticed ‘KAH’ – meaning “Kill all Huns” – was inscribed on the side of a telephone junction box near the UNISON office in North Belfast. It struck me as particularly poignant because Inez McCormack had recently passed away [in January 2013]. Someone like Inez would have been classed as a ‘Hun’ – and yet she had done so much to oppose sectarianism and promote fair employment. I looked recently and the inscription is still there, despite the amount of time that has now passed. It raised a question that cuts to the heart of questions around incitement to hatred. What – if anything – should we do about it? And if we think it shouldn’t be there, whose job is it to remove it?

....It is still there, it is still pervasive, and it is still so normalised. We do not even equate these things to the genocidal imperative.

Dr McVeigh discussed the case of the Ballycraigy Bonfire, a loyalist bonfire in County Antrim which led to a high-profile conviction in 2015 against an individual in relation to racist messages placed on the bonfire.³⁸ In this case the media tended to blank out the racist ‘N’ word in publishing pictures of the bonfire, although sectarian slogans were still published. In this instance only the racist material was subject to the criminal proceedings (although it is thought this may relate to evidential issues).

I move on now to the case of the Ballycraigy Bonfire, which led to a prosecution of one young man for inciting racial hatred. This is the most high-profile case of late, but there have been other examples and there have been other prosecutions and other convictions. One thing DoJ need to do in future is triangulate the information gathered by the PSNI and PPS and use this to establish baseline data on what is happening in these cases because a gap exists at present.

The judgment in the Ballycraigy Bonfire case generated a lot of public discussion. The act prosecuted was in relation to the racist slogan placed on the bonfire, not the sectarian slogan that was also present. The genocidal sectarian material was not prosecuted. The reason given for this was that the investigation was mostly done [in relation to a witness], who happened to see the person writing the racist statements. While I do think the prosecution was correct with regards to the threshold for incitement to hatred, there were a lot of other things there that should have been prosecuted for at the same time.

³⁸ See BBC News Online (8 September 2015) “[Named man] convicted over racist slogan on loyalist bonfire”.

Another example in a nearby locality that received less public attention was the 2019 Doonbeg bonfire, where Irish-language signage stolen from another council area was burned, along with other items constituting racist and sectarian expression. The bonfire was reported to the PSNI. A specific issue with many such bonfires is the extent to which they are facilitated by public authorities, either being directly funded by a public authority (as was apparently the case in Ballycraigy) or being on the property of a public authority. In the case of the Doonbeg bonfire Antrim & Newtownabbey Council stated that it had not been funded under their Bonfire Management Programme, but it transpired that the bonfire had been held on NIHE land.

It is important to distinguish the focus of this report from issues relating to regulating bonfires and the removal of flags from lampposts in general which are unrelated to hate expression. One of the barriers to progress on removing hate expression has been to treat incidents where flags are used for racist or sectarian intimidation as part of a broader generic response to flags that is largely based on non-intervention. In such circumstances no distinction is made between hate and non-hate expression, and there is a reluctance to intervene in case a broader precedent is set for flags policy. Distinguishing between flags that constitute hate expression and those that do not is a key factor in protecting targeted groups and ensuring that hate expression is promptly removed.

The 2018 *Incitement to Hatred in Northern Ireland* report by Dr McVeigh concludes that the current approach to addressing incitement to hatred, including incitement in public space, is not working. He found that despite “copious evidence of hatred – particularly racism, sectarianism and homophobia”, generally “this incitement is being tolerated rather than prohibited by the state”. In particular, ‘incitement to hatred’ is being underplayed and not specifically addressed:

*In response to rising racist violence, the state put in place an infrastructure based on foregrounding a particular construction of ‘hate crime’ which has done little to address the seriousness of the violence involved. Even when the seriousness of incitement to violence is not lost in the wider sweep of more general discussions of ‘hate crime’, this does nothing to address the specificity of incitement. This focus on ‘hate crime’ to the exclusion of incitement to hatred is the Northern Ireland variant of a wider fiction – the notion that states have begun to take violence seriously simply by undertaking public relations work around ‘hate’.*³⁹

In addition to a new focus on racist hate crime, as well as incidents relating to homophobia and disability, problems remained with *the normalisation of sectarian expression*, and the deficiencies in the criminal justice system as to how it is tackled:

Alongside these new developments, there was a continued integrity to more traditional hatreds. Most obviously in terms of incitement to hatred, we find the ‘genocidal imperative’ – ‘KILL ALL HUNS’ and ‘KILL ALL TAIGS’ routinely graffitied across Northern Ireland. In short, it would be difficult for anyone to argue that there is not a ‘problem’ with hate and hatred in contemporary Northern Ireland. In other words, it is not the absence of hatred in Northern Ireland that explains the absence of

³⁹ McVeigh, Robbie (2018) *Incitement to Hatred in Northern Ireland* (Equality Coalition), page 55 (emphasis in original).

prosecutions for incitement to hatred. There is obviously something else going on – if the law is intended to prevent the profusion of hatred, it is not working very well.

The McVeigh report states that whilst incitement to hatred constitutes a significant threshold, it is often met in the Northern Ireland context, but the handful of prosecutions meant that “*there are hundreds – if not thousands – of similar cases of incitement taking place across Northern Ireland annually*” that are not pursued.

Many expressions might be regarded as incitement to hatred in the context of international human rights standards. For example, it would be difficult not to regard at least some of the use of flags, bonfires and parading as examples of ‘stirring up’ hatred in the sense identified in legislation. These classically involve ‘non-verbal forms of expression such as the display of racist symbols, images and behaviour at public gatherings’ and are often ‘sites’ of incitement. In other words, we can begin any discussion by suggesting that contested expression is hard-wired into the social dynamics of rights and conflict in Northern Ireland.⁴⁰

The report advocates a move from ‘toleration’ towards a ‘zero-tolerance’ approach with regard to any expression – including graffiti, flags and murals – that meets the threshold of ‘incitement to hatred’, noting that “*Fortuitously, there is a broad recognition across sectors that the approach needs to change.*”⁴¹

This recognition is now reinforced by the recommendation in the Hate Crime Review. We will now examine the overarching legal framework around the powers and duties that public authorities have to intervene on public hate expression, before critiquing the current policies and practices of relevant public authorities.

⁴⁰ As above, page 52.

⁴¹ As above, page 55.

2. Duties on public authorities to remove public hate expression: the legal framework

2.1 Duties from human rights law, and distinguishing between protected freedom of expression and prohibited hate expression

There are a number of provisions in international human rights law found in Council of Europe and United Nations (UN) treaties that are relevant to the removal of hate expression. There are also a series of 'soft law' recommendations that assist in interpreting the scope of such obligations.

Public authority compliance with duties under the **European Convention on Human Rights (ECHR)**, a Council of Europe treaty, is directly enforceable in the domestic courts, due to the **Human Rights Act 1998 (HRA)**. By virtue of the HRA, public authorities shall interpret and give effect to all other legislation, in so far as is possible, compatibly with ECHR rights.⁴² Whilst provisions of other human rights treaties may not be directly incorporated into domestic law, public authorities are nevertheless as a matter of international law, bound to implement their provisions when falling within their competence.⁴³

The main positive legal duties on public authorities to intervene to counter 'hate expression' in public space centre around:

- Positive obligations under **Article 8 ECHR** (right to family and private life);
- Positive obligations under the Council of Europe **Framework Convention for the protection of National Minorities (FCNM)** to take steps to protect persons from hostility as a result of their ethnic, cultural, linguistic or religious identity;
- Positive obligations flowing from **United Nations human rights treaties**, in particular the **International Convention on the Elimination of all forms of Racial Discrimination (ICERD)**.

The Council of Europe and UN anti-racism committees have held that sectarianism in Northern Ireland is to be considered as a form of racism, and hence duties flowing from ICERD and the ECHR also apply to sectarianism in Northern Ireland.

Human rights duties can be characterised as either negative or positive. Negative in that they impose duties on States *not* to do particular things (e.g. torture people or imprison without a fair trial), positive when they impose duties to take action to protect and secure rights. In relation to the ECHR it has been established that there are positive obligations under Article 8 to protect persons from racist expression. In addition, the European Court has held that sexual orientation and gender identity are protected by Article 8.⁴⁴

⁴² Human Rights Act 1998, sections 3 & 6.

⁴³ As set out by NIHR "As a matter of international law, the UK is obliged to respect and protect all of the human rights in the treaties that it has committed to. That duty extends across all the relevant parts of government and parliament. For Northern Ireland it embraces not only Westminster but also the Executive and the Assembly, as well as local government."

⁴⁴ The increased codification of Article 8 ECHR rights as providing for positive obligations for intervention to protect against actions that include being subjected to racist expression has been a feature of Strasbourg jurisprudence (see for example *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]

The duties under the ECHR, given further domestic effect by the HRA, therefore empower and place positive duties on Northern Ireland public authorities to take steps to tackle hate expression. These provisions should be read and interpreted in line with other relevant human rights standards. This would include Article 6 of the Framework Convention for National Minorities which obliges public authorities 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.

Racist expression constitutes a form of racial discrimination under ICERD (the UN anti-racism convention).⁴⁵ Duties on public authorities under Article 2 of ICERD include pursuing “*by all appropriate means*” policies of eliminating racial discrimination in all its forms; this includes measures to “*prohibit and bring to an end*” racial discrimination by third parties, and undertaking not to “*sponsor, defend or support*” such discrimination.

Under Article 4 ICERD there are specific duties to take “*immediate and positive measures*” to eradicate incitement to or acts of discrimination, including banning expression (“*propaganda*”) that promotes racial hatred and discrimination. There are also specific duties not to assist racist activities. These provisions can be read as placing duties on public authorities not to assist racist (including sectarian) expression by third parties, by for example tolerating its presence on their property, or by funding activities which are likely to include racist (including sectarian) expression.

Some of these provisions in ICERD relate to prohibiting ‘incitement to hatred’. Such duties are also found in Article 20 of the (UN) **International Covenant on Civil and Political Rights (ICCPR)**, which provides that: “*Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*”. Incitement to hatred should be considered as a subset of and as the most serious type of hate expression, to be criminalised on the basis that it incites racial discrimination, hostility or violence in a public context. The ICCPR duties are further interpreted by the UN **Rabat Plan of Action** (on combatting incitement to hatred). Rabat sets out general principles that distinctions 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.⁴⁶

The ICCPR/ICERD duties to outlaw incitement to hatred are currently provided for under the ‘stirring up hatred’ and ‘arousing fear’ criminal offences in the Public Order (NI) Order 1987. This covers hate expression of a sectarian, racist, disablist or homophobic nature that reaches an incitement to hatred threshold. There is consensus that the legislation is not working very effectively and should be reformed and strengthened, a matter currently under consideration by the Hate Crime Review.⁴⁷

⁴⁵ CERD/C/GC/35 *General Recommendation 35* (Combating racist hate speech).

⁴⁶ *Rabat Plan of Action*, para 20, recommendations.

⁴⁷ *Independent Review of Hate Crime Legislation in Northern Ireland*, consultation document, January 2020.

Duties on public authorities to remove hate expression from public space encompass such expression which reaches the threshold of constituting a criminal offence of ‘incitement to hatred.’ However, the duties derived from human rights standards on public authorities go beyond intervention only when a high criminal law threshold is reached, and compel relevant positive action to combat hate expression.

There are also relevant duties on public authorities to intervene on public hate expression in other UN human rights treaties. The UN **Convention for the Elimination of Discrimination Against Women (CEDAW)** contains specific provisions to counter gender-based violence against women and girls. This includes duties to take all appropriate measures to prevent acts which result in such gender-based violence, which includes misogynist hate expression in public space.⁴⁸ In relation to gender-based violence, the UN CEDAW committee has at present 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 Council of Europe **Istanbul Convention on preventing and combating violence against women (IC)**, which the UK has also ratified.⁴⁹ General obligations under Article 12 of the Istanbul Convention include public authorities taking necessary measures to “*promote changes in the social and cultural patterns of behaviour of women and men*” to eradicate prejudice and other practices “*based on the idea of the inferiority of women or on stereotyped roles for women and men*”.⁵⁰

The UN **Convention on the Rights of Persons with Disabilities (CRPD)** contains relevant provisions around combatting “*stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life*”.⁵¹ This could engage duties on public authorities in relation to removing hate expression of a disablist nature from public space.

In relation to sectarianism there is the duty in the rights etc. section of the **Belfast/Good Friday Agreement** (a binding treaty in international law) in relation to “*the right to freedom from sectarian harassment*.”⁵² This engages the issue of the removal of hate expression from public space, when it would constitute harassment.

The boundary between protected freedom of expression on one hand and prohibited advocacy of ethnic and religious hatred on the other has been debated internationally and locally for some time. ECHR jurisprudence has established that free expression is protected even 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*

⁴⁸ 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...”

⁴⁹ CEDAW (2019) [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).

⁵⁰ <https://www.coe.int/fr/web/conventions/full-list/-/conventions/rms/090000168008482e>

⁵¹ [UNCRPD, Article 8\(1b\)](#)

⁵² *Rights, Safeguards and Equality of Opportunity*, para 1.

⁵³ *Handyside v UK* 1976[49]

⁵⁴ *Vajnai v Hungary* (2008) [57].

⁵⁵ *Erbakan v Turkey* (1999) [57].

division".⁵⁶ The right to freedom of expression under Article 10 ECHR includes the protection of the 'rights of others' as one of its grounds for legitimate restriction. The rights of others include other ECHR rights, including the duties under Article 8 to tackle racist expression. This is particularly the case when the harms of such expression are heightened by paramilitary involvement, even when there is no actual resultant violence.⁵⁷

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

⁵⁷ In a case dealing with 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 (*R.B. v Hungary* (no. 64602/12) 12 April 2016 [99]) The 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 emphasised 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 organised activists*" and hence that it was capable of "*conveying the message to those present that its organisers had the intention and the ability to have recourse to a paramilitary organisation to achieve their aims, whatever they may be*". The Court contextualised 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 organisation 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 emphasised 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: *Vona v Hungary* (application no. 35943/10) (2013).

2.2 Duties on public authorities from criminal law

2.2.1 Incitement to hatred

As referenced above the current legislation that implements international duties to prohibit incitement to hatred is Part III of the **Public Order (NI) Order 1987**. This covers offences of ‘stirring up hatred’ or ‘arousing fear’ against a group of persons on grounds of religious belief, sexual orientation, disability, colour, race, nationality (including citizenship) or ethnic or national origins. The categories of sexual orientation and disability were added in 2004. Gender is not a category in the legislation, nor is gender identity, although the PSNI does consider transphobic hate expression to be covered, presumably under grounds of sexual orientation (given that the perpetrators of such expression rarely make a distinction).

Offences under this legislation include (with some caveats) threatening, abusive or insulting words or behaviour, or displaying written material which either intends to stir up hatred or arouse fear (on one of the listed grounds), or which, having regard to all the circumstances, is likely to have that effect. The legislation therefore already does not require proof of ‘intent’; rather it defers to context to determine whether an offence occurred. Part of the context in Northern Ireland is the reality in which paramilitary incitement is likely to lead to violent actions. This includes the involvement of loyalist paramilitary groups in racist intimidation.⁵⁸

The Hate Crime Review has made a series of recommendations for strengthening the current incitement to hatred offences in Northern Ireland law. This includes the extension of protected groups to cover sex/gender in relation to misogynistic and transphobic incitement, and a number of technical amendments to strengthen the legislation.⁵⁹

The Review also recommended that Northern Ireland adopt hate crimes legislation along the ‘aggravated offences’ model where all existing criminal offences could be considered ‘aggravated’ on the protected grounds. In simple terms the offence of ‘intimidation’ could become an offence of e.g. ‘racist intimidation’, or criminal damage ‘homophobic criminal damage’, etc.

The Review also recommended the inclusion of offences relating to causing ‘harassment, alarm and distress’ and ‘fear and provocation of violence’ in Northern Ireland⁶⁰ in the hate crimes bill. This would mean such offences could also be ‘aggravated offences’ (e.g. a ‘harassment’ offence could be treated as ‘misogynistic harassment’).

2.2.2 Other relevant criminal offences

Other criminal offences relevant to hate expression include the following:

- Offence of **intimidation** under the **Protection of the Person and Property Act (NI) 1969** whereby it is an offence to unlawfully cause “*by force, threats or menaces, or in*

⁵⁸ See for example comments by Chief Constable George Hamilton pointing to involvement in both organised crime and racist attacks: “*The irony here is that there are loyalist groups working with eastern European gangsters in the drugs trade, in prostitution and extortion. Yet these same loyalist groups are the ones behind burning out and intimidating people from places like Lithuania and Romania in areas they perceive as their own.*” <https://www.theguardian.com/uk-news/2018/feb/07/n-ireland-police-chief-says-hard-brexit-border-posts-would-be-paramilitary-target>

⁵⁹ Hate Crime Review, Recommendation 14.

⁶⁰ These offences are currently provided for under sections 4, 4a and 5 of the Public Order Act 1986 in England and Wales, but not in Northern Ireland: <https://www.legislation.gov.uk/ukpga/1986/64>

any way whatsoever” a person to leave their home, employment, to terminate a person’s employment or “*refrain from doing any act*”.⁶¹

- Offence of **harassment** – requiring a *course of conduct* (i.e. more than once) targeted at a specific victim, under the **Protection from Harassment (NI) Order 1997**.⁶²

At the time of writing, anti-stalking legislation has been proposed in the NI Assembly, to include an offence of ‘threatening or abusive behaviour’ which could encompass publicly displayed expression that had such an effect – and that may also constitute hate expression (for example in using abusive and misogynistic language).⁶³

Regarding items placed on the property of others, there are the offences relating to **criminal damage** (e.g. in the case of graffiti) or in a strict legal sense **trespass**. As alluded to below, there are specific offences in relation to placing unauthorised items on lampposts under roads legislation.

Pending the implementation of the recommendations of the Review there is at present no ‘hate crimes’ legislation in Northern Ireland *per se* (in the sense of defined aggravated offences) but there is provision for *enhanced sentences* when offences are ‘aggravated by hostility’ on racial, religious, sexual orientation or disability grounds. This is under Article 2 of the **Criminal Justice (No. 2) (NI) Order 2004**.

2.2.3 PSNI duties to prevent the commission of criminal offences

The general duties of the PSNI are set out in section 32 of the Police (NI) Act 2000 and go beyond bringing offenders to justice to encompass a duty to prevent the commission of criminal offences.⁶⁴

Therefore the PSNI has both a permissive power and positive duties to intervene to remove hate expression from public space, *when that expression constitutes a criminal offence*. Not to do so permits the commission of a criminal offence to continue.

The extent of the general duties to prevent the commission of criminal offences was tested in the February 2017 UK Supreme Court case of *DB v the PSNI*. This case challenged the PSNI’s assertion that it had no power or duty to intervene to prevent weekly un-notified loyalist flags marches in late 2012 and 2013 past the nationalist Short Strand area of east Belfast. The Supreme Court found otherwise, holding that in light of non-notification being a criminal offence, the PSNI’s duty to prevent the commission of offences (s.32 Police (NI) Act 2000 and common law) did provide them with such a legal power. The PSNI were therefore legally empowered to intervene as a *criminal offence* was being committed. The Supreme Court recognised that notwithstanding the legal powers to intervene there was operational discretion on the part of the PSNI regarding what action to take. However, it importantly noted that such discretion was constrained by both judicial oversight and ECHR rights.

⁶¹ <https://www.legislation.gov.uk/apni/1969/29/section/1>

⁶² This refers to generic harassment offences (aggravated by hostility on protected grounds); there is no equivalent of the offences of racially or religiously aggravated harassment as provided for by the Crime and Disorder Act 1998 in England and Wales <https://www.legislation.gov.uk/ukpga/1998/37/section/32> and in Scotland <https://www.legislation.gov.uk/ukpga/1998/37/section/33>.

⁶³ <http://www.niassembly.gov.uk/assembly-business/legislation/2017-2022-mandate/primary-legislation---bills-2017---2022-mandate/protection-from-stalking/bill---as-introduced/>

⁶⁴ [s32 Police NI Act 2000](#)

Specifically, in the *DB* case, this referred to the Article 8 rights (private and family life) of Short Strand residents.⁶⁵

In this context therefore not only were there legal powers for the PSNI to intervene but positive ECHR obligations to do so. We believe the same principles are directly applicable to hate expression in a public space *when it constitutes a criminal offence*.

2.2.4 Duties on the PSNI to provide support to other agencies

In addition to the role of the PSNI to intervene where hate expression constitutes a criminal offence, there is also the broader remit of the police to provide security to other public authorities when carrying out their duties in circumstances in which they may be at risk of violence and intimidation from third parties.⁶⁶

Indeed, the exercise of this support function by the PSNI can determine whether another public authority will intervene to remove materials, as it may not be safe for staff to do so without PSNI support.

Internal Operational Guidance from the PSNI, last revised in 2019 (following a reference to banners or flags supporting the Parachute Regiment being placed on the property of others without permission) states:

*Police will act to support the removal of banners by those who have responsibility for a structure on which the item is displayed but we will only consider removing such items ourselves where there is an imminent and immediate likelihood of a breach of the peace.*⁶⁷

The exercise of this requested PSNI support function cannot however be taken for granted by public authorities. The operational discretion around exercising powers referred to in the above *DB* ruling was more recently tested in the courts in JR169 in the summer of 2021.⁶⁸

JR169 related to a ‘substantial’ Eleventh Night bonfire on the peace line between Tiger’s Bay and the New Lodge, on land owned by the Department for Communities and adjacent to land owned by the Department for Infrastructure.

There are no issues of *physical items of ‘hate expression’* relating to the bonfire recorded in JR169, but other sectarian hate crimes and incidents are alluded to. The JR makes reference to the bonfire being used to:

...intimidate and terrorise those residents in the adjacent properties in the New Lodge area. This intimidation took the form of attacks by hitting golf balls from the bonfire and throwing bricks. These criminal actions were complemented by the singing of sectarian songs late at night. Effectively, those in and on the bonfire prevented or

⁶⁵ The Article 8 rights of residents were not engaged by the assembly *per se*, but because “There was substantial violence and disorder as the parade went through that nationalist area. Sectarian abuse was directed at the residents of Short Strand; stones and other objects were thrown at them; and their homes were attacked” [12]

⁶⁶ Further to the general duties on PSNI officers under section 32 of the Police Act (NI) 2000 to protect life and property, to preserve order, to prevent the commission of offences and, where an offence has been committed to take measures to bring the offender to justice; as well as relevant duties under the ECHR.

⁶⁷ PSNI (2019) *Operational Guidance: Flags, Emblems and associated displays*, District Policing Command, reviewed 29 June 2019 (provided to this research January 2022).

⁶⁸ JR169 [2021] NIQB 90 <https://www.judiciaryni.uk/judicial-decisions/2021-niqb-90>

*restricted the nationalist residents from accessing and using their back gardens. This was intimidation of the worst kind. It was anti-social. This was criminal conduct. It was designed to incite, to try and produce a visceral reaction.*⁶⁹

The Department of Communities had sought PSNI support for contractors to remove the bonfire. The PSNI had however taken an operational decision not to do so and set out reasons in writing as to why it would not intervene. These included:

(i) the bonfire was constantly occupied by children in or on the pyre and the police considered that there would be insuperable difficulty in removing them safely when trying to dismantle the bonfire;

(ii) intelligence suggested that police intervention would be resisted by the local community and in particular by women and children. The use of force would be required, resulting in the risk of casualties;

*(iii) there was intelligence that a significant number of petrol bombs had been assembled and it was likely the use of force by the police would result in these being thrown at the police and any contractors used by the police. There was also untested intelligence that there was a risk of firearms being discharged. In any event the likelihood of significant disorder was high. This was a highly charged situation ready to ignite.*⁷⁰

Two judicial reviews were taken: JR169 – by an affected resident asking the Court to order the PSNI to intervene and assist in removing the bonfire materials in pursuance of its legal and ECHR duties, and a second application by both the Communities and Infrastructure Ministers. It is the former that resulted in a detailed written judgment giving consideration of the key issues. The applications in both cases to compel PSNI intervention were unsuccessful. Once interim relief had been refused any further intervention became redundant by the lighting of the bonfire, yet the written judgment deals with the issue of the extent of duties on the PSNI and operational discretion.

The applicant had argued the PSNI were “*obliged to dismantle the bonfire in order to protect property and to prevent the commission of offences.*” The PSNI argued that the dismantling of the bonfire would have provoked widespread unrest, resulting in the commission of offences and endangering both life and property.⁷¹ The Court ultimately held the PSNI were in the best position to balance competing issues and to make an operational determination as to the benefits and risks of intervention, stating:

It is obviously wrong that members of either community should be permitted to indulge in criminal behaviour or to be seen to escape sanction for such behaviour when they do. However, against that it is also unacceptable that police action against such criminal conduct should endanger the lives of children and result in a real risk of further widespread civil disorder. The police were satisfied that these were real and serious risks. The court is in no position to gainsay the police’s conclusions on this issue.

There is no basis for the court interfering with the decision of the police who were best placed to judge the likely consequences of any attempt to dismantle the Adam Street bonfire, namely widespread civil unrest with a particular risk to young children. On the basis of the evidence placed before this court the police’s decision was lawful,

⁶⁹ JR169, para 31.

⁷⁰ JR169, para 13.

⁷¹ JR169, para 19.

*proportionate, rational and lawful [sic]. The consequence of the construction of the bonfire at this location meant that the risks involved in dismantling it far outweighed the risks in letting it remain in place to be ignited on the eleventh night...*⁷²

The Court in this instance held that duties under the ECHR and Police Act had been complied with. Horner J also disagreed that the PSNI decision was grounded in a weighing up of “*which side of the community will cause most trouble as a result of them carrying out their duties.*”⁷³ This recalls the remark by an NIO Minister in 1997 that police decision-making on whether to stop or push through parades on public order grounds “*contained a perverse incentive by making it possible for the group that threatened to create most mayhem to get what it wanted.*”⁷⁴

A better approach requires a balancing exercise of the human rights of all involved, including the harms of hate expression and the potential harms of intervention if there would be likely casualties, particularly when alternative measures (such as subsequent criminal proceedings) could prevent a recurrence.

Such considerations fit within a framework of taking ‘reasonable steps’ to deal with hate expression. Most situations (whereby, say, a poster or graffiti is simply removed) will not give rise to ‘mayhem’. Where such situations do arise, however, the importance of a transparent and objective process balancing different rights considerations, including the harms of leaving hate expression in place, should be considered.

2.2.5 Duties on the PSNI to record hate crimes and incidents

Duties to record the ‘hate’ element of incidents can be derived from the ECHR, UN human rights treaties such as ICERD and the EU Victims Rights Directive.⁷⁵

The PSNI have accepted as a matter of policy and procedure a duty to record hate crimes and hate *incidents* (the latter not necessarily being a crime but an incident indicating hate on the basis of a protected characteristic.)

The Hate Crimes section of the PSNI website states:

*A hate and signal crime or incident will be recorded where it is perceived that the perpetrator’s hostility or prejudice against any person or property is on the grounds of the victim’s ethnicity, sexual orientation, gender identity, religion, political opinion or disability.*⁷⁶

All but one of these protected grounds (gender identity) is found in the current Northern Ireland incitement to hatred and ‘hate crimes’ (enhanced sentences) legislation. The recording policy does not currently extend to recording misogynistic crime and incidents against women and girls. Such recording is now done by a number of police forces in Britain.⁷⁷ The outworking of the Hate Crime Review may also extend protected grounds to this end.

⁷² JR169, paras 30 & 31.

⁷³ JR169, para 33.

⁷⁴ <https://api.parliament.uk/historic-hansard/commons/1997/dec/18/public-processions-northern-ireland-bill>

⁷⁵ For further detail see NI Policing Board (2017) *Thematic Review of Policing Race Hate Crime*, pp78-9.

<https://www.nipolicingboard.org.uk/publication/thematic-review-policing-race-hate-crime>

⁷⁶ <https://www.psni.police.uk/crime/hate-crime/disability-related-hate-crime2/>

⁷⁷ <https://news.sky.com/story/women-have-no-confidence-in-police-campaigners-want-all-forces-to-record-incidents-of-misogyny-12438907>

The PSNI largely operates on the basis of ‘victim perception’ in relation to whether a crime or incident is recorded as hate. As set out on the website and the PSNI Hate Crimes Service Instruction:

*Evidence is NOT the test when reporting a hate incident. The perception of the victim or any other person is the defining factor in determining whether an incident is a hate incident, or in recognising the hostility element of a hate crime.*⁷⁸

The policy approach of recording crimes and incidents as hate is qualified in the following way:

*It would not be appropriate to record a crime or incident as a hate crime or hate incident if it was based on the perception of a person or group who had no knowledge of the victim, crime or the area, and who may be responding to media or internet stories or who are reporting for a political or similar motive.*⁷⁹

The background as to why there is a ‘victim perception’ test can be found in the past underreporting of racist incidents. The Macpherson Report into the racist murder of London teenager Stephen Lawrence, highlighted institutional racism within the Metropolitan Police and consequently recommended a definition of a ‘racist incident’ as follows: “A racist incident is any incident which is perceived to be racist by the victim or any other person.” The Macpherson report went on to recommend that “the term ‘racist incident’ must be understood to include crimes and non-crimes in policing terms. Both must be reported, recorded and investigated with equal commitment.”⁸⁰

In essence, the goal of the ‘victim perception test’ was to counter the reluctance of police to record racist incidents by empowering the victim and others. Whilst it is possible that a victim perception-based approach can be abused, including by the far right, the imperative of actual racist incidents being more accurately recorded has outweighed that concern.

This perception-based recording has been extended into other grounds by the PSNI and other public authorities, including recording ‘sectarian incidents’ where there remains no definition of sectarianism in law.

Despite the victim perception approach being introduced to ensure that racist crime and incidents were not misrecorded as non-racist, there have long been questions (documented in reports by the Human Rights Commission and by the Policing Board) about a reluctance of PSNI officers in some instances to record racist crime as racist.⁸¹

The lawfulness (and specifically ECHR-compatibility) of the PSNI recording all hate incidents as such on the basis of victim perception has been called into question in the recent *Miller v College of Policing* case in the English courts.⁸² In this case, the applicant successfully challenged the victim perception provision of the College of Policing Hate Crime Operational

⁷⁸ <https://www.psnipolice.uk/crime/hate-crime/disability-related-hate-crime2/> and PSNI SI2117 *Hate Crimes*, 2017, pp3-4. Available at: <https://www.psnipolice.uk/advice-information/our-publications/corporate-policy/>

⁷⁹ As above.

⁸⁰ Cm 4262-I (1999) *The Stephen Lawrence Inquiry* (Macpherson Report), recommendations 12 & 13.

⁸¹ See NI Policing Board (2017) *Thematic Review of Policing Race Hate Crime* page 79, and Northern Ireland Human Rights Commission (September 2013) *Racist Hate Crime, Human Rights and the Criminal Justice System in Northern Ireland*.

⁸² *Miller v The College of Policing* [2021] EWCA Civ 1926 <https://www.judiciary.uk/judgments/miller-v-the-college-of-policing/>

Guidance, requiring that a hate incident must be recorded as such *“irrespective of whether there is any evidence to identify the hate element”*. The case related to a number of tweets posted by Mr Miller, *“made in the context of a Government consultation on proposed reforms to the Gender Recognition Act that placed greater emphasis on the self-identification by a person of their gender.”*⁸³ The tweets were reported to police who, in accordance with victim-perception under the Policing College Guidance, recorded a Transphobic Hate Incident. There was an investigation, police visited the applicant, and asked him to stop tweeting. The ruling noted that having been a suspect in a non-crime hate incident could be disclosed in an Enhanced Criminal Records Check.

The Court held in this case that the recording constituted an interference in Article 10 ECHR rights to freedom of expression, as it had the potential to *“create a chilling effect in relation to public debate on a controversial issue”* and that the ECHR-permitted ‘legitimate aim’ of the measure (to prevent crime and protect the rights of others) could be pursued by less intrusive measures. The restriction was therefore disproportionate. The Court concluded: *“That is not to say that perception-based recording of non-crime incidents is per se unlawful, but that some additional safeguards should be put in place so that the incursion into freedom of expression is no more than is strictly necessary.”*⁸⁴

This ruling may have read-over implications for the PSNI approach to victim-perception recording, promoting specific safeguards, albeit only in relation to issues of public debate. Other hate expression, for example graffiti containing a racially abusive slogan, will not attract the protection of Article 10.

It should also be noted that the PSNI confirmation as to whether an incident is a hate incident can be determinate in the process of other public authorities. Access to the Housing Executive’s Hate Incident Practical Action Scheme (HIPA) requires victims to report the hate incident to the PSNI to be eligible for support, and the PSNI to confirm the hate incident.⁸⁵

⁸³ Summary of judgment: <https://www.judiciary.uk/judgments/miller-v-the-college-of-policing/>

⁸⁴ *Miller v The College of Policing* [2021] EWCA Civ 1926, para 122.

⁸⁵ See <https://www.nihe.gov.uk/Community/Anti-Social-Behaviour/Hate-Crime/HIPA>

2.3 Powers of public authorities to remove public hate expression

2.3.1 Powers of district councils

Under the **Local Government Act (NI) 2014**, which established the present 11 district councils, in addition to specific statutory powers there is a General Power of Competence that permits councils to undertake most acts any person could otherwise do.⁸⁶

There are also a number of relevant local government powers that would engage the question of removing hate expression in public space. Under Article 18 of the **Local Government (Miscellaneous Provisions) (NI) Order 1985** (as amended by the **Clean Neighbourhoods and Environment Act (NI) 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].⁸⁷

Councils can also issue notices to persons identified as having displayed such materials to require its removal within two days, and recover costs if not removed.

There are further powers under the Clean Neighbourhoods and Environment Act (NI) 2011, in relation to graffiti⁸⁸ and fly posting. This includes powers to issue Defacement Removal Notices (DNR) when a council is satisfied that “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...⁸⁹

There are powers to issue notices on *persons responsible for the surface* requiring removal within 28 days. If the DNR is not complied with, councils can remove or otherwise remedy the defacement. The powers relate to most surfaces on public land.

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.⁹⁰ This creates the situation whereby an individual could escape the risk of a fine for graffiti and flyposting by making the content either racist or sectarian. Whilst not entirely clear it appears that this exemption may have been erroneously copied over from the equivalent legislation

⁸⁶ <http://www.legislation.gov.uk/nia/2014/8/section/79>

⁸⁷ This power does not cover items displayed within a building or land owned by another public authority.

⁸⁸ “‘Graffiti’ includes painting, writing, soiling, marking or other defacing by whatever means”.

⁸⁹ Department for Environment, *Guidance for District Councils on Sections 31 to 35 of the Clean Neighbourhoods and Environment Act (NI) 2011*, para 2.6

⁹⁰ 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.”

in England whereby such offences are exempted in the context of instead deferring to the aggravated offence of racially and religiously motivated criminal damage.⁹¹ This clearly constitutes a loophole in council powers.

Councils also have a number of prosecution powers over graffiti and ‘fly posting’ in relation to relevant offences under road traffic and planning legislation.⁹²

Councils also have a remit over planning powers designed to restrict the display of commercial advertisements in public space. The definition of ‘advertisement’ is set out in the **Planning (NI) Act 2011** and covers virtually anything that is placed for the purposes of “*advertisement, announcement or direction.*”⁹³ Advertisements can require the consent of councils under planning regulations.⁹⁴ Such powers would therefore not usually capture hate expression unless it were part of an advertisement.

An example of an advertising board with misogynistic content, namely a chalkboard outside a south Belfast restaurant stating “*You can beat the wife but you can’t beat our deal*”, was given at the Equality Coalition Countering Incitement to Hatred conference. As such occurrences are far from isolated, the councils’ advertising consent powers are relevant to tackling hate expression.

Conversely, there is also an example of a council stretching beyond credible interpretation the definition of an advertisement in order to censor cultural expression that was neither commercial nor hate-based. In summer 2019 Antrim & Newtownabbey Council, citing its powers under the advertising regulations, threatened to prosecute an 85-year-old woman for the display outside her own home of a small Irish language sign that clearly was not an advertisement.⁹⁵ The Council’s action was on the basis of an anonymous complaint, the motivation for which is unknown. It is possible of course that complaints against the inclusion of Irish in signage could be made on the basis of sectarianism or intolerance towards the Irish language, yet could still result in public authority action. This action stands in stark contrast to the general reluctance of public authorities to intervene over hate expression. It is also notable that the defacing of Irish on bilingual signage can be held to constitute an incident of sectarian hate expression.⁹⁶

⁹¹ The equivalent provisions for graffiti and fly posting in England are found in section 43 of the Anti-social Behaviour Act 2003, <https://www.legislation.gov.uk/ukpga/2003/38/part/6/crossheading/penalty-notice-for-graffiti-and-flyposting>; these exempt from council-issued fixed penalty notices offences graffiti or fly posting that would be prosecutable as a criminal offence motivated by racial and religious hostility (including “racially or religiously aggravated criminal damage”) under s.30 of the Crime and Disorder Act 1998. <https://www.legislation.gov.uk/ukpga/1998/37/section/30>

⁹² See DoE *Grffiti and Fly-posting Offences Prosecution Powers* guidance.

⁹³ “‘Advertisement’ means any word, letter, model, sign, placard, board, notice, awning, blind, device or representation, whether illuminated or not, in the nature of, and employed wholly or partly for the purposes of, advertisement, announcement or direction, and (without prejudice to the preceding provisions of this definition) includes any hoarding or similar structure used or designed, or adapted for use and anything else principally used, or designed or adapted principally for use for the display of advertisements, and references to the display of advertisements shall be construed accordingly;” s250, [Planning Act \(NI\) 2011](#)

⁹⁴ [Planning \(Control of Advertisements\) Regulations \(NI\) 2015](#)

⁹⁵ <http://www.irishnews.com/news/northernirelandnews/2019/06/19/news/andalstown-irish-language-sign-will-not-be-removed--1644982/>

⁹⁶ For an example of where the PSNI have treated such defacement as such see:

<https://www.irishnews.com/news/northernirelandnews/2021/12/30/news/police-treating-damage-to-bilingual-irish-language-information-sign-in-co-armagh-as-sectarian-hate-crime-2546833/>

The advertising regulation powers can only be exercised for the purpose of amenity or public safety. Public safety issues largely relate to the risk an advert poses to road users, in general or through obscuring a warning sign. An example is the banner stating “No Irish No Gay” *[sic]* which was placed on the M1 motorway near Lurgan in October 2018. In this instance the PSNI removed the banner and treated it as a racist and homophobic hate incident.⁹⁷ Whilst clearly constituting hate expression, the banner, if it fell on a busy motorway, would also clearly have been a traffic hazard. In the advertising regulations factors relevant to ‘amenity’ include the ‘general characteristics of the locality’ with reference made to features of historic interest.⁹⁸ There is no explicit reference to hate expression as a reason for declining consent for an advertisement. It could be argued that hate expression is inherently detrimental to the ‘amenity’ of any area, but that would be dependent on councils taking such an interpretation on material captured by advertising regulations.

2.3.2 Powers of the Department for Infrastructure

Under Article 87 of the **Roads (NI) Order 1993** any person who (without lawful authority) *“paints or otherwise inscribes or affixes any picture, letter, sign or mark... upon 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 such items (and recover reasonable costs from responsible persons) and to serve removal notices.

The powers of the Department have been characterised as covering ‘street furniture’ such as lampposts which are part of the property of the public authority.

Under Article 73 of the same Order it is an offence to fix a cable, wire or similar items across a road without Departmental consent, which may capture cables or wires used to hold up banners between lampposts.⁹⁹

Under the Article 33 of the **Road Traffic Regulation (NI) Order 1997** it is also an offence to intentionally ‘interfere with’ or cause damage to a traffic sign.

⁹⁷ <https://www.breakingnews.ie/ireland/no-irish-no-gay-banner-removed-from-ni-motorway-876941.html>

⁹⁸ <http://www.legislation.gov.uk/nisr/2015/66/regulation/3/made>: *“factors relevant to amenity include the general characteristics of the locality, including the presence of any feature of historic, archaeological, architectural or cultural interest, disregarding, if [the Council] thinks fit, any advertisements being displayed there”*. Councils are also to take into account provisions of their Local Development Plan.

⁹⁹ <http://www.legislation.gov.uk/nisi/1993/3160/article/73/made>

2.4 The ‘good relations’ duties

In relation to duties to take positive action to combat hate expression (which would include duties on councils, the Housing Executive, housing associations and other public authorities to remove hate expression on their own property) the most relevant domestic provisions are the ‘good relations’ duties on public authorities.

It is these ‘good relations’ duties that are supposed to assist in giving effect to duties under international human rights law to, for example, tackle expressions of racism (including sectarianism).

Under Section 75(2) of the **Northern Ireland Act 1998** there is a duty on designated public authorities in carrying out their functions (without prejudice to the duty to promote equality of opportunity under s75(1)) to “*have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group*”.

There is also the general duty under the **Disability Discrimination Act 1995** (s.49A) to have due regard to the need to promote positive attitudes towards disabled persons.

There is also a duty (on district councils only) under Article 67 of the **Race Relations (NI) Order 1997** to eliminate unlawful racial discrimination and promote good relations between different ‘racial groups’.

In relation to the Section 75(2) ‘good relations’ duty the Hate Crime Review report highlights that, whilst interpreting this duty gives a fairly wide remit of discretion to local authorities, nevertheless:

*Clearly, it is unarguable that any public authority which tolerates incitement to hatred in its functions is not promoting good relations. Indeed, it is also arguable that inaction or inactivity may also have a similar effect of allowing fear and distrust to fester in communities.*¹⁰⁰

There are limitations with the Northern Ireland good relations duty in the construction of the legislation itself but also in how it has been poorly interpreted.

The Great Britain counterpart ‘good relations’ duty in the Equality Act 2010 explicitly frames the purpose of the duty as “*tackling prejudice and promoting understanding*”, i.e. a duty to tackle racism, misogyny, homophobia, and other prejudice across all protected equality grounds.¹⁰¹ By contrast, the Section 75(2) duty only extends to racism and sectarianism and not other protected grounds, and the term ‘good relations’ has not been defined in the legislation.

Regarding an interpretation of ‘good relations’ in international standards, the Council of Europe has stated that:

*Promoting good relations between different groups in society entails fostering mutual respect, understanding and integration while continuing to combat discrimination and intolerance.*¹⁰²

The Equality Commission for Northern Ireland, which has a statutory function to advise on the Section 75 duties, has also promoted the ‘tackling prejudice, promoting understanding’

¹⁰⁰ Hate Crime Review, para 10.4.

¹⁰¹ S.149 of the Equality Act 2010.

¹⁰² [ECRI General Recommendation no 2 \(revised\), explanatory memorandum](#), para 21

definition in the Equality Act 2010 but, drawing on legislation in Britain, states that “*Good relations can be said to exist where there is a high level of dignity, respect and mutual understanding; an absence of prejudice, hatred, hostility or harassment; a fair level of participation in society.*”¹⁰³

These definitions therefore provide a sound basis of how ‘good relations’ at least *should* be interpreted by public authorities in Northern Ireland. The elements of good relations include tackling prejudice, hatred, hostility, discrimination and intolerance. There is a clear interface with consequent actions to tackle hate expression. The good relations duty applies within a public authority’s ‘functions’, which include, but are not limited to, actions in relation to its own property. This would include promoting good relations in the exercise of its specific public authority powers (e.g. on graffiti removal, or removal of items from lampposts), but also through its broader remit.

There has however been significant criticism from Council of Europe treaty-bodies about the interpretation *in practice* 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 said:

*This would be due to the fact that, unlike the rest of the [United Kingdom], 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]*¹⁰⁴

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]*¹⁰⁵

The Commission on Flags, Identity Culture and Tradition (FICT) final report issued in 2021 includes among its recommendations that “*the legal duty of Good Relations should be clearly defined in law*” and that “*the delivery of Good Relations interventions has reductions of sectarian and race hate incidents as key outcomes.*”¹⁰⁶

If interpreted in accordance with international standards, the ‘good relations’ duty therefore provides a legislative basis and duty for public authorities to intervene to remove hate

¹⁰³ Equality Commission (September 2015), *Equality Commission Advice on Good Relations in Local Councils*.

¹⁰⁴ <https://www.coe.int/en/web/minorities/-/united-kingdom-publication-of-the-4th-advisory-committee-opinion>

¹⁰⁵ As above.

¹⁰⁶ FICT (2021) *Final Report* (TEO), para 3.38-9.

expression in public space (at least in relation to expression of a racist, sectarian and disablist nature).

An example of the utility of such a 'good relations' duty is found in the *Core Issues Trust v Transport for London* judicial review in 2013.¹⁰⁷ In this instance the London public transport company refused to carry adverts on its busses proclaiming that gay people could be 'cured'. The applicants (the Core Issues Trust, "*a non-profit Christian ministry supporting men and women with homosexual issues*" [sic]) unsuccessfully argued that this ban interfered with their rights to free religious expression but the Court disagreed, ruling that the 'rights of others' limitations on free religious expression meant the limitation was legitimate, and that the London authorities had positive obligations due to their 'good relations' duty to intervene. In this case, the 'good relations' duty also covered the ground of sexual orientation and hence became a duty on public authorities to tackle homophobic expression, even when such expression fell below any criminal threshold.

Also relevant are duties on public under Section 76 of the Northern Ireland Act 1998 making 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.

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.¹⁰⁸ This provision also only covers sectarianism. It prevents a public authority from 'aiding' a third party in committing acts of sectarian discrimination. This could include sectarian expression if, for example, the expression were on a bonfire that was either funded or permitted on the land of a public authority and no reasonable steps were taken by the public authority to prevent it.

Under the Section 75(1) equality duty there is a 'due regard' duty to 'promote equality of opportunity' across nine protected grounds. This could be engaged as a duty on public authorities to remove public hate expression in the context whereby hate expression has the effect of deterring persons from using their facilities: for example, if loyalist and Union flags were placed directly outside a council leisure centre with the purpose and effect of deterring Catholics from using it.

The Section 75 duties operate within a framework of statutory Equality Schemes which also contain procedural duties relevant to the subject matter.

¹⁰⁷ [2013] EWHC 651 <https://www.casemine.com/judgement/uk/5a8ff7ce60d03e7f57eb23ce>

¹⁰⁸ Specifically in relation to sectarianism, the Fair Employment and Treatment (NI) Order 1998, s.76(4).

2.5 Procedural duties under Equality Schemes and administrative law

Under Schedule 9 of the Northern Ireland Act 1998, public authorities are obliged to adopt Equality Schemes that contain binding procedures which demonstrate how the public authority has complied with its Section 75 duties.

Under an Equality Scheme, public authorities commit to a methodology that requires 'equality screening' of new or revised policies and, where the screening identifies issues of substance, completing a full Equality Impact Assessment (EQIA).

Failures to comply with these duties under Equality Schemes can result in the Equality Commission of Northern Ireland (ECNI) exercising enforcement powers against a public authority. This is through formal investigation by the ECNI (on the basis of a complaint or on the ECNI's own initiative) and then recommendations to the public authority which can be enforced through a direction by the Secretary of State.

The ECNI has established through one such investigation – *Gerald Marshall & Omagh District Council* – that a public authority allowing an item placed by a third party on its property to remain constitutes a *policy decision* that requires equality screening.

This particular investigation was triggered by a complaint by a Dromore resident against Omagh District Council in relation to the presence of a memorial to the 1981 IRA hunger strikers in the town's Old Church grounds and graveyard. The memorial had been constructed by a third party in 2001 but this land was owned by the Council which had not removed it. The Council argued that there was no duty to equality-screen the inaction to remove the memorial as there had been no policy decision taken in the matter. The investigation rejected this, finding among other matters that whilst the Council was not responsible for the initial placement of the memorial the Council had adopted a *de facto* policy of allowing it to stay, and should have conducted a screening exercise on the policy. The investigation therefore held that the Council had failed to comply with its equality scheme.

In this instance the ECNI rejected the position of the public authority that screening was not required, noting that the definition of 'policy' in the Equality Scheme and guidance includes both written and unwritten policies. The ECNI also defines policy in its guides to the statutory duties as including "*a course of action adopted or proposed*". The ECNI held that the item having been placed by a third party did not negate the matter falling within the Council's functions, nor did the passage of time as the item had been there for some years.¹⁰⁹ The ECNI also held that in circumstances where policy decisions have "*significant implications for equality of opportunity*", there is a duty to conduct an EQIA.

The precedent set by this decision is that a public authority allowing an item such as a flag or banner to remain on its property is technically taking a policy decision that requires equality screening. If the item in question has significant implications for equality of opportunity – as items constituting hate expression will – there is a duty to conduct an EQIA.

Such issues could be dealt with in an overarching policy adopted by the public authority as to how it will deal with such matters, rather than having to equality-screen each occurrence on a case-by-case basis. The latter approach would however be required if there is no formal policy adopted by a public authority on how it will remove public hate expression.

¹⁰⁹ *Gerald Marshall & Omagh District Council* investigation (ECNI, 2007)

In addition to the procedural duties under Equality Schemes, there are also relevant ECHR and administrative law principles regarding a public authority adopting a policy in relation to how it will exercise a discretionary power. This is relevant to, for example, councils' powers to remove graffiti, or DfI powers to remove items from lampposts.

There are principles that when ECHR rights are engaged, restrictions must be "*in accordance with the law*" and this may require the publication of a policy.¹¹⁰

The stipulation "*in accordance with the law*" means not just that a power is set out in law, but that there must be some clear basis for when that power is exercised, to avoid arbitrariness and to allow affected persons to regulate their conduct. In this instance these considerations are relevant to both the ECHR positive obligations under Article 8 (to tackle racist etc. expression) but also to the rights of free expression under Article 10 (i.e. a citizen should know under what circumstances a public authority will exercise an enforcement power against them, in order to know what they can and cannot do.)

There are broader legal principles that can be drawn upon regarding the adaptation and publication of a policy. As recently held by the Court of Appeal, "*As a matter of domestic administrative law, where a public authority has formulated and applies a policy, it should be published.*"¹¹¹

For example, it would not be tenable for a council or part of the Housing Executive to have internally formulated an approach on how to exercise (or not exercise) powers to deal with a contentious issue such as hate expression on bonfires, while keeping their approach (and hence 'policy') secret. As argued by CAJ and three other NGOs in recent litigation before the Investigatory Powers Tribunal (in relation to an MI5 policy on authorising informant involvement in crimes):

*It is the antithesis of good government to operate a "secret policy": B v Secretary of State for Work and Pensions [2005] 1 WLR 3796, per Sedley J at [43]. The rule of law instead calls for "a transparent statement by the executive" of the circumstances in which it will exercise any discretionary power: R (Lumba) v Secretary of State for the Home Department [2012] 1 AC 245, per Lord Dyson at [34].*¹¹²

What follows therefore is that relevant public authorities should have developed clear written policy that has procedurally passed through equality screening, and where necessary an EQIA, in relation to their policies over intervening on hate expression.

¹¹⁰ For a recent Northern Ireland case considering such matters see: *Raymond McCord's Application: Border Poll* [2020] NICA 23, para 88.

¹¹¹ *Raymond McCord's Application: Border Poll* [2020] NICA 23, para 88 (ii).

¹¹² In the Investigatory Powers Tribunal Case Nos. IPT/17/86 & 87H *Privacy International, Reprieve, CAJ, Pat Finucane Centre (Claimants) v SoS FCO; SoSHD; GCHQ, MI5, MI6* [Claimants' Skeleton Argument](#) para 90.

3. Strategic overarching policy

3.1 Summary of overarching policies

This section examines the extent, if any, that relevant strategic overarching policies have dealt with the issue of hate expression. The following policies are considered:

Policy and public authorities	Summary of relevant aims and provisions
<p><i>Joint Flags Protocol</i> 2005</p> <p>PSNI, NIHE, OFMdfM (now TEO), DfI, & DfC. Followed the 2003 NIO <i>A Shared Future</i> document.</p>	<p>One aim is to remove flags of a ‘sectarian nature’ (there is no reference to racist nature etc.). Aims to remove all flags and emblems from arterial routes and town centres and ‘control’ display in ‘mixed/interface’ areas and near certain buildings. Advocates ‘proactive’ approach ‘with the support of communities and their representatives’ with PSNI taking lead role where partner agency unable to take action and negotiation/consultation has failed. The Protocol was adopted at a time of ‘direct rule’ and a <i>de facto</i> policy decision appears to have been taken not to implement the Flags Protocol in practice.</p>
<p><i>Together: Building a United Community (T:BUC)</i> 2013</p> <p>OFMdfM (now TEO) & NI Executive Departments</p>	<p>T:BUC is the NI Executive strategy to tackle racism and sectarianism, although its central focus is through the ‘good relations’ paradigm. There are no express references or commitments to tackling hate expression in public space, but this area implicitly falls within the remit of some of its Key Priorities. There is a reference (limited to flags and emblems) under the ‘Our Shared Community’ objective. The area is also alluded to, including intimidatory graffiti, under the ‘Our Safe Community’ objective. Here there is a reference to removal of ‘threatening symbols used to intimidate’ by ‘working with people’ rather than through direct state intervention. T:BUC superseded the NIO’s <i>A Shared Future</i> strategy which had a specific objective relating to “tackling the visible manifestations of sectarianism and racism” and proposed a Flags Protocol. <i>A Shared Future</i> also advocated that moving to a “normal society” should make flag flying on lampposts “off limits”, along with “the display of bunting, graffiti or paint on any publicly owned object.”</p>

<p><i>Racial Equality Strategy 2015-2025</i> 2015</p>	<p>Commits to combatting and providing effective protection against all manifestations of racism and racist crime, but has no specific references or commitments to tackling racist expression in public space.</p>
<p><i>Executive Action Plan for Tackling Paramilitarism</i> 2016</p>	<p>This Action Plan emerging from a Fresh Start, and the assessments that preceded it, do not make any reference to paramilitary involvement in hate expression.</p>
<p>TEO</p>	
<p><i>Commission on Flags Identity Culture and Tradition - Final Report</i> 2021</p>	<p>Final report was made public in late 2021, with recommendations but no process for its implementation. Recommendations were made in relation to regulating bonfires, including that the NI Executive ‘fully support’ statutory organisations intervening in bonfires in specified circumstances including those that give rise to a hate crime. It is intended this will involve statutory bodies using their existing powers, and new powers where needed, to allow agencies “to take proactive remedial steps at a bonfire site to activate the removal of a bonfire, if this is required.” There was no agreement on measures for flags, although there was general consensus on some items that could form part of a Code of Practice including that flags should not be placed on lampposts “in any way that could be considered intimidatory or threatening.”</p>
<p>FICT</p>	

3.1.1 Joint Flags Protocol

In 2005 under direct rule the NIO published *A Shared Future*, a community relations strategy which proposed as an action “*the development of an agreed protocol between PSNI and all key agencies outlining precise responsibilities for removing ‘inappropriate and aggressive’ displays taking account of existing legislation*”.¹¹³

A number of public authorities were then signatories to the Joint Protocol in Relation to the Display of Flags in Public Areas, which states: “*This protocol sets out an agreed partnership approach in dealing with flags issues between the Police Service of Northern Ireland, the Department of the Environment, Department for Regional Development, Department for Social Development, Office of the First Minister and Deputy First Minister, and the Northern Ireland Housing Executive.*” It sets out an understanding that “*police are mainly concerned*

¹¹³ Community Relations Unit (CRU) (21 March 2005) *A Shared Future – Improving Relations in Northern Ireland: The policy and strategic framework for good relations in Northern Ireland*, para 2.1.5.

*with the display of flags supporting proscribed organisations, where flags are likely to cause a Breach of the Peace or for other possible criminal intent”.*¹¹⁴

The Joint Aims of the Protocol include *“To improve the environment by removing the display of paramilitary flags or flags of a sectarian nature”* (there is no reference to racism) and to provide a proactive approach, with the support of communities and their representatives, to address *inter alia*:

- *The removal of all flags and emblems from arterial routes and town centres;*
- *The control of displays of flags and emblems in particular areas: e.g. mixed and interface areas and near buildings such as schools, hospitals, places of worship and community halls.*¹¹⁵

The Key Responsibilities under the Protocol involve, where necessary, the PSNI taking *“the lead in the removal of flags where the partner agency is unable to take action, and where negotiation and consultation have failed or where such items must be seized as evidence for Court purposes.”*¹¹⁶

Whilst this Protocol was signed up to by various public authorities, it appears that subsequent policy decisions have been informally taken not to abide by or implement it.

Notably, PSNI policy expressly instructs officers to take decisions under the terms of its internal Guidance and not the Flags Protocol. It notes the Protocol *“technically remains extant”* but has been *“under review”* since 2008, prompted by events subsequent to its publication in 2005. The PSNI Guidance also contests the interpretation in the Flags Protocol that the display of flags supporting paramilitary organisations is illegal under the Terrorism Act, and states that interpretations of the Flags Protocol as ‘requiring police to act’, and as having an automatic power to do so, are incorrect.¹¹⁷

3.1.2 Together: Building a United Community (T:BUC)

The T:BUC strategy was developed in 2013, with the purpose of *“provid[ing] the framework for government action in tackling sectarianism, racism and other forms of intolerance while seeking to address division, hate and separation.”*¹¹⁸ The vision outlined by the strategy was of *“a united community, based on equality of opportunity, the desirability of good relations and reconciliation – one which is strengthened by its diversity, where cultural expression is celebrated and embraced and where everyone can live, learn work and socialise together, free from prejudice, hate and intolerance.”*¹¹⁹

Despite the stated purpose of the strategy being to tackle sectarianism and racism, the strategy itself was explicitly focused on the ‘good relations’ paradigm. (The term ‘good relations’ is used 179 times in T:BUC but not defined.) T:BUC acknowledges that *“tackling the*

¹¹⁴ Joint Flags Protocol, para 1.5.

¹¹⁵ Joint Protocol, para s 2.1 and 2.4;

¹¹⁶ Paragraph 4.2.

¹¹⁷ PSNI (2019) *Operational Guidance: Flags, Emblems and associated displays*, District Policing Command, reviewed 29 June 2019 (provided to this research January 2022).

¹¹⁸ https://www.executiveoffice-ni.gov.uk/sites/default/files/publications/ofmdfm_dev/together-building-a-united-community-strategy.pdf (2)

¹¹⁹ See above at page 3.

twin blights of sectarianism and racism, in addition to other forms of intolerance, is essential in shaping a shared and cohesive community”.

Addressing public hate expression is not explicit in the strategy. However, references to the removal of public hate expression can be implied within the scope of Key Priority 2 – Our Shared Community and Key Priority 3 – Our Safe Community.

‘Our Shared Community’ primarily addresses the removal of interface barriers. It addresses some public hate expression – but only in relation to flags and symbols – stating *“Flags and symbols that are used in a way to cause intimidation, or to glorify violence, hate or prejudice can represent a barrier to the development of truly shared public spaces across our community.”* T:BUC commits to an All Party Group to consider a number of items including ‘flags’ and ‘symbols’.¹²⁰ These issues were followed by the Haass-O’Sullivan talks, and subsequently the commitment in the Stormont House Agreement that led to the establishment of the commission on Flags, Identity, Culture and Tradition (FICT).

There is also some implicit engagement with the broad issue of ‘hate expression’ in the T:BUC Key Priority 3 – Our Safe Community, including intimidatory graffiti. These Provisions of T:BUC focus on the (also important) dimension of intercultural dialogue to address *“prejudice, intolerance [and] hate crime”*.¹²¹ T:BUC states that *“perceptions of safety”* can be *“influenced by imagery and displays of cultural expression where these are motivated by a desire to intimidate”* and states that *“working with people to remove threatening symbols where these are used to intimidate is an important step towards increasing perceptions of safety in those areas most affected.”*¹²² Policing and Community Safety Partnerships (PSCPs) are cited as one of the primary tools to address community safety concerns.

The predecessor *A Shared Future* document alluded to above included *“tackling the visible manifestations of sectarianism and racism”* as a specific objective. This was expressly aimed towards *“freeing the public realm (including public property) from displays of sectarian aggression”*, envisaging a two-stage approach of ‘local dialogue’ to *“reduce and eliminate displays of sectarian and racial aggression”*, and then for the PSNI in conjunction with other agencies to remove such displays *“where no accommodation can be reached.”*¹²³ The document spoke of the *“removal of ‘inappropriate and aggressive’ displays of flags (specifically paramilitary flags and any other displays which have the effect of intimidating or harassing), murals and painted kerbstones”* as being best part of a ‘common project’ to enhance areas, but also sought the *“development of contact procedures”* for agencies with responsibility: councils, DRD (now DfI), NIHE and PSNI.¹²⁴ A further section advocated that a

¹²⁰ See above at 96-97 *“5.45 We recognise that there remain difficult and contentious issues in our society. In order to take forward work on these issues, we will establish an All Party Group which will have an Independent Chair from outside the political parties. The All Party Group will consider and make recommendations on matters including parades and protests; flags; symbols, emblems and related matters; and the Past.”*

¹²¹ See paras 4.9-11 which note threats to the safety of persons from a minority ethnic background *“can manifest itself in intimidatory graffiti and in some cases violence and attacks on people’s homes”* and seeks to encourage and build on community initiatives to tackle racism.

¹²² T:BUC para 4.26.

¹²³ *A Shared Future*, para 2.1.

¹²⁴ *A Shared Future*, para 2.1.2

moving to 'normal society' would place flags on lampposts, or bunting, graffiti or paint on any publicly owned object, be 'off limits'.¹²⁵

3.1.3 Racial Equality Strategy

The Racial Equality Strategy 2015-2025 was published in 2015. The purpose of the strategy is to establish a framework for Government departments to tackle racial inequality, eradicate racism and hate crime, and promote good race relations and social cohesion in line with the T:BUC policy.

The strategy does not specifically address racist hate expression, although it references "*racial harassment, from offensive graffiti and name calling through to physical assault*" and states that this behaviour makes minority ethnic people feel excluded from Northern Ireland society and restricted in activities and service provision. The strategy aims to "*combat racism and race hate and to provide effective protection against all manifestations of racism and racist crime. To provide redress and to have a victim-centred approach.*"¹²⁶

The actions provided in the strategy to achieve this aim are working with DE "to identify ways to tackle racist bullying in schools" and working with the Department of Justice "to develop our approach to tackling race hate crime."¹²⁷ There is no specific action for public authorities to remove or address hate expression.

3.1.4 Executive Action Plan for Tackling Paramilitarism

In 2015, *A Fresh Start: The Stormont Agreement and Implementation Plan* set out the commitment to ending paramilitarism and tackling organised crime. This was preceded by a UK Government assessment of paramilitary activity (*Paramilitary Groups in Northern Ireland*, October 2015) that remarkably made no reference at all to the involvement of paramilitaries in racist incidents. Further to *A Fresh Start* in 2016 a panel report was published making recommendations for an Executive Strategy, this made reference to racist and sectarian intimidation from housing, but not paramilitary involvement in hate expression *per se*.¹²⁸ Following this the Executive published the *Executive Action Plan for Tackling Paramilitarism, Criminality and Organised Crime*. From 2016-2021, the Executive and Westminster Government each committed £25 million, for a total of £50 million to implement the Action Plan.¹²⁹

There is nothing specific about addressing the removal of public hate expression by paramilitaries in the Action Plan. There is a broad commitment to "upholding the rule of law and tackling all forms of paramilitary activity, including placing a greater strategic focus on

¹²⁵ *A Shared Future*, paras 2.2-2.2.3

¹²⁶ <https://www.executiveoffice-ni.gov.uk/sites/default/files/publications/ofmdfm/racial-equality-strategy-2015-2025.pdf>, page 29.

¹²⁷ See above.

¹²⁸ The Fresh Start Panel (May 2016) *Report on the Disbandment of Paramilitary Groups in Northern Ireland*, paras 2.12-3.

¹²⁹ As of the review of the programme in 2021, 41% of the total £50 million funding went directly to law enforcement, specifically the Paramilitary Crime Task Force (PCTF) which consists of the PSNI, NCA and HMRC. <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/tackling-paramilitary-term-review-proposed.pdf>, pages 49-53.

tackling paramilitary activity linked to organised crime so that communities and businesses can prosper without the threat of coercive control or intimidation.”¹³⁰

3.1.5 Commission on Flags, Identity, Culture and Tradition (FICT)

The FICT Commission was a product of commitments in the Stormont House and Fresh Start Agreements and was formally launched by the First and deputy First Ministers in June 2016. The Commission had 15 members, only one of whom was a woman. Seven were drawn from NI Executive parties. The FICT Commission was to “*focus on flags and emblems and, as required, broader issues of identity, culture and tradition, and seek to identify maximum consensus on their application*”. FICT presented a final report to The Executive Office (TEO) in July 2020. TEO did not publish the report until December 2021, and without any implementation process being agreed following political blockages.¹³¹

The FICT final report sets out recommendations in areas where consensus was agreed. For other areas where there was no agreement (“*where challenges remain*”) some details of discussion are included in the report.¹³² The report coincided with the timeframe of the Hate Crime Review.

In relation to bonfires the report contains a number of agreed recommendations. This includes “*that the NI Executive fully supports statutory organisations where and when they have to intervene in the event of a bonfire being planned, constructed or burned*” in six specified circumstances. These include when the bonfire “*gives rise to an offence of hate crime*” or “*encourages support for proscribed organisations*”. Both of these criteria engage regulating *expression* on a bonfire, albeit the former when the expression constitutes a ‘hate crime’, a higher threshold than a ‘hate incident’. The FICT report envisages intervention with existing enforcement powers or new powers where needed “*to enable agencies to take proactive remedial steps at a bonfire site to activate the removal of a bonfire, if this is required.*”¹³³

With such a system in place the FICT Commission recommends a set of conditions that public land owners would require bonfire builders to comply with for a bonfire to be permitted. The most relevant condition recommended for the purposes of this report is:

*The burning of any flag, emblem, election poster or any other image or item which could cause offence is counter to the positive expression of culture and identity in a culturally diverse society and bonfire builders and organisers should refrain from this practice. This will be enforced by the land owner and other relevant statutory agencies.*¹³⁴

Another chapter of the FICT report covers issues relating flags. Whilst it is clear that no consensus was reached on a regulatory system for flags in public space, the FICT Commission did reach consensus that the 2005 Flags Protocol had not been effective. The Commission heard evidence that there was a lack of clarity regarding lead responsibility for the Protocol,

¹³⁰ <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/tackling-paramilitary-activity-action-plan.pdf>, page 5.

¹³¹ See <https://www.belfasttelegraph.co.uk/news/northern-ireland/long-awaited-report-on-flags-identity-culture-and-tradition-expected-to-be-published-41105477.html>

¹³² <https://www.executiveoffice-ni.gov.uk/publications/commission-flags-identity-culture-and-tradition-final-report>

¹³³ FICT *Final Report*, para 13.29.

¹³⁴ FICT *Final Report*, para 13.30.

that councils were not involved, and the Commission was not aware of consistent partnership working between agencies. FICT also reports statutory bodies seeking to enforce the Protocol faced particular challenges *“not least of which was dealing with overt paramilitary threats.”*¹³⁵

Whilst there was no agreement on a change to regulatory legislation, FICT does indicate wide agreement on a number of elements of a Code of Practice for the flying of flags in light of any legislative change. This included that *“Flags should not be placed on lamp posts, on individual property, or near a place of worship or school, in any way that could be considered intimidating or threatening.”*¹³⁶

¹³⁵ FICT *Final Report*, para 11.34

¹³⁶ FICT *Final Report*, para 11.41.

4. Public authority policies and practice on removing public hate expression

This chapter deals with the policies of key public authorities in relation to the removal of hate expression, providing a number of examples as to how powers and policies have been implemented in practice. The public authorities in question are:

- The PSNI, in relation to duties under the criminal law.
- The Department for Infrastructure, with reference to powers and practices regarding items on lampposts and other ‘street furniture’.
- District councils, with reference to powers for removing graffiti and other notices.
- The NI Housing Executive, with reference to practice on its own land and social housing in general.

4.1 PSNI policy and practice

4.1.1 The current PSNI policy position

The PSNI has regularly set out its policy position in relation to a number of ‘hate expression’ scenarios in statements to the media or responses to the Policing Board. However, the PSNI policy has not been set out in a publicly available formal Service Policy, Instruction, or Procedure.¹³⁷

The PSNI has adopted “Operational Guidance for Flags, Emblems and associated displays” which was last reviewed in June 2019. This document was not publicly available at that time. It was made available to this research in January 2022. This is discussed later in this section.

There is a published PSNI Service Instruction on Hate Crimes, adopted in 2017 and last updated in 2018. The purpose of the Service Instruction is to provide detailed operational guidance as to how the PSNI should “respond to, report and investigate hate crime incidents, together with overarching principles.”¹³⁸ However, the Service Instruction does not cover procedures as to how the PSNI will respond to hate expression in public space, in the form of Executive Action to remove items or in providing security support to other agencies doing so.

The only express reference in the Service Instruction to items that may constitute hate expression (specifically posters and flags) is to state that a Vulnerability Risk Assessment Matrix (VRAM) exercise should not be required in such circumstances. The purpose of the VRAM is to “*assess the risk and impact of hate and signal crime/incident on the victim and the wider community, and will provide an audit of the actions taken by PSNI personnel to mitigate further victimisation.*” The rationale for *not* undertaking the VRAM process in a case where the hate incident is a “*flag or poster related incident*” relates to when there is “*no specifically*

¹³⁷ PSNI policy documents are available at: https://www.psnipolice.uk/advice_information/our-publications/corporate-policy/

¹³⁸ PSNI (2017) SI2117 *Hate Crimes*, available at: https://www.psnipolice.uk/advice_information/our-publications/corporate-policy/ The policy superseded an earlier Service Procedure SP 16/12, police response to hate incidents, which was equality screened. This Service Procedure focused on investigations of incidents and does not deal with Executive Action.

identifiable person or group at risk".¹³⁹ Clearly, however, hate expression will impact on a specific 'wider community'.

The articulation of the PSNI policy position to the media and Policing Board on removing hate expression has most commonly been in relation to flags, but at times also in relation to emblems and banners. In general, in relation to flags, the articulation of the policy tends to be as follows:

The removal of flags is not the responsibility of the PSNI and police can only act to remove flags where there are substantial risks to public safety.

It is not clear when this policy position was adopted. It has been around for some time.

Back in 2014, the PSNI retreated from an apparent policy approach whereby the police service had reportedly indicated, following the erection of flags by loyalists in the Ballynafeigh area of South Belfast, that any new flags would be treated as a 'breach of the peace', and reverted to the policy line that removing flags was not the responsibility of PSNI, and the claim that the PSNI 'can only act' when there are substantial risks to public safety.¹⁴⁰

As the PSNI reiterated that its policy on this matter had not changed, it therefore clearly predates 2014, but we do not know when it was adopted, nor when the decision was taken to depart from the 2005 Flags Protocol, in which the PSNI had agreed to a broader range of circumstances for intervention, namely "*where flags are likely to cause a Breach of the Peace or for other possible criminal intent*".¹⁴¹ Whilst sectarian or racist hate expression is not expressly singled out in the Joint Protocol, as alluded to earlier in this report 'possible criminal intent' would cover a range of offences relevant to racist and sectarian expression – including stirring up hatred, intimidation and harassment. The Joint Aims of the Flags Protocol include "*To improve the environment by removing the display of paramilitary flags or flags of a sectarian nature*". They make reference to the use of flags for "*sectarianism or intimidation*" and note that "*there are many examples of aggressive displays, which aim to intimidate and harass*". The Protocol also aims to provide a "*proactive approach*", albeit with some qualification as to "*support of communities and their representatives*" on the removal of flags in certain locations.¹⁴² The Protocol states that the PSNI will take the lead in removing flags in a number of circumstances. These include where other public authorities are "*unable to take action*" but also "*where negotiation and consultation have failed*" or "*where such items must be seized as evidence for Court purposes*".¹⁴³ The PSNI has however subsequently taken a decision to adopt an alternative policy that is more limited than the Flags Protocol.

¹³⁹ PSNI (2017) SI2117 *Hate Crimes*.

¹⁴⁰ See for example statement in May 2017 (in relation to Loyalist and Union flags at an east Belfast railway station) <https://www.irishnews.com/news/2017/05/18/news/police-will-not-intervene-to-remove-flags-at-train-station-near-belfast-city-airport-1029473/>; or in 2017 in relation to flags in Larne: <https://www.larnetimes.co.uk/news/crime/removal-of-flags-not-responsibility-of-psni-1-8025569> Statement in June 2014 in relation to Union flags in Ballynafeigh in south Belfast, in which the PSNI reiterates that the policy has not changed <https://www.belfasttelegraph.co.uk/news/northern-ireland/no-change-to-flags-policy-psni-30352804.html>

¹⁴¹ Joint Flags Protocol, para 1.5.

¹⁴² Joint Protocol, paras 1.5, 2.1 and 2.4: "*The removal of all flags and emblems from arterial routes and town centres*"; "*The control of displays of flags and emblems in particular areas: e.g. mixed and interface areas and near buildings such as schools, hospitals, places of worship and community halls.*"

¹⁴³ Para 4.2.

This PSNI position in relation to taking action to remove items was elaborated on in response to questions from members of the Policing Board. In September 2015 the PSNI stated that it did not have an official flags policy but had issued guidance to officers on flags in June 2015, which runs into several pages. The response to questions from the Policing Board asserted that:

*... the removal of flags is not the responsibility of the PSNI and police will only act to remove flags in extreme circumstances, for example where life is at risk or there is a substantial, immediate risk of disorder and police action to remove flags would mitigate the risk.*¹⁴⁴

The response states that circumstances will be dealt with on a case-by-case basis, and mentions a number of offences, including stating that, in strict legal terms, placing flags or other items on lampposts may constitute trespass on the property. The response also makes reference to a number of potential offences under the Terrorism Act 2000 that may (or may not) be engaged when flags relating to proscribed organisations are displayed.

A further response by the PSNI to the Policing Board in 2016 related to a banner in Dungannon commemorating UVF/LVF leader Billy Wright, quoting him saying “I would look back and say Cappagh was probably my best” (a reference to the sectarian murder of four people in a pub shooting). The PSNI response in this instance stated:

*The removal of flags, emblems or banners is not a role for the police unless a criminal offence has been committed or a Breach of the Peace might occur... only [then] can police intervene.*¹⁴⁵

In this instance the PSNI did not assess the display of the poster as constituting a criminal offence, having considered offences under the Terrorism Act and the incitement to hatred provisions under the Public Order (NI) Order 1987.

A further Policing Board question related to the burning of effigies (of politicians) and election posters on bonfires. The question sought clarification as to the progress the PSNI had made in holding to account persons who burn election posters, and on lessons learned to prevent recurrence. The PSNI response focused more on the issue of the potential prosecution of offenders rather than executive action to remove items (although there is reference to engagement with bonfire organisers regarding potential offences, and such interventions having resulted in some items being removed.) The response appended an explanatory note on potential relevant criminal offences, which were also elaborated upon in an oral evidence session. These include generic offences such as theft of the election poster or criminal damage to it. However, the response also includes reference to the incitement to hatred offences under Part III of the Public Order (NI) Order, and reference to the ‘hate crimes’ legislation that allows for aggravated sentences in relation to other criminal offences.¹⁴⁶

The interpretation of the incitement to hatred offences in this written response, and the oral briefing to the Policing Board, is problematic and led to correspondence from CAJ.¹⁴⁷ The PSNI

¹⁴⁴ Questions to the Chief Constable (3 September 2015) Official policy for handling complaints concerning the public display of Union and loyalist paramilitary flags / erection of flags on Ormeau Road (Pat Sheehan)

¹⁴⁵ Questions to Chief Constable (August 2016) Display of Billy Wright posters in the Eastvale Estate (Nichola Mallon).

¹⁴⁶ Questions to Chief Constable (August 2016) Bonfires (Gerry Kelly).

¹⁴⁷ Correspondence to ACC Martin 5 September 2017.

had maintained that an effigy at a bonfire could not normally meet the test of stirring up hatred unless accompanied by words or written material. However, this is mistaken: the legislation provides that words or *behaviour* are within its scope and the *burning* of an effigy can therefore meet the test in the legislation.

A second issue in the oral answer was the assertion that offences “*require evidence that hatred has actually been stirred up*”, and that a particular act *has increased* levels of hatred. However, Article 9 provides, with some qualification, that the offence is committed if the person either “*intends*” to stir up hatred or “*having regard to all the circumstances hatred is likely to be stirred up*”. This is not as high a threshold as having to prove hatred was in fact stirred up or increased.¹⁴⁸ In addition, the PSNI in this instance took the position that hatred will not likely be stirred up if the audience are from one side of the community, but only if other members of the community are likely to be present.¹⁴⁹ This appeared to be a regressive interpretation of the legislation linked to the high threshold of ‘clear and present danger’ rather than an interpretation that is in accordance with contemporary standards. Should such a position be more broadly held it would have an adverse read-over into other circumstances – for example that “KAT” being written in graffiti or on a placard is acceptable if it occurs in a mostly unionist area where few Catholics are likely to see it, and would only constitute stirring up hatred if placed in a mixed or nationalist area. In the course of our work we have heard such a position articulated, both in relation to this specific example, the burning of items on bonfires, and slogans at a republican concert (where the converse example of few Protestants being likely to be there to hear them was expressed). These positions misunderstand the concept of ‘incitement’, in that such a message, being seen to be tolerated or even acceptable through a policy of non-intervention, can increase the legitimacy of prejudicial attitudes among persons who are likely to act upon them.

At the time of these Policing Board questions the PSNI confirmed that it held no service procedures or policies pertaining to interpretation of the incitement to hatred offences under this section of public order legislation.¹⁵⁰ At the next meeting of the Policing Board questions were asked as to when the PSNI had last sought substantive legal advice on its interpretation of the incitement to hatred provisions in the context of the development of international standards and case law. The PSNI responded that advice was provided by its internal Human Rights Legal Adviser, and regularly sought on specific instances, including the aforementioned Billy Wright banner. The PSNI stated it would not be appropriate to publish the advice.¹⁵¹

A subsequent perspective into the backdrop of PSNI’s ‘non-intervention’ policy was provided by a senior justice practitioner interviewed (anonymously) by the BrexitLawNI project.¹⁵² This person took the view that an approach to ‘tolerate’ sectarian hate expression was influencing the PSNI’s ability to effectively deal with racism at a strategic level:

¹⁴⁸ ACC Martin, Public Meeting Northern Ireland Policing Board August 2016, minute 51:51 of online recording.

¹⁴⁹ Questions to Chief Constable (August 2016), Bonfires (Gerry Kelly).

¹⁵⁰ FoI F-2016-0894

¹⁵¹ Questions to Chief Constable (September 2016), Provisions of Part III of the Public Order NI Order 1987, Raymond McCartney and Billy Wright poster in Dungannon (Jennifer McCann). These responses did not relate to intervention to remove materials, but rather the test for an offence applied by the PSNI in the context of investigation; they nevertheless provide an insight as to when the PSNI considers an offence to have been committed and hence when they would feel a duty to intervene.

¹⁵² <https://brexitlawni.org/> a partnership between CAJ and the law schools in Queens and Ulster Universities.

*I think the vast majority of ordinary cops are pretty good about race hate crime and sectarian hate crime, and they're appalled by it. But there seems to be a strategic decision to ignore it... it's just too big... everyone is doing it anyway... The race hate stuff is a little bit easier for them to deal with because it tends to be more localised. But decisions about whether to remove a Confederate flag are infected I think by their view about how they deal with sectarian hate crime... a Confederate flag tends to be found in a loyalist area... [there is] a very clear link between race hate crime and loyalist paramilitaries in certain hotspots... [but] even the attitude to EU and non-EU people present on the island of Ireland is affected by the sectarian approach to sectarian hate crime... and they are also afraid to set an unhealthy precedent, that they will take down racist stuff but not take down sectarian stuff.*¹⁵³

In January 2022 the PSNI provided this research with a copy of the “Operational Guidance for Flags, Emblems and associated displays”.¹⁵⁴ This provides detailed procedural advice to officers. The Guidance was last revised in June 2019 but had been in place for an unspecified time prior to this, but not publicly available.

The PSNI Guidance covers the relevant legal framework for removal of items. This rightly stresses a formulation of the *context* in which the flag/banner is flown, rather than just the *content* of a particular flag or banner. It is stressed for example that there is no such thing as an ‘illegal flag’ but only “*illegal intentions of the person possessing or erecting it*”.¹⁵⁵

However, the focus on context is predominantly through a lens of offences relating to disorder. There is no reference at all to offences that would relate to the harms of hate expression, such as ‘intimidation’, ‘harassment’ or the ‘stirring up hatred’ offences.

Rather there is a focus on common law powers to respond to a Breach of the Peace and to intervene to prevent one developing, stating it is reasonable to argue “*that provocative flying of flags is likely to result in disorder and therefore ‘harm’ being caused to persons unknown*”. Public order legislation is also cited, including powers to deal with ‘provocative conduct’ which could result in disorder. In essence the PSNI approach is to intervene to prevent or remove a flag or other item only if other people are likely to react violently to its display.

Whilst it has to be recognised that human rights issues do of course arise in dealing with disorder, and that disorder is best avoided, this approach is problematic at a number of levels. Not least, it provides an incentive to paramilitaries and others to create a threat to control the type of expression that is permitted in a particular area. At worst this policy could be interpreted as providing for PSNI intervention (a) to prevent persons from placing expression that paramilitaries oppose, and (b) protecting expression ‘approved’ by paramilitaries, if they generate a threat of disorder if expression they support is removed.

Some insight into how the Guidance operates is found in the following extract:

¹⁵³ BrexitLawNI [Policy Report: Brexit, Xenophobia and Racism in Northern Ireland](#) September 2018, page 20.

¹⁵⁴ PSNI (2019) *Operational Guidance: Flags, Emblems and associated displays*, District Policing Command, reviewed 29 June 2019 (provided to this research January 2022).

¹⁵⁵ As above, pages 4-5.

*It is vital that we understand the **context** in which flags are flown if we are to be able to defend police decision making. For example, a Union flag or Tricolour flown within recognised community boundaries is unlikely to cause offence or provoke disorder. But any attempt to fly such flags inside the boundaries of other communities may be seen as provocative and result in rapidly escalating tension and the possibility of disorder.*¹⁵⁶

There are clearly a number of issues with a policy consolidating ‘recognised community boundaries’. A broader issue is that there is nothing in this approach that singles out for intervention a flag or banner flown within a ‘recognised community boundary’ for the purpose of sectarian or racist intimidation or harassment against someone living in or passing through that area. In some senses this is the logical outworking of an approach focusing on managing threats to disorder, rather than considerations of combatting hate expression.

The PSNI policy also makes references to it being an offence to place items on the property of another person (including lampposts/street furniture) without their consent. Procedures are set out for evidence gathering as to whether a person has consent and then passing the details *“to the relevant land or property owner who will decide on the appropriate course of action which may include the matter being reported for prosecution”*, and stating the PSNI will only remove the items themselves where there is an imminent and immediate likelihood of a breach of the peace.¹⁵⁷

There is also some reference to the Terrorism Act in relation to flags of proscribed organisations, but it is emphasised that a paramilitary flag is not necessarily a criminal offence, and the police do not have an automatic right to remove it.¹⁵⁸

The overall preferred approach of the PSNI set out within the Guidance is ‘community resolution’ based on principles of engagement between local communities and the PSNI and other agencies, this is considered the ‘most effective solution’ to provide for public safety and the prevention of disorder.¹⁵⁹

An appendix to the Operational Guidance, consisting of a Capability Planning Options Paper from 2019, provides some historical context to the PSNI approach taken. This states: *“Due to previous historical events, where IEDs have been attached to flags or serious public disorder has occurred as a result of flags being removed, PSNI have moved to a position of shared problem solving with other partner agencies.”*¹⁶⁰

This report followed a Subject Matter Expert Meeting in May 2019 which identified the risks presented by the removal of items as follows:

1. Setting a precedent – if PSNI remove one flag or contentious item the expectation will be that all such flags and items will be dealt with in the same manner

¹⁵⁶ PSNI (2019) *Operational Guidance: Flags, Emblems and associated displays*, District Policing Command, reviewed 29 June 2019 (provided to this research January 2022), page 3.

¹⁵⁷ As above, page 2.

¹⁵⁸ As above, page 5.

¹⁵⁹ As above, page 2.

¹⁶⁰ As above, appendix C.

2. No capability to prevent flags being replaced in greater numbers
3. Capacity – PSNI do not have capacity to remove all such flags or contentious items
4. Mission creep – taking responsibility away from other partner agencies
5. Terrorist exploitation of pattern setting (historically based)
6. Likelihood of serious public disorder (historically based)
7. Health and Safety risks to officers physically engaged in removing such items
8. Reputational risk to organisation

The report recommends Option 1 (the current approach) rather than Option 2 (grounded in the more proactive removal of items) for a number of reasons including avoiding public disorder.

Again, it is notable that in considering such policy options and in the broader exercise the PSNI makes no reference to offences relevant to hate expression but continues to focus on offences relating to public disorder.

4.1.2 Application of policy in practice

In 2017 at the launch of a Thematic Report on Race Hate Crime at the Policing Board, the question of flags and graffiti on homes was raised. This included the police response to the circumstances whereby Union or loyalist flags were placed outside the home of ethnic minorities or Catholics who had moved into a street. The responses revealed that at times the PSNI had intervened to remove such flags, but on other occasions, despite acknowledging that the display constituted a criminal offence, the PSNI had left such items in place.¹⁶¹

In one incident in July 2015, a Confederate flag was placed on a lamppost outside the home of a black family in East Belfast. The family included a 13-year-old boy who was a member of a local football team. The racist connotation of this flag was particularly heightened at the time following the massacre in Charleston, USA, of nine black people by a white supremacist. The PSNI attended the scene but did not remove the flag despite reportedly treating it as a hate crime. The flag was ultimately removed by the coach of the football team.¹⁶² Around the same time more Confederate flags were put up alongside loyalist flags in Carrickfergus. Nazi flags were then also placed in the area close to a loyalist bonfire. On this occasion the PSNI did take the position it would remove the Nazi flags. This ultimately did not happen as they were removed by local residents with the support of the PUP.¹⁶³

Also in 2015, in Carryduff a house being allocated to a Catholic woman in a predominantly Protestant area was followed by a UVF flag going up outside that house, and then outside other houses. 40 new houses had been built in the Killynure estate in the area, with UVF flags

¹⁶¹ See Cormac Campbell (6 November 2017) "Housing intimidation in Northern Ireland: More than 2,000 incidents but only 32 convictions", *The Detail*.

¹⁶² "East Belfast football coach pulls down Confederate flag flying outside black player's home" <https://www.belfastlive.co.uk/news/belfast-news/east-belfast-football-coach-pulls-9584044>; <http://www.irishnews.com/news/2015/07/04/news/football-club-remove-flag-at-centre-of-race-hate-crime-in-support-of-young-player-160263/>

¹⁶³ Nolan and Bryan (2016) *Flags: Towards a new understanding* (Queens University), page 15.

greeting their new tenants. In this instance the PSNI stated it would not remove the flags as it had not received complaints from members of the public.¹⁶⁴

The issue of flags on new 'shared housing' developments built under the *Together: Building a United Community* (T:BUC) policy has also arisen. In 2015 the Felden estate in Newtownabbey, built as a shared housing initiative, had Tricolours placed on lampposts surrounding the site where houses were being built along with graffiti stating that Protestant residents would be burned out and shot. The flags were removed by Sinn Féin, and the graffiti painted out. It is not clear whether the PSNI would have otherwise intervened.¹⁶⁵

In 2017, as alluded to earlier, another T:BUC shared housing development, Cantrell Close and Global Crescent in South Belfast, saw the placement of UVF flags in a similar context to intimidate Catholics away from the development. The PSNI gave its general policy response that it was not responsible for removing flags save for when there was a "*substantial risk to public safety*" or where it was believed that a criminal offence had taken place.¹⁶⁶ It therefore appears that the PSNI did not consider this behaviour to rise to the level of the offence of stirring up hatred, or intimidation.¹⁶⁷ This is possibly attributable to such offences not being considered in the PSNI Operational Guidance if it was in place at the time. Subsequently the Catholic families were violently intimidated out of their homes. The PSNI attributed this to the UVF.¹⁶⁸ Flags and banners were also erected in the area in 2018 and again in 2019.¹⁶⁹ In 2018, UVF flags were put up on lampposts near Cantrell Close and removed shortly after by others. The PSNI "spoke with" the group removing the flags, and stated about the incident that:

...while in this instance, we had not received any complaints about any flags, we *will continue to work with communities and partners and respond to any issue where there is a concern for public safety or where it is believed a criminal offence has occurred.*¹⁷⁰

In 2019, UVF flags were again erected in Cantrell Close. The PSNI response was that the removal of the flags was not the responsibility of the PSNI, but rather the person or organisation who owns the street furniture on which it is flown (likely referring to the Department for Infrastructure). The PSNI stated that "*police action on its own is not sufficient; we all need to work together for a confident, peaceful society*".¹⁷¹

Contestation over PSNI policy had previously been highlighted in the Ormeau Road area, when complaints were made in 2014 regarding the erection of Union and Ulster Banner flags

¹⁶⁴ "Loyalist flags now on 'every lamppost' at new development"

<http://www.irishnews.com/news/2015/10/26/news/loyalist-flags-now-on-every-lamppost-at-new-development-304928/>

¹⁶⁵ Nolan and Bryan (2016) *Flags: Towards a new understanding* (Queens University), page 15.

¹⁶⁶ <https://www.belfasttelegraph.co.uk/news/northern-ireland/dups-pengelly-slammed-over-let-it-be-attitude-to-terrorist-flags-in-mixed-estate-35849293.html>

¹⁶⁷ Under section 1 of the Protection of the Person and Property Act (NI) 1969.

¹⁶⁸ "PSNI: 'UVF behind intimidation of Catholic families'" <http://www.bbc.co.uk/news/uk-northern-ireland-41515142>

¹⁶⁹ <https://www.belfasttelegraph.co.uk/news/northern-ireland/uvf-flags-in-belfast-mixed-housing-scheme-absolutely-appalling-38267969.html>

¹⁷⁰ <http://www.irishnews.com/news/northernirelandnews/2018/05/18/psni-spoke-with-group-removing-uvf-flags-in-belfast-1332812/?ref=sh>

¹⁷¹ <https://www.belfasttelegraph.co.uk/news/northern-ireland/psni-approach-to-removing-loyalist-flags-frustrating-38319474.html>, see also: <https://www.belfasttelegraph.co.uk/news/northern-ireland/alliance-disappointed-by-police-response-to-uvf-flags-in-cantrell-close-38318559.html>

in the area. The initial PSNI response said that any further flags *would* be treated as a breach of the peace; this was then retracted and the existing policy reiterated. The next year, when flags were placed along the same route, the PUP stated that this had been undertaken *in agreement* with the PSNI, which the PUP stated had informed it that the flags did not breach the peace if they were non-paramilitary.¹⁷²

In 2018 a local flags protocol endorsed by the East Belfast UVF was reportedly brokered with assistance from the then south Belfast DUP MP Emma Little Pengelly. This involved permitting only 'legal' flags to fly for certain periods; 'legal' appears to have referred to not flying paramilitary flags although an exemption was made for supposedly 'historical' UVF flags (those bearing the date 1912). It appears that the question of whether flags were being used for sectarian intimidation was not explicitly dealt with.¹⁷³ Rather the distinction was made between paramilitary and non-paramilitary flags, an approach the PUP had claimed had been endorsed several years earlier by the PSNI. Such an approach would clearly not be effective in combatting hate expression related to sectarian intimidation, which can extend beyond paramilitary flags as it relates to the context in which flags are placed.

The placement in Dungannon in 2016 of a banner commemorating Loyalist Billy Wright, with a quotation celebrating a multiple murder, led to considerable contestation over PSNI policy. This controversy was in part related to comments by a local PSNI commander regarding the banner only offending "*some*".¹⁷⁴ This indicates scant understanding of the applicable legislation that could prompt intervention.¹⁷⁵ An MLA had complained that the banner constituted incitement to hatred. However, the PSNI did not consider it a hate crime, and would not take action to remove it, citing the policy position of requiring a criminal offence or breach of the peace to intervene. The policy decision not to remove the Billy Wright poster was then publicly contrasted with a PSNI decision in Enniskillen in 2013 to remove a banner making a derogatory reference to Margaret Thatcher at the time of her death. The PSNI stated that the reason for removing that banner was that it 'may have led to a breach of the peace' and was on an arterial route.¹⁷⁶

In 2014, the PSNI refused to remove a Ku Klux Klan flag, an emblem which advocates white supremacy and racism, from a lamppost in east Belfast.¹⁷⁷ The flag was put up in the context of a rise in racist motivated hate crime in the area. The PSNI said "*it would not be taking the*

¹⁷² Nolan and Bryan (2016) *Flags: Towards a new understanding* (Queens University), page 14.

¹⁷³ <http://www.irishnews.com/news/northernirelandnews/2018/05/23/news/dup-s-emma-little-pengelly-welcomes-east-belfast-uvf-flags-protocol-1336237/>

¹⁷⁴ In a statement to the *Irish News*, PSNI inspector Keith Jamieson said: "*There is no doubt that this sign will be perceived by some to be offensive, but not by others. While we are sensitive to the feelings of victims' families, the PSNI must attempt to achieve a balance between the rights of one community over another, and act within the law. We are working with the community in an attempt to resolve this matter, and we will continue to do so.*"

¹⁷⁵ <https://www.belfasttelegraph.co.uk/news/northern-ireland/billy-wright-banner-police-stance-adds-further-insult-to-grievous-harm-34899867.html>

¹⁷⁶ See <http://www.irishnews.com/news/2016/07/25/news/billy-wright-poster-row-psni-removed-margaret-thatcher-banner--620299/>

¹⁷⁷ KKK flags and paramilitary flags do of course provide a further barometer of content v context approaches to capture hate expression. The KKK flag is blatantly racist. Whether a paramilitary flag is racist depends on the context in which it is placed, i.e. whether it has the purpose or effect of racist intimidation. In terms of threat, however, a paramilitary organisation represents more of an immediate threat in NI than the KKK as such, albeit if a KKK flag is put up with the real or perceived endorsement or protection of paramilitary elements, the sense of threat may be the same.

flag down and that it would instead adopt a 'multi-agency approach'". The flag was subsequently removed. When asked if the erection of the flag constituted a crime, a PSNI spokesperson declined to comment.¹⁷⁸

In 2017 in the same area of Dungannon, banners to UVF member Wesley Somerville, a member of the Glenanne gang and the UDR, were erected on lampposts alongside UVF banners and UVF flags. Families of victims sought PSNI intervention to remove the banners. The PSNI took the position that in this instance no crime had been committed and it could not intervene. The incident was recorded as a hate incident (presumably on victim perception) but not a hate crime.¹⁷⁹ When a third party removed the items from the lamp posts, the PSNI did intervene to arrest the suspected individual for theft.¹⁸⁰ The individual was charged with the offence of 'attempting to cause criminal damage' and the banner was returned to the person who put originally put it up.¹⁸¹

Other instances where the PSNI have misinterpreted the scope of 'stirring up hatred' provisions under the 1987 Order include the action taken against a woman for holding a "Fuck the DUP" placard at the 2017 Belfast Pride parade, in the likely context of protected expression opposing the DUP stance on LGBT rights. No executive action was taken on the day by the PSNI (the organisers of the Pride Parade did remove the banner), but the PSNI, further to complaints from a DUP MLA and another person, launched an investigation and questioned 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. A file was subsequently sent to the PPS which, unsurprisingly, took a decision not to prosecute on evidential grounds as the message was not directed to any of the protected groups under the 1987 Order.¹⁸² Whilst this relates to investigating an offence this does further demonstrate significant issues with the PSNI's interpretation of the 'stirring up' hatred offences.

In June 2018, the PSNI again elaborated on its policy, stating that

The flying of flags in public places is an issue that provokes a range of strong responses and very different viewpoints. The type of flags flown, how, where and when they are flown are all important considerations. The removal of flags is not the responsibility of the Police Service of Northern Ireland and police will only act to remove flags where there are substantial risks to public safety.¹⁸³

¹⁷⁸ <https://www.belfasttelegraph.co.uk/news/northern-ireland/racists-fly-ku-klux-klan-flag-in-east-belfast-30397555.html>

¹⁷⁹ <https://www.belfastlive.co.uk/news/planning-enforcement-look-lamp-post-13283105>

¹⁸⁰ <https://www.newsletter.co.uk/news/fears-of-tension-after-man-arrested-for-stealing-controversial-wesley-somerville-banner-in-moygashel-1-8025875>

¹⁸¹ <https://www.belfasttelegraph.co.uk/news/northern-ireland/pensioner-fined-after-removing-banner-depicting-loyalist-killer-38681297.html>

¹⁸² In a statement a PPS spokesperson stated "it was concluded that there was insufficient evidence to provide a reasonable prospect of conviction for an offence under Article 9 of the Public Order (NI) Order 1987 because the message was not directed towards a group of persons defined by religious belief, disability, race, sexual orientation, colour, nationality or ethnicity." <http://www.irishlegal.com/11011/woman-will-not-prosecuted-f-dup-placard/>

¹⁸³ <https://www.derryjournal.com/news/call-action-over-bombardment-unionist-flags-and-emblems-1018166>

In 2019, Chief Constable Simon Byrne stated that the PSNI did not need to have a ‘blanket policy’ around removing flags and banners, but would instead take the approach that the removal of flags and banners would be ‘discretionary’. He stated that

*[The removal of flags and banners is] about discretion and about understanding concerns and emotions in a number of different communities where those things are evident. Sometimes if a banner or flag is completely offensive we may need to act differently in the moment. Broadly I think it is patience, it’s about dialogue, it’s about acting with a dose of common sense frankly to deal with this issue.*¹⁸⁴

In 2019, at a public consultation of the Policing Plan, a request was put to the PSNI to include an explicit commitment in the Plan that the PSNI will remove items that constitute hate expression and incitement to hatred. The response from the PSNI representative was that the PSNI is able to remove “obviously racist” items but is not able to remove other items due to the “unique nature of the two communities in Northern Ireland”.¹⁸⁵

Regarding an incident in 2019 where police confirmed that loyalist paramilitaries were responsible for racist hate graffiti on the house of a black Muslim family in Belfast which led to the family having to move and ending up homeless, the PSNI stated:

*Whenever police deal with this type of criminal behaviour, the challenge is that there is not always a policing solution to it. So our job as a police service is to work with the neighbourhood officers, the Housing Executive, local representatives, the families themselves and the wider community, to say this sort of behaviour is unacceptable and, if people have particular issues or concerns, to deal with it in a constructive and democratic way.*¹⁸⁶

A report in 2019 highlighted that hundreds of people had been made homeless due to paramilitary intimidation. Between April 2015 and October 2018, 2,017 households presented as homeless. There were 1,488 cases with paramilitary intimidation as the reason why people were forced from their homes. On average, eight families a week present as homeless due to paramilitary intimidation.¹⁸⁷

One example is provided in an article in *the Detail* in relation which explores the impact of racist hate expression and hate crime on a Muslim family living in the Village in South Belfast. In 2015, the family was living in the area and was experiencing racism, including having their windows smashed. After NIHE offered them a new social home in the Village, the home was sprayed with graffiti reading ‘Locals Only’. The police confirmed that paramilitaries were responsible, and the family was not allowed to move into the new house. In 2019, their temporary accommodation was sold and the house they were offered was the same one that a family friend had to move out of due to hate crime. Scared of experiencing the same hate crime, the family moved into a hostel. Regarding the actions of the police, a family member stated:

¹⁸⁴ <https://www.belfasttelegraph.co.uk/news/northern-ireland/not-about-blanket-flags-policy-but-dose-of-common-sense-says-new-psni-chief-constable-byrne-38270176.html>

¹⁸⁵ From public Policing Plan Consultation, St Columb’s Park House, Derry/Londonderry on 28 October 2019.

¹⁸⁶ <https://www.thedetail.tv/articles/racist-intimidation-in-the-village-in-south-belfast-been-going-on-for-years>

¹⁸⁷ <https://www.belfasttelegraph.co.uk/news/northern-ireland/exclusive-2000-households-forced-out-of-their-homes-paramilitaries-blamed-for-73-of-cases-37676384.html>

When that house was offered to me in the Village, they should have reached out and said they would keep us safe and they should have spoken about how our family has the right to live in this country, but they just said, 'sorry, paramilitaries are involved'. If they keep doing that, this thing will never end. They have to enforce the law and say there is a reason why we are here – we are not illegal. It's like the police are afraid. I don't understand. It's been going on in the Village area for a very long time, I know a lot of families who have suffered with this in the area.

My friend was attacked and another lady I know was getting abused every day. She has now got a house in Tate's Avenue. My cousin had to move out of the Village and is now in Beechmount. Those are just a few examples, there are more. It has been going on for years... They put up flags, flags, flags. It's their area and newcomers aren't welcome.

The PSNI stated that in this instance due to the lack of witnesses, forensic opportunities and CCTV, nobody was held responsible.¹⁸⁸ This is an example of flags being used for the purposes of racist intimidation, deterring persons from exercising their right – in the words of the Good Friday Agreement – ‘to choose one’s residence’, and also shows how incitement is followed by actual intimidation and evictions and reinforces housing segregation.

Other examples of racist expression include in 2017, when a community centre in East Belfast was sprayed with graffiti including a swastika, “No Blacks” and “No Muslims”, and a pig’s head was left at the door. Belfast City Council removed the graffiti and the PSNI investigated it as a hate crime.¹⁸⁹ Similarly, again in 2017 a pig’s head was left outside the Bangladesh Islamic Community Centre in Newtownards with the words “Muslim rapists out” and “Islam rapists out”.¹⁹⁰ These are incidents where the PSNI would agree criminal offences had been committed, yet it is not clear if in such incidents there would be a policy approach of Executive Action to remove items.

There are examples of when the PSNI has treated graffiti as a sectarian hate crime. In January 2021, the PSNI investigated graffiti on a Catholic church in Limavady as a sectarian hate crime. The initials UFF and UDA were painted on the church, alongside the slogan “KAT”.¹⁹¹ Another example, a year earlier, was the spraying of “IRA” on an Orange Hall in Glenavy, which was also treated as a sectarian hate expression.¹⁹² There is an indication that the PSNI in some circumstances may treat paramilitary graffiti as a sectarian hate crime regardless of whether its location targets the ‘other’ community, with the slogans including “CIRA” treated as such when sprayed on a courthouse and adjacent vehicles in Ballymena.¹⁹³ It is not clear whether the location, a mostly unionist town, was a factor in the categorisation of the graffiti as sectarian, or whether an approach was taken that considered all paramilitary graffiti *de facto* sectarian. This was not the case, for example, in the incident in Dungannon where the PSNI

¹⁸⁸ <https://www.thedetail.tv/articles/racist-intimidation-in-the-village-in-south-belfast-been-going-on-for-years>

¹⁸⁹ <https://www.bbc.co.uk/news/uk-northern-ireland-41378205>

¹⁹⁰ <https://www.belfastlive.co.uk/news/muslims-living-fear-after-being-13526996>

¹⁹¹ <https://www.belfastlive.co.uk/news/belfast-news/sectarian-graffiti-catholic-church-branded-19740463>

¹⁹² <https://www.bbc.co.uk/news/uk-northern-ireland-51009200>

¹⁹³ <https://www.itv.com/news/utv/2020-04-09/sectarian-graffiti-daubed-on-buildings-cars-and-courthouse> and <https://www.ballymenaguardian.co.uk/news/2020/04/09/gallery/condemnation-of-dissident-republican-slogans-in-ballymena-9016/>

protected LVF banners to the extent of arresting a member of the public who removed them. Loyalist paramilitary flags are generally not *de facto* considered ‘sectarian’ incidents or crimes.

Policy development

In June 2019, CAJ was informed by the PSNI that it was in the process of developing an Equality Impact Assessment (EQIA) around a revised flag removal policy. In July, CAJ was informed that the EQIA was in progress. However, this process then appeared to stall. In December 2020, the PSNI responded with the following information:

At the end of the parading season this year, we reviewed again our approach to flags and banners as well as bonfires etc. We pulled back on our policy and have reviewed it, it is now in the process of being approved and we will publish again in the New Year. This policy will then be subject to EQIA process.

The PSNI stated in November 2021 that the EQIA had been ‘suspended’ to await both the release of the FICT report and outcome of the Review of Hate Crime Legislation from the Department of Justice.¹⁹⁴

The PSNI also confirmed that it had reviewed and updated the “Operational Guidance for Flags, Emblems and associated displays” in June 2019.¹⁹⁵ This document was provided to us in late January 2022. We were also informed that the policy would be kept under review.¹⁹⁶

¹⁹⁴ PSNI E Correspondence to CAJ 22 November 2021.

¹⁹⁵ As above.

¹⁹⁶ PSNI E Correspondence to CAJ 12 January 2022.

4.2 Department for Infrastructure policy and practice

4.2.1 Policy position of the Department

As previously stated, the Department for Infrastructure has powers to remove public hate expression. 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... upon 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 serve removal notices or to remove any of the above items and recover reasonable costs from responsible persons.

In response to this research in August 2019 the Department elaborated on its policy around exercising its powers to remove public hate expression and items that constitute incitement to hatred:

The Department seeks to handle issues concerning the type of items/fixtures you outlined in a manner which is consistent with the ‘Joint Protocol in Relation to the Display of Flags in Public Areas’.

The Department considers a number of factors in deciding what action to take where it receives a complaint or a request to remove such items/fixtures from the surface of a road or from a structure on the road. These include any negative impact caused by the presence of such items/fixtures, including any risk of harm posed to motorists, pedestrians or residents; whether there is evidence of community support for removal; whether removal would further raise community tensions and whether taking action to remove would present risks to the safety of our staff and contractors.

In considering requests to remove such items/fixtures the Department will consult colleagues in the PSNI and, where appropriate, other Departments and agencies which may have a relevant input to the decision-making process.

The Department stated that there had been no equality screening, EQIA or monitoring of this policy to date, but that it was under review and that the policy would eventually be Equality Screened.

Internal PSNI Guidance provided to this research sets out a position provided to the PSNI by the Department for Infrastructure on 25 June 2019 as follows:

The illegal display of flags/banners continues to be a difficult issue for many people. The Department does investigate complaints and we work closely with colleagues in the PSNI on all such cases. However, the reality is prosecution does not solve the underlying factors that give rise to such displays and we need also to be mindful of the broader issues including heightening of community tension and compromising the safety of our staff.

For clarity, we will take action if displays create road safety concerns. We will also take action to arrange for the removal of flags and banners where there is clear community support for their removal and where we are satisfied that removing them will not further raise community tensions or present risks to the safety of our staff and contractors.

*We will always act on the advice of our PSNI colleagues on such matters. We are also keen to engage with local councils and political representatives to respond to requests from local communities where consensus on removal is clear.*¹⁹⁷

The PSNI internal Guidance further states that the PSNI will not progress prosecutions without a statement of complaint from DfI, and that at that time (2019) DfI had taken a position that it would not be progressing complaints:

*Therefore all officers must be aware that in the knowledge that DfI will not be progressing prosecutions we have no powers to require any member of the public to desist from erecting a flag or banner unless it is likely to lead to an imminent breach of the peace or is an item which displays support for a proscribed organisation or which is tantamount to provocative conduct.*¹⁹⁸

The PSNI Guidance therefore indicates that DfI had taken a policy position to *disapply the use of its powers* to prosecute those unlawfully fixing flags and banners to lampposts. We put this contention to the Department who responded to state that the DfI has “*no specific policy regarding the progressing of complaints or prosecutions relating to attachments to its property. In each instance, we will assess the likelihood of increased risk to our staff and contractors and will take appropriate action based on that assessment.*”¹⁹⁹

The PSNI Guidance elsewhere reiterates DfI “*will not act without police advice and then only to remove an item that is causing a danger to road users*”.

It is also clear that the criteria in the broader policy approach do not expressly distinguish whether the items in question constitute hate expression. It also appears that road safety is the only cited reason for removal.

This approach was reiterated to the media in June 2021 when DfI stated it would take action if displays create “road safety concerns” and:

*We will also take action to arrange for the removal of flags/banners or paint from kerbstones/signs where there is clear community support for their removal and where we are satisfied that removing them will not further raise community tensions or present risks to the safety of our staff and contractors.*²⁰⁰

This policy approach extends beyond flags to banners, signs, and to the painting of kerbstones which, when reflecting the colours of national flags, can be used as a form of sectarian intimidation from taking up housing.

There are however significant questions – and adverse equality impacts – stemming from a policy approach of removing public hate expression when there is evidence of ‘clear community support for removal’ and no risk of raising ‘community tensions’. Take for example the (real) situation whereby Ku Klux Klan flags, which by their nature advocate white supremacy, were displayed on lampposts or other Departmental property. Under this approach the Department would have to consider whether there was ‘evidence of community

¹⁹⁷ PSNI (2019) *Operational Guidance: Flags, Emblems and associated displays*, District Policing Command, reviewed 29 June 2019 (provided to this research January 2022).

¹⁹⁸ As above.

¹⁹⁹ Departmental e-correspondence with CAJ on file, 22 March 2022.

²⁰⁰ <https://www.bbc.co.uk/news/uk-northern-ireland-57484742>

support' for their removal before intervening. It also implies that the Department would allow the flags to remain if 'the community' was not in support of their removal. It is not clear who is considered to be 'the community' and whether in practice this is generally a codified reference to direct or indirect engagement with those putting up such items, and whether therefore at times the 'community support' and tension criterion in practice simply can act as a paramilitary veto over whether expression – including hate expression – is removed.

The Department has stated that it will defer to an assessment from the PSNI as to whether the removal of flags may raise community tension prior to exercising its own powers of removal. The Department outlined this policy in a statement in June 2018:

The Department does not approve of the unauthorised use of departmental property, which is an offence under the Roads (NI) Order 1993, however, the removal of flags needs to be treated with sensitivity.

The Department acts in accordance with the multi-agency Joint Protocol in Relation to the Display of Flags in Public Areas that was introduced in 2005. The Department's operational policy in relation to the Protocol is that once the location of a flag/banner complaint is established, the PSNI will be contacted to determine if there will be community tension if removed. If there are no public order issues then the next step is to ensure the safety of staff/contractors prior to the removal.

Where there is agreement and support from communities and their representatives, the Department will work with statutory agencies to address the removal of flags.²⁰¹

Again, it is unclear how the Department determines who is considered a 'community representative' and whether there is 'agreement and support' from 'the community'. It is also unclear whether there are circumstances where the Department will still remove items – specifically those constituting in content or context, hate expression, if there is not support from 'community representatives' to do so.

The internal PSNI Operational Guidance states that PSNI and DfI possess joint powers of investigation in such matters but that DfI "remain the primary investigators" should it wish to progress the matter to court. Complaints to the PSNI are therefore referred to the DfI for consideration.²⁰²

The internal PSNI Operational Guidance also sets out a detailed 11-stage set of procedures for dealing with complaints about banners and flags on DfI street furniture. This largely involves attendance at the scene and evidence gathering in response to a complaint with a referral to DfI. The Guidance also states:

If asked for advice on the removal of any flag or banner or related material by DfI the PSNI position is that we will support them and, where necessary, provide a police presence to prevent any interference in their staff carrying out their statutory duties should they wish to enforce them.²⁰³

²⁰¹ <https://www.derryjournal.com/news/call-action-over-bombardment-unionist-flags-and-emblems-1018166>

²⁰² PSNI (2019) *Operational Guidance: Flags, Emblems and associated displays*, District Policing Command, reviewed 29 June 2019 (provided to this research January 2022).

²⁰³ As above.

There is no reference to any process however whereby the PSNI will provide advice or an assessment as to whether removal of a flag would create ‘community tension’.

4.2.2 Application of the policy in practice

In June 2019, a single Union flag was placed outside a Catholic primary school (St Joseph’s) on Holland Drive, East Belfast. There were no other flags on lampposts in the street in the vicinity. From this context therefore the flag would fall to be considered hate expression, given as it is being used for purposes of sectarian harassment and intimidation. Similarly, a Union flag and a UVF flag were placed outside a Catholic church in Larne, constituting sectarian intimidation as they were the only such flags in the area. Asked about its policy response to these instances, the Department stated that it had contacted the PSNI “*to establish if removing the flags will create community tension*” and that it was “*awaiting a response from the PSNI*”.²⁰⁴ The question of whether the erection of the flags had ‘created community tension’ was not addressed.

As previously stated, the PSNI policy around exercising its own powers to remove hate expression is largely unwritten and appears to centre on exercising powers only when there is a clear and present danger to public safety or evidence of overt criminality. We do not know: 1) what kind of ‘community tensions’ analysis the PSNI provides to the Department to determine the circumstances under which the Department will exercise its powers, 2) whether there is a policy agreement in place between the PSNI and the Department for the provision of this advice, and 3) the timeframe for the advice provided, and the procedure for the subsequent removal of the expression if it is indeed deemed to ‘create community tension’.

An ongoing issue of public hate expression in Northern Ireland is the placing of flags on new build developments, typically with the purpose or effect of sectarian and racist intimidation of potential homeowners or renters. The Department has at times taken the policy position that it is unable to remove public hate expression from developments until the roads are formally adopted under powers in legislation. For example, in July 2019 at Millmount Village Development (which was still partly under construction) Union flags and paramilitary flags were placed at the entrance to the development, with the purpose or effect of sectarian/racist intimidation against Catholics and ethnic minorities who were current and potential tenants/homebuyers. The Department’s stated position regarding the removal of the flags was as follows:

*The street lighting installation in Millmount village development has not yet vested in the Department under Article 10A of the Private Streets (NI) Order 1980 as the road is not yet adopted. Whilst the majority of the work has been completed, further work is necessary before this street, including its street lighting installations, meets the standard to allow it to be fully adopted by the Department. The Department therefore has no powers to remove these flags.*²⁰⁵

²⁰⁴ Departmental e-correspondence with CAJ on file.

²⁰⁵ Departmental e-correspondence with CAJ on file.

The Department took the same position regarding the erection of UVF flags on lampposts in Cantrell Close in June 2019, following sectarian intimidation of Catholics from housing in the area. The Department again stated that the street lighting installation in Cantrell Close had not vested in the Department, because the road was not yet adopted, so that the Department was unable to remove the flags.

This leaves a gap in powers for the removal of flags when the lampposts are essentially the property of the developer. The Department provided the following statement to this research on the matter:

- *Where street lighting columns are installed as part of a private streets developments, these lighting columns remain the property of the developer until formal adoption is completed. Until this time, the Department has no responsibility in relation to such lighting nor legal authority to remove any unauthorised attachments.*
- *Where lighting is installed as part of other alterations on an adopted road at the entrance to a development, a separate licence is issued under Article 3(4C) of the Private Streets (Amendment) (NI) Order 1992. Those lights, including the removal of any attachments which may be in place, again remain the responsibility of the developer until the end of the licence period, at which time ownership transfers to the Department.²⁰⁶*

As argued elsewhere in this report, where the display reaches the threshold of a criminal offence – including ‘intimidation’ – the PSNI could intervene. Another possibility would be to explore the option (which may require legislative amendment) of licencing conditions on private street developments replicating any policy adopted by the Department to take reasonable steps to remove hate expression; the developer could be required to prevent or remove flags etc., or to authorise the Department to do so.

In 2019 Belfast City Council passed a motion to take legal action against the Department for failing to remove paramilitary flags and banners on its property. In response, the Department reiterated its policy of removing flags in situations where there is “*clear community support*” for their removal.²⁰⁷

In other instances, there were issues of delay and a lack of clarity in how the Department responds to incidents:

- In November 2019, a complaint of a sectarian banner placed in a residential neighbourhood in Glengormley was referred to the Department. The banner was draped over a road on Departmental property constituting a road safety issue as well as hate expression. Within a matter of days, the banner was removed, but the Department confirmed that it had not removed it, and it is unclear if there was any intervention at all from the Department.
- In January 2020, a complaint was referred to the Department regarding the placement of Union flags on lampposts at the entrance to the new Braidwater Development on the Glenshane Road in Derry. These were the only flags on the street, hence the

²⁰⁶ Departmental e-correspondence with CAJ 15 November 2021 on file. The reference to Article 3(4C) appears to be to the Principal Order – the Private Streets (NI) Order 1980 as amended by the 1992 Order.

²⁰⁷ <https://www.bbc.co.uk/news/uk-northern-ireland-48830950>

context appeared to be that the placement was intended to intimidate Catholics from taking up housing in the new development. The Department responded to say that it had sought advice from the PSNI on the 'risks of removal' and were waiting for a response. As of May 2020, the Department had not heard back from the PSNI.

The Department's policy of requesting the PSNI to assess the 'risks of removal' prior to the Department removing hate expression on its property comes up against the PSNI's own policy of non-intervention on most public hate expression. The impact is, at best, a routine delay in the removal of public hate expression and at worst, hate expression remaining on Department property.

In engaging on this report, the Department confirmed that there was no formal agreement or arrangement with the PSNI to conduct such assessments. Rather requests were made on an ad hoc basis to the PSNI and at times other relevant agencies (councils, NIHE). Requests for assessments generally related to staff and contractor safety if removing items, as the Department itself would not be in a position to make an informed assessment. However, the responses received from the PSNI tend to be 'neutral' and do not assist in making such an assessment.

There are examples of where PSNI assessments have influenced decisions. One example is from June 2021 in Lisburn where flags (Union, Ulster Banner and skull and crossbones) were erected on lampposts beside a mixed housing development. This reportedly prompted over 150 complaints to local SDLP MLA Pat Catney, stating that the development was a mixed community and the residents wished to live in a mixed community without flags. The Department took the position it would take no action to remove the flags on grounds of PSNI advice that doing so would "increase local community tensions".²⁰⁸ Again in this context 'community tensions' is code for removal angering those who put the flags up. In response, the Department reiterated its policy position that it would only remove such items where there was "clear community support for their removal". Again, this raises the question as to what 'community' means in such circumstances – given the evidence that the community on the actual development wished for the flags to be removed. The only 'community' whose support for removal was not forthcoming appears to be those who placed the flags.

A further example from July 2021 relates to the placement of a Union flag at the entrance to Fleming Fulton special school in south Belfast. The flag was placed in a context where there are no other flags along the same stretch of road, and the school provides integrated education. A school source is quoted as stating "There are no flags opposite the school. The nearest one is at Taughmonagh. This has been a deliberate move to put it there." The Department for Infrastructure declined to remove the flag. In correspondence to local Alliance MLA Paula Bradshaw the Department stated:

In this particular case, the Department sought advice from the PSNI who advised that they have engaged with local community representatives to have the flag in question removed. However, no agreement has been reached.

²⁰⁸ <https://www.bbc.co.uk/news/uk-northern-ireland-57484742>

*The PSNI further advised that if the flag was removed it is highly likely that a lot more would appear given the current tensions. Consequently, it is not considered appropriate to remove the flag at this time.*²⁰⁹

Both the school and Ms Bradshaw expressed frustration at the decision, the latter stating *“It is a shame that threats of escalating tensions, intimidation and more flags are enough to undermine the right of these pupils to be educated free of the shadow of sectarianism.”*²¹⁰ Again in this instance ‘the community’ is not that of the school and parents.

The Department invokes its powers relating to the removal of ‘non-contentious’ material from its property on a regular basis, leading to the strange situation whereby public hate expression is routinely allowed to remain on Departmental property while non-contentious material is removed. For example, in November 2019, during a meeting with Newry, Mourne & Down District Council officials, the Department discussed the issue of unauthorised signage on Department property and told Council officials that the Department would be increasing enforcement of its powers to issue fines and to remove unauthorised signs placed on Department property. The Department stated that due to a lack of resources its officials had not been enforcing this recently, but in some areas *“things are starting to get out of hand, so [the Department] will be taking action again very soon”*. The Department listed examples of the types of unauthorised signs to be removed as including *“football clubs promoting events”*; groups organising *“coffee mornings/fun runs for charities such as Marie Curie”*; and resident groups *“with things such as neighbourhood watch, traffic speeding signs etc.”*²¹¹ From discussion with the Department we understand that the threat of exercising Article 87 powers is often sufficient to ensure materials are removed, with a limited number of fines issued.

The key issues from the perspective of the Department in relation to the removal of hate expression were twofold. The first was the safety of staff and contractors. The second concern was that the Department was not set up in a way where there was internal capacity to make assessments and determinations as to which items would constitute ‘hate expression’ *in the context* they were placed. To this end, the possibility of Guidance from the Department of Justice flowing from the Hate Crime Review that would assist in making such assessments was discussed.

Given the frequency with which the Department has to deal with hate expression and other contested materials on its property, the development of internal capacity in the form of an internal specialist unit on such issues would be very beneficial.

²⁰⁹ <https://belfastmedia.com/union-flag-outside-fleming-fulton-will-not-be-removed>

²¹⁰ As above.

²¹¹ <http://www.irishnews.com/news/northernirelandnews/2019/11/14/news/stormont-said-charities-faced-50-fee-for-unauthorised-signs-while-soldier-f-banners-fly-freely-1764653/>

4.3 District council policies and practice

As set out above, councils have a range of powers at their disposal to remove public hate expression and items that constitute incitement to hatred based on their content and/or the context of where they are placed.

Councils have powers to ‘remove or obliterate’ graffiti detrimental ‘to the amenity’ of any land in its district, or to remove any placard or poster displayed outside of planning rules (or compel the person who has put it up to do so). Councils can also issue Defacement Removal Notices over such material including prioritising removal where it is ‘offensive’ which includes material that 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.*”²¹² there are also powers to issue fines, although due to an apparent drafting error these exempt material motivated by racial or religious hostility. This leads to the present odd situation whereby such fines can only be issued if the message in the graffiti or poster *is not* racist or sectarian.

As part of its initial research in 2019 CAJ surveyed district councils, and no council at the time had a specific policy on removing public hate expression. Few councils 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 policies that councils do have which lay out the circumstances under which they utilise their powers to remove hate expression on their property range widely. The usage of the powers to remove hate expression has also varied.

²¹² Department for Environment, *Guidance for District Councils on Sections 31 to 35 of the Clean Neighbourhoods and Environment Act (NI) 2011*, para 2.6

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 & Newtownabbey Borough Council	No	No	No	No	No	Reference to DAERA guidance regarding graffiti prosecution
Ards & 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 & 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: 246 ²¹³	No
Armagh City, Banbridge & 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 3 years	Yes - Graffiti Removal Scheme
Causeway Coast & Glens Borough Council	No	Draft policy on fly posting offences, unpublished	No	No	Yes – 20 recorded complaints in last three financial years	Yes: 1) Follows DAERA guidance on graffiti & fly posting prosecution 2) PSCP Graffiti Programme Procedural Guidance Document
Derry City & 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

²¹³ 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).

Fermanagh & Omagh District Council – Enniskillen Office	No	No	No	No	No	Reference to Council Complaints procedure
Lisburn & Castlereagh City Council	No – Referred to Council by-laws addressing individual behaviour	Possibly unwritten. Council “takes action” upon public referrals and complains.	No	No	Yes - fly-posting / graffiti: 2016-17: 30 2017-18: 34 2018-19: 48	Referred to statistics held by PSNI regarding sectarian or homophobic incidents.
Mid & East Antrim Borough Council	No	An unwritten “response initiative” to respond to sectarian and hate crime graffiti ²¹⁴	No	No	Yes, all graffiti removed (not necessarily hate): 2017: 9 2018: 5 2019: 5	No
Mid Ulster District Council Dungannon	No ²¹⁵	No ²¹⁶	No	No	No	Reference to council’s complaints procedure.
Newry, Mourne & Down District Council	No	Unwritten ²¹⁷	No	No	No	No

²¹⁴ “Mid & 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.”

²¹⁵ “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. Council’s 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.psni.police.uk/crime/hate-crime/reporting-a-hate-crime/> to investigate should a member of public interpret an issue being an expression of hate in line with the definition of hate.”

²¹⁶ “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.”

²¹⁷ “Council Policy is to promptly remove any graffiti or posters from its own property e.g. walls, litterbins, railings. The Council will also refer any enquiries relating to flyposting and graffiti to other statutory bodies e.g. 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 (NI) 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.”

4.3 District council policies and practice (cont.)

The most comprehensive policy around the exercise of powers to remove public hate expression on council property was actually from a local Policing and Community Safety Partnership (PCSP), in collaboration with the Causeway Coast & Glens Borough Council and NIHE. This policy focuses on the removal of graffiti. The policy sets out the responsibilities of each partner agency including a flow chart, time frames for the graffiti removal (prioritising the removal of “sectarian, hate, offensive, or other sensitive” graffiti; it is worth noting here that ‘sectarian’ is considered a category distinct from ‘hate’), a system for data collection of the graffiti, and an embedded evaluation and review process for the policy. However, this policy contains a caveat stating that graffiti with “political sensitivities” will not be removed until after the PSNI or NIHE consult with “community and statutory partners” and “community representatives”.

Armagh, Banbridge & Craigavon Council also provided further information to this research in 2021. The Council highlighted that whilst there was no specific policy on removing hate expression, there was the Clean Neighbourhoods Enforcement policy, and the PCSP also had a Graffiti Removal Scheme, with terms and conditions for its contractor where each *“individual piece of offensive graffiti is assessed and a decision made by experienced officers.”* The Council stated that ‘offensive graffiti’ will include *“racism, homophobia, sectarianism along with paramilitary slogans, graffiti that names or threatens an individual, is sexual in nature or is anti-police.”* Records are kept of the number of interventions and graffiti removed (not disaggregated to hate expression specifically). In terms of process PCSP staff will ask public authorities to remove materials from their own property in the first instance and will also take referrals from property owners, community groups, elected representatives and the PSNI for removal of offensive graffiti. The main challenges in operating this system related at times to establishing ownership of the property, and approval to remove, and also difficulties *“in some areas with removal of paramilitary graffiti, some risk to Contractor, community tension or risk of even more graffiti being put up.”*

In general across councils, it appears that according to their policies councils will remove most ‘offensive’ graffiti on council property once a complaint is made. However, the data around the number of complaints made regarding graffiti and subsequent removal varies in quality across councils so it is difficult to determine how effective councils are at removing reported public hate expression.

Councils have at times also been proactive about removing unauthorised items on their property that do not constitute hate expression. Several examples include Belfast City Council removing an emergency sleeping shelter placed in Victoria Street, on the grounds that it was there without permission and a potential fire hazard,²¹⁸ Antrim & Newtownabbey District Council threatening to fine and prosecute a homeowner for placing a sign in Irish on her property on the grounds that the sign constituted an unauthorised advertisement,²¹⁹ and Belfast City Council threatening to fine and prosecute a hotel for putting up a “Happy Holidays

²¹⁸ <https://www.bbc.co.uk/news/uk-northern-ireland-30986235>

²¹⁹

<http://www.irishnews.com/paywall/tsb/irishnews/irishnews/irishnews/news/northernirelandnews/2019/06/18/news/council-threatens-to-prosecute-85-year-old-woman-over-irish-language-street-sign-1644039/content.html>

Belfast” banner on the grounds that it was put up on a listed building without planning permission.²²⁰

Over the past year – despite the pandemic and lockdown – examples of racist and sectarian graffiti have continued. The following are a few reported examples:

- In November 2020, blatantly racist and sectarian (‘Taigs out’) graffiti was sprayed on walls around Queen Victoria Gardens in North Belfast, in an apparent attempt to intimidate families from moving into the area in advance of scheduled house viewings.²²¹
- After the Black Lives Matter protests in July 2020, racist graffiti was sprayed on the Newington Presbyterian Church in North Belfast which stated “Kill all [N-word]”. Local residents painted over the graffiti.²²²
- In June 2020, racist graffiti stating “Locals Only” was sprayed on a house in the Finaghy area of Belfast. The council confirmed that it would be removed.²²³
- In August 2020, the slogan “KAT” was sprayed on a family home and car in the Kilcoole area of North Belfast. It is unclear who removed the graffiti.²²⁴
- In June 2020, a banner was erected in North Belfast at the entrance to Grove Playing Fields which read “Anti British GAA not welcome”, and the same words were sprayed on the walls of the changing rooms building. This was in the context of some of the persons playing (association) football on the fields wearing GAA tops, and thus the graffiti – whilst ostensibly anti-GAA – was in context sectarian graffiti in objection to persons presumed to be Catholic using the playing fields. The facility is owned and run by Belfast City Council which removed the banner and the graffiti. A house nearby was also sprayed with ‘sectarian and paramilitary slogans’.²²⁵

²²⁰ <https://www.bbc.co.uk/news/uk-northern-ireland-50465173>

²²¹ <https://belfastmedia.com/police-investigating-north-belfast-sectarian-and-racist-graffiti-94e28775-1b14-41c7-83f9-906b0945ebf6>

²²² <https://www.belfastlive.co.uk/news/belfast-news/vile-racist-graffiti-north-belfast-18677984>

²²³ <https://www.belfasttelegraph.co.uk/news/northern-ireland/racist-graffiti-painted-outside-finaghy-home-39322792.html>

²²⁴ <https://www.belfasttelegraph.co.uk/news/northern-ireland/mla-hits-out-at-campaign-of-sectarian-intimidation-against-catholic-community-in-north-belfast-39416919.html>

²²⁵ <https://www.belfastlive.co.uk/news/belfast-news/north-belfast-playing-fields-daubed-18417641>

4.4 Housing Executive policy and practice

Along with district councils and the Department for Infrastructure, the Northern Ireland Housing Executive (NIHE) has both international and domestic positive legal duties to intervene to remove public hate expression. As previously stated, these include obligations under Article 8 ECHR, the Framework Convention for National Minorities, good relation obligations and NIHE's duties under Section 75 to pay due regard to the equality of opportunity of protected groups as elucidated in its Equality Scheme. This particularly engages duties of the NIHE when hate expression occurs on its own land or housing, occurs on housing association property and social housing, is facilitated by its funding, or is directed against NIHE tenants.

It is notable however that NIHE does not have express legal powers and sanctions, akin to those vested in the Department of Infrastructure and councils, that can be deployed to remove hate expression items. There is also the complexity of diversity of housing and land ownership, with housing associations and the private rented sector key players as well as NIHE.

In response to initial correspondence the NIHE described its (unwritten) policy around public hate expression when it takes place on NIHE land and property as ranging from immediate removal of the "offending item" to managing the emotions elicited by the presence of the item until the "political context" improves.

This is an important issue for all public bodies but it can be both sensitive and emotive. The incidents of inappropriate use of land range from common racist, sectarian or homophobic graffiti to highly detailed built structures that act as memorials associated with our recent past. The response of the Housing Executive can range too; from immediate removal of an offending item to engaging with communities and managing a highly emotive issue until the political context improves to a stage where more direct action can be taken.

The NIHE 'Land Use' policy details the circumstances under which NIHE *disposes* of land, including disposing of land to "cohesive" organisations rather than organisations which are "essentially divisive". The initial NIHE correspondence states:

[It] is also important to note that we conduct much of our work alongside the Department for Communities, Local Councils, Housing Associations, Health and Social care providers, the voluntary sector and many other housing and community bodies. In many cases our work is aligned and coordinated in plans and strategies such as Community Planning, Supporting People strategies, Community Safety and Community Engagement policies. Our Cohesion policies are also developed based on high level strategic objectives (aligned with Programme for Government, Executive Office and Departmental priorities) but also local needs and developments. Our Good Relations policy team are supported by 13 local Good Relations officers and a Race Relations officer working "on the ground".

These customer-focused strategies (such as Cohesion) are also supported by complementary and/or technical policies. With regard to the issue of inappropriate use of land (for example, expressions of hate) our Land Use strategy has a range of policies that seek to ensure appropriate use of land in out [sic] ownership or subject to disposal to another person or organisation.

For example, the Land Sales policy stipulates at 14.5 that:

“Where the Housing Executive has discretion as to the type of body to which a disposal is to be made, the overriding principle is that organisations which are essentially cohesive and likely to bring different groups in their district into closer contact with each other on an equal footing should be encouraged whereas organisations which are essentially divisive and exist principally to serve sectional interests should not be encouraged on Housing Executive property. When preparing economic appraisals in such cases, consultation should include the Housing Executive’s Head of Community Cohesion and the disposal method should reflect the Housing Executive’s Corporate Objectives as outlined in the Corporate Plan.”

In respect of small land sales to owner occupiers and sales of lands within or adjoining NIHE estates, the special conditions to the contract and clauses within the deed will usually contain a generic restriction: “Not to cause, permit or suffer upon the land hereby transferred or any part thereof any nuisance or annoyance to the Transferor or its tenants or occupiers of the neighbouring lands.”

However, such a clause would not usually be included in the disposal of sites remote from NIHE lands, as we seek to divest ourselves of our full interest in and responsibility for surplus lands.

Land which is *leased* by NIHE is also subject to a termination clause which prohibits the erection or construction of any murals, flags or emblems which relate to any sort of group, regardless of whether or not the item involves hate expression.

In respect of the leasing of NIHE land, the terms of the lease will include a termination clause to the effect of “Not to do or permit or suffer to be done in or on the Lands or within the curtilage or neighbourhood of the Lands any act or thing which is or may be an annoyance or nuisance to occupiers in any adjoining Lands or dwellings.” Where the lease is for a community garden, this clause will be more detailed, being “Not to use the Premises or any part thereof for any dangerous noxious or offensive trade or business nor for any illegal act or purpose and in particular shall not construct, erect or tolerate nor permit the construction, erection or display of any murals, flags, emblems, touching upon, concerning or permitting or in any way relating to any political, religious, sectarian or paramilitary beliefs, opinions or groupings howsoever arising.”

Regarding the primary issue of how the NIHE responds to intervene when public hate expression is erected on its property, the NIHE’s unwritten procedure appears to be to seek the support of the PSNI when there is “*clearly a hate incident*”, and otherwise to intervene when there is ‘community support’ for the removal of the item:

The key question is of course in relation to how we act when there is a breach or when there is an unplanned event such as a bonfire.

In response... well... we still live in difficult times. With regard to bonfires for example, the Housing Executive does not give approval for bonfires on our land. We along with many other public bodies have bonfires located on our land every year. Our stance usually is that, where we have the community support and assess that it is safe for our staff and contractors to do so, we remove the materials. If we don’t have this support

we keep a constant monitor on the situation and do all we can to reduce the risk of negative impacts.

We do engage with communities and partner organisations throughout the year to address the potential impacts both physical and social of bonfires and associated events or issues. Where necessary and where there is clearly a hate incident we seek the support of the PSNI.

On a wider front I think there is no definitive guidance in relation to central Government (Executive Office) guidance to public bodies on the issue of dealing with expressions of hate in the context of the “unique circumstances of Northern Ireland”. Where it is graffiti we attempt to remove it immediately. Where it is a mural we attempt to engage the community and use our partner arrangements to reimagine the issue. Currently we have mapped all murals on our internal GIS system to feed into our Community Cohesion polices over the incoming years. On a general level I think it is fair to say that do not tolerate expressions of hate and take immediate steps to address them based on an assessment of the situation and the associated risks.

The NIHE now has a *Community Safety Strategy 2020-2023* which examines the work of the previous strategy in helping to “tackle anti-social behaviour and alleviate the fear of crime in our communities” and then “sets out what will be done over the next three years to continue this work”.²²⁶

The Strategy contains a section on Hate Crime:

As a Social Landlord, the Housing Executive is strongly committed to equality principles and promoting good relations between different communities in our estates. We are committed to tackling hate crime and supporting victims of hate crime by working in partnership with the police, other statutory agencies and the community and voluntary sectors thus strengthening a multi-agency response to hate crime incidents.

Any hate harassment reported to the Housing Executive will be investigated under the anti-social behaviour process; we will respond in a sensitive way and take appropriate action taking individual wishes into account, this may include referring to organisations which can provide further support, seeking to take action to stop the harassment and to deal with the perpetrator, along with working in partnership with other agencies to create an environment which encourages community cohesion and prevents further harassment.

The Strategy discusses the Hate Incident Practical Action Scheme (HIPA) which is available for victims of hate incidents in their homes and provides personal and home protection for hate motivated crime. “The HIPA scheme is available to all tenures. It is jointly supported by the Department of Justice, PSNI, the Housing Executive and the Department for Communities. When an incident is confirmed by the PSNI and the victim wants to remain in their home, the Housing Executive can provide security measures to the home.”²²⁷ A service level agreement between NIHE, DfC, DoJ and the PSNI for this scheme was in place until at least 31 March 2021. The NIHE also has produced a Hate Harassment Toolkit.²²⁸

²²⁶ <https://www.nihe.gov.uk/Documents/Community/Community-Safety-Strategy.aspx>, page 2.

²²⁷ <https://www.nihe.gov.uk/Documents/Community/Community-Safety-Strategy.aspx>, page 28.

²²⁸ [https://www.nihe.gov.uk/Documents/Community/hate_harassment_toolkit.aspx?ext=.](https://www.nihe.gov.uk/Documents/Community/hate_harassment_toolkit.aspx?ext=)

It is not clear how these policies on hate crime and harassment engage the issue of physical hate expression on NIHE property or against NIHE tenants.

The CAJ engaged with NIHE in 2021 on a draft of this report after a joint meeting with the Communities Minister and NIHE Chief Executive. A written response to the draft confirmed that “the NIHE does not currently have a formal written policy on hate expression in public spaces” but there was now an intention to review this in light of the forthcoming hate crimes Bill and the Hate Crime Review recommendation 15 (on hate expression in public space) in particular. The response stated:

As the Housing Authority for Northern Ireland, and as a landlord, we are acutely aware of the circumstances unique to NI, particularly the complexities of managing homes and spaces in the context of bonfires, and removal of some flags, emblems and other forms of expression (for example murals) from within our estates. These are complex matters, which often involve a range of competing factors, and we work hard to take all reasonable steps to resolve issues, as they arise, while also proactively meeting our legal responsibilities.²²⁹

The NIHE reiterated that it would continue to work “with communities and partner organisations when dealing proactively with hate expression, and considers this an organisational priority. It is hoped that the introduction of a new Hate Crime Bill will provide clarity on how organisations can improve practice.” In relation to powers the NIHE stated:

In terms of implementation of Recommendation 15, most of the property owned by the Housing Executive is tenanted property (circa 85,000 homes) and these properties are regulated by a tenancy agreement or lease. As a landlord, NIHE does not possess powers equivalent to those of Councils and the Department for Infrastructure (DfI), rather its standard conditions of tenancy are generally framed to deal with nuisance and annoyance to neighbours, and breaches of planning and building control. Currently there is no legislative basis for the Housing Executive as a social landlord to carry out this function, whereby the powers already provided to Councils and DfI give authority to do so.²³⁰

Statistics were also provided on removal of graffiti by NIHE area offices. These recorded 268 interventions in 2017-18 (at a cost of £11k), 229 interventions 2018-19 (£11k); 281 in 2019-20 (£14k); 179 in 2020-21 (£8k). These figures related to graffiti removal in general as there was no disaggregation available for hate expression.²³¹

Along with hate expression being used to intimidate people out of NIHE housing, hate expression placed on bonfires on NIHE property is an ongoing issue. While the burning of the placards of a political party on summer bonfires will not automatically constitute sectarian hate expression, the burning of a placard or other items meant to represent an entire community would constitute sectarian hate expression. For example, in 2019, in Rathcoole, Irish language signs stolen from another council area were burned along with other items representing the Catholic/nationalist community. Particularly in the context of increased hostility against the Irish language, it is reasonable to conclude that this constituted sectarian

²²⁹ NIHE CEO correspondence 11 August 2021.

²³⁰ NIHE CEO correspondence 11 August 2021.

²³¹ Graffiti removed by Area Office, NIHE figures 2017-22

hate expression. The bonfire took place on NIHE property. We have not been able to get clarity as to whether there was any attempt (or opportunity) to seek to prevent this.

The issue of bonfires is of particular relevance to the NIHE and councils as many take place on their land, and at times with their funding. The most notorious has been the Ballycraigy bonfire – where there was a conviction for racist hatred – and the bonfire in 2014 contained racist, sectarian and homophobic expression (the latter involving the burning of a rainbow flag.) There were subsequent proposals at Antrim & Newtownabbey Council to seek to sanction or limit bonfire funding when such items were burned, but these were blocked by the unionist parties on the Council.²³²

These issues appear to have been examined also in a subsequent ‘Bonfire Scoping Exercise’ report commissioned by the Community Relations Council (CRC), further to the T:BUC strategy to feed into the FICT commission. The report has not been published but a draft version was leaked to the *Irish News* in 2018. This report cited the draft as recording that:

Bonfires represent a way for paramilitaries to “extend their legitimacy and control community activities”, the study says.

Although authorities do not condone paramilitarism, there are concerns that bonfire management programmes can place staff in a position where they are “turning a blind eye to alleged paramilitary influence”.

*Many officials are “operating in an environment where rules are at a minimum and the power essentially lies with unofficial organisations and unelected individuals”.*²³³

The *Irish News* report states that the researchers “spent several months last year interviewing officials who spoke in stark terms about the issues they faced... But the report notes the ‘reticence of so many participants to speak “on the record”, for fear that this would make them organisationally and/or politically vulnerable’.” One official is quoted as saying:

*Compared to any other issue it is almost impossible to have anything other than a coded conversation. Nobody speaks with candour because there might be political liability.*²³⁴

This has indeed been our experience in putting together the present report on hate expression. Whilst we found many persons willing to engage quietly with us, we have also experienced minimal responses and a ‘pulling down of the shutters’ in response to the issue. We have structured this report in an anonymised way, citing only written correspondence, in reflection of this.

The fate of the CRC Bonfire Scoping Report itself is indicative of the culture of discussion behind closed doors. Despite the media coverage in 2018, the final report has not been published, and is not referenced in the FICT report. As part of this research CAJ sought a copy of the Bonfire Scoping Report through a freedom of information request in April 2021. There was some delay in receiving a response from CRC. The main reason given for the delay was the need to first consult with key stakeholders. A formal response was not received until 17

²³² <https://www.irishnews.com/news/2016/02/22/news/unionists-set-to-block-sanctions-over-loyalist-bonfires-425045/>

²³³ <https://www.irishnews.com/news/northernirelandnews/2018/02/26/news/paramilitary-control-of-loyalist-bonfires-exposed-in-leaked-report-1263722/>

²³⁴ As above.

June 2021. This, however, oddly stated that CRC did not actually hold a copy of the Bonfire Scoping Report which CRC had apparently commissioned and on which it claimed to have been consulting with stakeholders over the previous two months. It appeared the request ‘for the final report’ may have been re-interpreted (unreasonably in our view) as relating to the *existential status* of the report, which on a technicality could be considered as not ‘final’. We lodged an appeal and in this instance, CRC decided to withhold the report in its entirety citing the public-interest qualified exemption under s.36 of the Freedom of Information Act which relates to the *“the free and frank provision of advice and/or the free and frank exchange of views for the purpose of deliberation and/or would otherwise prejudice (or be likely to prejudice, the effective conduct of public affairs.”* An appeal against this decision was lodged by CAJ with the Information Commissioner and awaits determination at the time of writing.

We consider it important to reflect the experience that, in relation to hate expression, it is not uncommon to be met with an unwillingness to engage publicly on the issues. In essence – and this is a theme flowing throughout this report – there is a context whereby policy is unwritten, unclear and inconsistently applied, decisions are made in apparent secrecy, and there is a reluctance to engage on them to the extent of the ‘shutters being pulled down’ when questions are raised. The research, and in particular this chapter, has had to reflect this context. It is reflective of the extent to which both paramilitarism and political contestation induce fear and shape practice in the present policy environment.

The *Irish News* cites the draft report as recording NIHE expenditure on bonfires at over £160,000 in 2016, with NIHE grants being *“used to fund wooden pallets in preference to rubber tyres”* to be burned on bonfires.²³⁵

The NIHE did in 2019 set out a policy position on bonfires stating:

*...we do not sanction, consent to or authorise the use of our lands for the purpose of bonfires. However, we have worked with communities and their representatives to promote positive cultural expressions and engaged with local groups to address issues as and when they have arisen on specific sites in Housing Executive ownership.*²³⁶

The costs associated with the management of bonfires relate to prevention/deterrent measures such as the boarding up of windows and the temporary removal of plastic guttering, lifting materials (e.g. tyres) and the clean-up operation after the bonfire has been burnt. In addition, there are costs attributed to the removal of unwanted bonfire materials from sites deemed ‘contentious’. The costs for 2018 and 2019 are included in the table overleaf.²³⁷

²³⁵ As above.

²³⁶ ‘Bonfire Update’ paper to NIHE Board 30/10/2019 released under FOI to CAJ, para 1.1.

²³⁷ As above, page 3.

Expenditure type	2018	2019
Expenditure on prevention of damage to properties & pre-bonfire costs	£140,735.00	£107,576.76*
Expenditure on cleaning up after bonfires (Grounds Maintenance costs)	£141,149.00	£139,127.74
Expenditure related to costs associated with contentious emergency lifts. Invoices are managed via NIHE procurement Unit.	£42,000.00	£18,370.00
Total	£323,884.00	£265,074.50

*(may be subject to increase, costs still being finalised).

In relation to vesting the statutory duty to take reasonable steps to remove hate expression in the NIHE, as envisaged by the Hate Crime Review, we would urge consideration of a number of complementary measures. This would include exploration of vesting express powers of removal in the NIHE, the extension of the duty to housing associations, and consideration of the role of NIHE and other public authorities in relation to the private rented sector.

5. Conclusions

5.1 The status quo

Hate expression, and particularly racist and sectarian expression, remains prevalent in public space in Northern Ireland and causes significant harm to the communities at which it is targeted. Through the intimidation it conveys, it is also a significant contributor to housing segregation, the tackling of which is regularly highlighted as a policy priority. Sectarian graffiti advocating genocide has become normalised. There is a concerning tendency of visible racist hate expression in public space. Hate expression targeting the LGBT community and women also occurs in public space.

Despite both the high profile of the issue and the experiences of targeted groups, the tackling of sectarian, racist, homophobic and other hate expression in public space is rarely expressly dealt with or otherwise referenced in relevant strategic policy.

Despite the involvement of elements of paramilitarism in hate expression being the *express reason* as to why public authorities are reluctant to intervene to remove items, it is particularly striking how the various assessments of paramilitary activity in recent years have overlooked or disregarded this issue. The resultant Executive Action Plan to tackle paramilitarism contains *no* proposed action that engages tackling hate expression.

Despite engaging their powers and functions, the most relevant public authorities including the PSNI, Department for Infrastructure, NIHE and most councils do not have formal written policies, developed through due process, that expressly set out how they will deal with hate expression in public space – either as a standalone provision or as part of a broader policy approach.

Such public authorities have nevertheless informally developed policy approaches as to how to deal with hate (and other forms of) expression. Very few have applied the *mandatory* process of equality screening. The PSNI and the Department for Infrastructure have subjected their policies to review and have made commitments to assess equality impacts, that have not been taken forward to date. Much of the decision-making by public authorities in relation to the removal of items of hate expression is inconsistent, unclear and, in the absence of equality assessments, potentially unlawful.

The PSNI has framed its policy approach as to whether to intervene and remove items in a manner which accommodates those most likely to create public disorder. This policy stance is eerily reminiscent of RUC decision making under public order legislation on parades prior to the establishment of the Parades Commission. When moving the Public Processions Bill in 1997 the then NIO Minister, Tony Worthington MP, in addition to stressing that the “*rule of law must prevail*”, criticised the previous approach as having “*contained a perverse incentive by making it possible for the group that threatened to create most mayhem to get what it wanted.*”²³⁸ The present approach by the PSNI and other authorities shows the same undue deference.

While there are issues with the way in which the PSNI has interpreted relevant criminal offences relating to hate expression, the removal of hate expression is not a policing issue alone. This is particularly the case when the items in question are on the property of another public authority or otherwise engage its functions.

²³⁸ <https://api.parliament.uk/historic-hansard/commons/1997/dec/18/public-processions-northern-ireland-bill>

Also problematic are policy approaches by public authorities including the Department for Infrastructure and Housing Executive that condition the removal of items subject to ‘community agreement’. This is not to criticise what is often very difficult on-the-ground work or to discount the benefits of community dialogue and engagement and broader work to tackle prejudice and promote understanding. However, as a matter of law, rather than process, it is wrong for the policy of any public authority on the removal of hate expression to be predicated on the ‘permission’ of others, particularly when vague terminology such as ‘community tensions’ or ‘risks to public safety’ is invoked to give an effective veto to racists and paramilitary organisations. Public authorities are bound by human rights duties to tackle racist, sectarian, homophobic, misogynistic and other hate expression regardless of whether there is real or alleged ‘community support’ for such material.

The tackling of hate expression is hampered by its conflation with the separate issues of political expression through flags and bonfires, and paramilitary expression. This has the effect that policy on dealing with hate expression in public space can be essentially ‘parked’ in the absence of progress on these issues.

Whilst we have noted more activity in relation to graffiti removal by councils, few also have formulated policy that specifically addresses the prioritisation of removing graffiti, placards and other similar materials when they constitute hate expression.

The Equality Coalition ‘incitement to hatred’ research report was critical of a general approach of tolerance of hate expression in public space. Whilst there has been some movement in recent years, the concerns largely remain the same.

We are familiar with the argument that intervention may antagonise protagonists into either disorder or lead to them placing even more items. This position tends to stress that intervention may make matters worse, at least in the short term, and current approaches ‘keep a lid’ on paramilitary activity. We would counter that things will not get better unless there is a change of approach, and the existing proliferation of hate expression has a very harmful effect on those communities it is targeted against. We advocate the recommendation of the ‘incitement to hatred’ research report for a move away from tolerance towards ‘zero tolerance’. This requires the separation and naming of hate expression from broader issues of expression, to ensure that it is delegitimised and a climate of zero tolerance is created.

5.2 Remedial action: “Time to cut the ‘Gordian knot’”

The recommendation for a statutory duty on relevant public authorities to take *“all reasonable steps to remove hate expression from their own property and, where it engages their functions, broader public space”* has received widespread support through the consultation exercise.

Work needs to be taken forward on its precise formulation, and a hate crimes Bill introducing such a statutory duty is unlikely to reach the statute book until at least mid-2023.

In the interim, we urge relevant public authorities to amend their (written or unwritten) policies and formally commit to *taking reasonable steps* to remove items when they constitute hate expression.

This recommendation relates to policy on hate expression on the public authority’s own property and broader relevant functions, including:

- *PSNI* duties to take ‘executive action’ when hate expression constitutes a criminal offence, and duties to provide support to other public authorities to ensure staff safety carrying out lawful duties in this area.
- *Department for Infrastructure*: exercise of powers under Article 87 of the Roads order to remove items from lampposts and other street furniture.
- *Councils*: exercise of powers to remove graffiti, placards and similar items.
- *Housing Executive*: removal of items from its own properties and land and in its role as social landlord.

Interim steps we recommend include:

- The adoption, by PSNI, Department for Infrastructure, NIHE and councils of written policies, through formal processes including equality screening, as to the steps that will be taken to intervene to remove hate expression.
- A policy approach of separating and specifying (in standalone or within a broader policy) hate expression from other expression, factoring in the harms created by hate expression on targeted groups.
- The Department of Justice should issue guidance to assist in the distinction of hate expression on a protected ground from other forms of problematic or contested expression. We recommend the adoption of the ‘Content v Context model’ framework alluded to in the Hate Crime Review and further developed in this report.
- The PSNI should overhaul its Operational Guidance to make specific reference to, and provision for intervention in relation to, criminal offences that relate to hate expression, and rescind approaches that expressly favour those most likely to create public disorder. This does not mean that broader human rights based factors should not be part of considerations.
- Public authorities including the Department for Infrastructure and the Housing Executive should drop policy approaches that condition intervention in this area to ‘community’ approval.
- The Department of Infrastructure should set up an internal specialist unit to deal with issues of hate expression on its property, and further examine the potential to extend duties to developers pending the transfer of streets to the Department.
- Councils in particular should ensure that approaches to removing graffiti expressly prioritise hate expression. This includes slogans constituting racist, sectarian and homophobic (etc.) intimidation from housing and preventing the ‘normalisation’ of slogans advocating genocide (KAT/KAH).
- The Department for Communities should prepare legislation to remove the (apparently accidental) exemption for racist and sectarian material from council enforcement powers over graffiti and posters. The Housing Executive should be provided with powers similar to those of other public authorities to remove items, and guidance should be provided to councils and the Housing Executive on an effective and consistent approach to tackling hate expression.



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