

CAJ's submission no. S418

**Briefing from the Committee on the Administration of
Justice (CAJ) on selected issues covered in the
'Together: Building a United Community' Strategy
and the multi party group on flags, parades and
dealing with the past**

August 2013

About CAJ

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First (formerly the Lawyers Committee for Human Rights) and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights.

CAJ however would not be in a position to do any of this work, without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding). We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Hilda Mullen Foundation, Joseph Rowntree Charitable Trust, Oak Foundation and UNISON.

The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

Briefing from the Committee on the Administration of Justice (CAJ) on selected issues covered in the 'Together: Building a United Community' Strategy and the multi party group on flags, parades and dealing with the past

August 2013

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

The Northern Ireland Executives '*Together: Building a United Community*' Strategy, was published on May 23 2013.¹ Two weeks earlier the First and deputy First Ministers had announced that in addition to publishing the strategy they would establish an All-Party Group, stating:

The all-party group will consider and make recommendations on matters, including parades and protests; flags, symbols and emblems and related matters; and dealing with the past. It will be comprised of two nominees from each of the five political parties and Junior Ministers.²

In July it was announced that Richard Haass, the former US Envoy to Northern Ireland, will be the independent chair of the group, and that the group would seek to bring forward a set of recommendations by the end of 2013 on the above matters.³ The Terms of Reference state the 'Panel of Parties in the NI Executive' in discharging its functions "will seek the views of, and evidence from, interested stakeholders on how best to address the issues that cause community division." This briefing provides commentary on the following themes, a separate briefing paper has been compiled in relation to Dealing with the Past:

- **Equality and 'Good Relations' Commission**
- **Flags, symbols, emblems and related matters**
- **Parades and Protests**
- **Definition of sectarianism**

CAJ above all urges that any settlements on the above matters do not constitute a rollback or regression from the equality and rights provisions committed to under the Belfast /Good Friday Agreement and its subsequent implementation agreements.

¹ Available at: <http://www.ofmdfmi.gov.uk/together-building-a-united-community> [August 2013].

² Statement from the First Minister and deputy First Minister, 9 May 2013;
<http://www.northernireland.gov.uk/index/media-centre/executive-statements/statement-090513-together-building.htm> [accessed August 2013].

³ Statement from the First Minister and deputy First Minister, 9 July 2013;
<http://www.northernireland.gov.uk/index/media-centre/news-departments/news-ofmdfm/news-ofmdfm-090713-dr-richard-haass.htm>

Summary of Key Points:

Equality and ‘Good Relations’ Commission

- **Serious inequalities continue and equality is still the issue.** CAJ urges any move to change the Equality Commission into an ‘Equality and Good Relations Commission’, and amend ‘Equality Impact Assessments’ to add good relations criterion should consider whether this can be accomplished in a manner which is not retrogressive to equality imperatives and broader international obligations, including those in the Belfast/Good Friday Agreement;
- **‘Good relations’ needs a definition in law**, which draws on and is compatible with international standards, **to prevent abuse of the concept to block equality and rights initiatives;**

Flags, symbols, emblems and ‘related matters’:

- **CAJ advocates a human rights policy framework is developed and applied consistently in relation to powers to limit political expression in public space and on public property.**
- In relation to public authorities use of flags and emblems the **Belfast/Good Friday Agreement** committed to a **statutory duty**, to be enshrined within a **Bill of Rights**, on **public authorities for equality of treatment for the identity and ethos of the two main communities**. The **Human Rights Commission**, in accordance with its mandate in the Agreement, advised on a **formulation** for the duty with a limitation clause and other provisions to protect the rights of other minorities. **CAJ recommends the implementation of the statutory duty and other outstanding commitments from the Agreements.**

Parades and Protests

- CAJ supports **decision-making on parades continuing to be undertaken by an independent body**. CAJ sees **no need to extend existing notification** requirements to other forms of public assembly.
- CAJ recommends the **decision-making criteria on restrictions** under the Public Processions Act are **amended to more explicitly reflect the legitimate aim under the ECHR of protecting the rights of others**, rather than relying on prevention of disorder criterion.
- CAJ recommends a decision making framework be introduced to ensure that **powers to sanction persons for unnotified processions or counter protests, or related offences, are exercised compatibly with the EHCR** and in a consistent manner in accordance with objective criteria.

Definition of sectarianism

- CAJ recommends the **consideration of tailoring and adopting a Council of Europe recommended definition to define sectarianism in Northern Ireland.**

Equality and ‘Good Relations’ Commission

Equality is still the issue

Inequality and deprivation remain serious problems effecting society. Key elements of the peace settlement, including the statutory duty on the Executive under legislation implementing aspects of the St Andrew’s Agreement to ‘adopt a strategy to tackle poverty, social exclusion and patterns of deprivation based on objective need’ are not being implemented. The Northern Ireland Act 1998, (the implementation legislation for the Belfast/ Good Friday Agreement) did introduce a ‘section 75’ statutory equality duty across nine grounds, providing for public authorities to conduct Equality Impact Assessments (EQIAs) on their policies and establishing the Equality Commission. Although not provided for in the Agreement the Act also established a counterpart ‘good relations’ duty. In response to concerns that (regardless of benign intentions) the ‘good relations’ duty would be harnessed by the opponents of rights and equality to obstruct equality initiatives on the grounds they could lead to community tensions, the Westminster Parliament did subordinate the good relations duty to its Section 75 equality counterpart on the face of the legislation.⁴

The equality section of recent Community Relations Council (CRC) Peace Monitoring Report states that the most recent figures (2010-11) indicate 20% of the population, or 355,000 people, were in relative poverty. There are geographical differences with, for example, in relation to child poverty, West Belfast having the second highest level (at 46%) of any Westminster constituency. Whilst persons in all sections of the community suffer poverty the CRC reports records there remain considerable inequalities on community background. Citing the February 2013 DSD Family Resources Survey the report notes that on every single measure on the deprivation indices Catholic families experience more deprivation than Protestants.⁵ Other data shows there are also significant inequalities for women, members of minority ethnic groups and other groups. People in the LGBT community continue to face specific disadvantage and prejudice. The *Together* strategy postpones the publication of a *Sexual Orientation Strategy* by a further year.⁶

The vision of the *Together* strategy draws on the language of the legislative formulation of the existing statutory duties in advocating for a united community based on ‘equality of opportunity’ and the ‘desirability’ of good relations. However, the strategy also plans to legislate to rename the Equality Commission the ‘*Equality and Good Relations Commission*’, grant the body additional community relations powers, and transform EQIAs into ‘*Equality and Good Relations Impact Assessments*.’ This move has brought an additional focus on long standing concerns raised by rights based NGOs and Council of Europe treaty bodies that the existing ‘good relations’ duty is being interpreted and applied in a manner which actually undermines equality. CAJ recently published ‘*Unequal Relations*’, a research report examining the practical impact of ‘good relations’ within EQIAs. Whilst not provided for in the legislation the Equality Commission from 2007 has recommended public authorities nevertheless consider ‘good relations’ impacts in EQIAs. The research finds that the current interpretation and application of the ‘good relations’ duty in this context is having a demonstrable practical impact in thwarting the implementation of particular equality and rights based initiatives, and is undermining the purpose of the section 75 equality

⁴ Section 75 ultimately set out that the ‘good relations duty’ is to be discharged ‘without prejudice’ to the equality duty, and that public authorities “should have *regard* to the *desirability* of promoting good relations”, rather than the stronger language of “*due regard* to the *need* to promote equality of opportunity” for the former limb of the duty.

⁵ Nolan, Paul Community Relations Council *Northern Ireland Peace Monitoring Report Number 2*, pp 85- 91.

⁶ *Together*, paragraph 1.25.

duty.⁷ Council of Europe treaty bodies dealing with minority rights and the application of specific UK commitments on the Irish language have also raised concerns about the existing interpretation and application of ‘good relations’ in a manner detrimental to human rights commitments.⁸ In relation to developing draft legislation to implement commitments in the *Together* strategy the *Unequal Relations* report recommends the process should:

- Consider whether the proposed changes to EQIAs and the Equality Commission can be accomplished in a manner which is not retrogressive to the equality duties and broader international obligations, including those under the Belfast/Good Friday Agreement;
- Ensure any resultant addition of good relations impact assessments should be underpinned by a legislative framework which ensures good relations have an appropriate methodology which is duly subordinate to and compatible with equality assessments and international obligations;
- Develop a definition of ‘good relations’ which draws on and is compatible with international standards, including human rights treaties and the framework provided by the Belfast/Good Friday Agreement, and place an obligation on the Equality Commission to interpret the duty in such a manner;
- Consider taking forward commitments to single equality legislation, in a manner which ensures upward harmonisation along with the extension of the present three ‘good relations’ categories to the other equality groups;
- Ensure that any changes to the remit of the Equality Commission are compatible with international obligations, best practice and are not regressive in relation to the institution’s equality function. This would include incorporating safeguards in the legislation to ensure the maintenance of the primacy of the equality function.

Defining ‘good relations’ compatibly with equality

A key issue which has emerged is the need to actually define good relations to ensure it cannot continue to be a vehicle where by mere objections against initiatives, which can even be based on sectarian or other forms of prejudice, can block equalities initiatives. The term ‘good relations’ is used 179 times in the *Together* strategy but not defined. It is also not defined in the legislation.

During the recent passage of the Northern Ireland (Miscellaneous Provisions) Bill at Westminster Mark Durkan MP tabled an amendment which would define good relations in the legislation as specifically relating to ‘tackling prejudice and promotion understanding’ and prevent public authorities from interpreting the concept in a manner incompatible with international obligations and the principle of objective need.⁹ CAJ regards it as essential that good relations is properly defined and there are sufficient safeguards to prevent it from continuing to be used to block equality initiatives. The legislation in England, Scotland and Wales (Equality Act 2010, s149(5)) links the definition of ‘good relations’ to the formulation of tackling prejudice and promoting understanding.

⁷ CAJ ‘*Unequal Relations? Policy, the Section 75 duties and Equality Commission advice: has ‘good relations’ been allowed to undermine equality?*’ May 2013.

⁸ Council of Europe (2010) Report of the Committee of Experts on the Charter (UK 3rd Monitoring Cycle) ECRML (21 April 2010)4, para 123. Council of Europe (2011) Advisory Committee on the Framework Convention for National Minorities (Third Opinion on the UK) ACFC/OP/III(2011)006 (adopted 30 June 2011) paragraphs 28, 126.

⁹ The Amendment read ““(1A) After subsection (2) of section 75 (Statutory duty on public authorities) of that Act insert— (2A) A public authority shall not interpret its obligations under subsection (2) in a way that is incompatible with measures taken on the basis of objective need.”. (1B) In subsection (5) of section 75 of that Act insert— “good relations” shall be interpreted in line with international obligations and, in particular, with regard to— (a) tackling prejudice, and (b) promoting understanding. The legislative process has not been completed.

Flags, symbols, emblems and ‘related matters’

The *Together* strategy envisages the multi-party group considering and making recommendations on flags, symbols and emblems and ‘related matters’. There is no further elaboration in the Terms of Reference. This submission separates out two issues, which influence each other but are separate in relation to the legal and policy framework: first the display of flags and other political expression by private persons and groups, including via public property; and second the display of flags and related national-identity linked symbolic displays by public authorities, especially Councils.

Private use of flags and other forms of political expression

National flags and related emblems have been a heavily contested issue for all of Northern Ireland’s existence. In a warning from history the events surrounding the seizure of an Irish Tricolour from a republican political office in Belfast in the mid-1960s against the backdrop of pressure from loyalist protests are often seen as a significant precursor to the 1968-1998 ‘Troubles.’ The Stormont Parliament heavily regulated the display of flags by private individuals, legislating to prohibit the Tricolour and making it a criminal offence to take down a Union Flag anywhere other than on your own property.¹⁰ This legislation was finally repealed in 1987, and would be incompatible with the framework provided by the European Convention on Human Rights (ECHR) for freedom of expression without discrimination (under Articles 10 and 14 respectively).

The Belfast/Good Friday Agreement guarantees the incorporation of the ECHR into Northern Ireland law.¹¹ Under the ECHR personal use of flags should only be restricted when necessary and proportionate to prevent matters such as disorder or undue interference in the rights of others¹² (e.g. the use of flags for sectarian intimidation.)¹³ Article 10 rights to freedom of expression have also been held to protect the desecration of flags.¹⁴ Such cases are however context specific and, for example, the desecration or burning of a flag is more likely to be protected freedom of expression if undertaken in protest at a State or its foreign policy rather than as advocacy of discrimination, hostility or violence against a target community.¹⁵ Local public order legislation prohibits a number of acts intended or

¹⁰ A 1933 regulation under the Civil Authorities (Special Powers) Act (Northern Ireland) banned (in reference to the Irish Tricolour) any ‘green, white and yellow’ (sic) flag. Further to a legal challenge by a Nationalist MP who had had a flag seized on a protest march which was successful on a technicality and difficulties the Stormont Parliament, which had no legislative competence in international relations, ran into over banning the flag of a state which had by then been formally recognised by the UK Stormont repealed the regulation introduced fresh public order legislation and the Flags and Emblems (Display) Act (Northern Ireland) 1954. This made it an offence to ‘interfere’ with a union jack anywhere other than on your own property and, targeting the tricolour, granted a power to the RUC to seize or require a person to remove any other flag (or other ‘provocative’ emblem) considered likely to cause a breach of the peace. A person declining to remove a tricolour (or other provocative flag or emblem, but not the union flag which was specifically exempt) committed an offence. The Act was finally repealed by the Public Order (Northern Ireland) Order 1987.

¹¹ The ECHR is currently given further effect in domestic law through the Human Rights Act 1998 and on the devolved institutions under the Northern Ireland Act 1998.

¹² The rights of others refer to ECHR and other recognised human rights, which have included protection against discriminatory expression (see for example *Vona v Hungary* 2013).

¹³ In one of the few cases dealing with the private display of flags -*Fáber v Hungary* -the European Court set a high threshold for restrictions.

¹⁴ In the UK courts see *Percy v Director of Public Prosecutions* Queen's Bench Divisional Court (2001) *The Times*, 21 January, in which a conviction for defacing a US flag with anti-war slogans outside a US air force base in Britain, was held to be incompatible with Article 10 ECHR.

¹⁵ Such actions on national, racial or religious grounds are to be prohibited by law further to Article 20 of the UN International Covenant on Civil and Political Rights (ICCPR) to which the UK is party.

likely to stir up hatred or arouse fear on racist, sectarian, or (since 2004) homophobic or disablist grounds, but has rarely been used.¹⁶ Under a human rights framework which respects freedom of expression the state is nevertheless entitled, and sometimes duty bound to restrict racist (and hence other discriminatory) expression.¹⁷ Whilst there has long been discussion on the ‘threshold’ test on the boundary between protected freedom of expression and sanctionable advocacy of hatred, there have recently been significant developments in international standards. This includes the setting out of a six-part threshold test in the *UN Rabat Programme of Action* on incitement to hatred.¹⁸

The private use of flags and other forms of political expression do engage state regulation when undertaken on public property, such as lampposts or on publicly owned land or buildings, including public housing. For employers and service providers (including public authorities) displaying flags and emblems engages duties under ‘*fair employment*’ legislation, which among other matters protects persons when a threshold of ‘sectarian harassment’ is reached.¹⁹

Beyond the above legislative provisions and planning law (which in theory restricts flags being hung on lampposts), the law today does not directly regulate the private display of flags. There is *the Joint Protocol in Relation to the Display of Flags in Public Areas* in which the PSNI are the lead agency. The interagency protocol lists four reasons why flags are often displayed: the ‘celebration of cultural identity’, ‘marking of a festive event’, ‘sectarianism or intimidation’ or ‘marking out territory’. The latter two categories could correlate with the ‘rights of others’ exemptions permitted under ECHR Article 10.

There however are indications of inconsistency in the current application of law and policy across different types of expression, which will disproportionately affect different groups.²⁰ At present the flags protocol and planning legislation are generally not implemented, the PSNI having indicated they will only intervene over public displays of flags when there is a risk to life.²¹ Anecdotally there also appears to be a degree of tolerance of related activity such as the painting of kerbstones. By contrast CAJ is aware of incidents of persons fly posting political posters who have been subject to fines and even, in the case of anti-G8 posters, arrest. **CAJ advocates that a human rights policy framework, in line with the ECHR and above considerations, is developed and applied consistently in relation to all powers to limit political expression in public space and on public property. The framework should ensure minority political expression is not given unfavorable levels of tolerance or facilitation.**

¹⁶ Part III of the Public Order (Northern Ireland) Order 1987. This includes offences related to threatening, abusive or insulting words, behaviour or written material on such grounds, and other offences relating to distribution and broadcasting. PSNI figures record only 11 arrests from 2002-2011, around one a year. There have only been 57 charges or reports of such offences from 1987-2011 (some of which relate to multiple charges against the same person.)

¹⁷ See for example the principles in relation to Article 8 of the ECHR (the right to private and family life) articulated in *Asku v Turkey* (app no 4149/04, 41029/04) 15 March 2012.

¹⁸ ‘*Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*’ Conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012, paragraph 22. See also more detailed version of test by NGO Article XIX in their December 2012 Policy Brief ‘Prohibiting incitement to discrimination, hostility or violence’.

¹⁹ The Fair Employment and Treatment (Northern Ireland) Order 1998 (as amended) (anti-discrimination law on grounds of religious belief /political opinion covering goods facilities and services, as well as employment).

²⁰ In addition to the above s76 of the Northern Ireland Act 1998 provides a general prohibition on 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.

²¹ e.g. see ‘Union flags erected before Tyrone Fleadh’ *Ulster Herald* 27 June 2013.

Flags and other symbolic displays by public authorities: the unimplemented statutory duty under the Belfast/Good Friday Agreement

It is important to recall that a binding framework to deal with matters such as flag flying by Councils, based on an 'equality of treatment' duty on public authorities, was provided for in the Belfast/Good Friday Agreement, but not implemented. This statutory duty on public authorities was explicitly singled out in the Agreement to be enshrined within the long overdue Northern Ireland Bill of Rights, with the Human Rights Commission tasked as to its formulation.²² The Human Rights Commission accordingly, in its 2008 advice to Government on the Bill of Rights, recommended the incorporation of such a statutory duty formulated as follows:

Public authorities must fully respect, on the basis of equality of treatment, the identity and ethos of both main communities in Northern Ireland. No one relying on this provision may do so in a manner inconsistent with the rights and freedoms of others.²³

This draws on the language of the Agreement and adds a limitation clause to ensure the provision is read compatibly with other rights, including those of numerically smaller new and long standing minority ethnic communities. The Commission's advice also contained further recommendations making provisions for all national, ethnic, religious, linguistic or cultural minorities along with a duty to encourage tolerance and dialogue. The Commission also recommended rights recognising the plurality of British and Irish citizenship and national identity. The UK Government however has not discharged its commitment to legislate for the Northern Ireland Bill of Rights.²⁴ At present the Ministerial Code does provide that ministers at all times must, among other matters, 'operate in a way conducive to promoting good community relations and equality of treatment'.²⁵

CAJ concurs that in the context of a divided society public authorities should not just reflect the national identity of one side of the community. It is also worth noting in the context of shifting demographics the Bill of Rights provision was also framed to provide a long term framework regardless of which of the 'two main communities' is in the minority in the overall jurisdiction or in local government districts. The approach does not necessarily mean a straight two flags, one flag, designated days or no flags debate, given that there are a broad range of cultural identity issues which the framework under such a statutory duty could deal with as a package. Such a package would not rule out public authority flags being specifically dealt with by legislation.

²² The Agreement tasks the Human Rights Commission to advise Government on the Bill of Rights which it states is to incorporate "additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem" and specifically asks the Commission to consider: "...the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland."

²³ Northern Ireland Human Rights Commission 'A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland' (Belfast, 2008), page 41.

²⁴ In 2009 the Northern Ireland Office (NIO) issued a controversial consultation paper, which proposed a very limited number of rights be included in the Bill of Rights. The incorporation of an 'equality of treatment for identity and ethos' provision was one of the few rights Government appeared to be willing to consider. (NIO 'A Bill of Rights for Northern Ireland: Next Steps' November 2009, paragraph 6.11). The NIO had also sought to defer part of the Northern Ireland Bill of Rights mandated by the Agreement to the separate Commission to investigate the creation of a "UK Bill of Rights" in March 2011. In December 2012 however in its final Report 'A UK Bill of Rights? The Choice Before Us' that Commission recognised the "distinctive Northern Ireland Bill of Rights process and its importance to the peace process in Northern Ireland" noting that the Commission does not wish to "interfere in that process in any way nor for any of the conclusions to be interpreted or used in such a way as to interfere in, or delay, the Northern Ireland Bill of Rights Process."

²⁵ The Northern Ireland (St Andrews Agreement) Act 2006 set up the ministerial Code on a Statutory Basis.

Such a framework concurs with human rights principles in relation to pluralism.²⁶ The European Court of Human Rights, in referring to the ‘hallmarks of a democratic society’ has consistently “attached particular importance to pluralism, tolerance and broadmindedness” and in relation to minority rights has asserted that “democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position” and set out that where conflict exists public authorities should not move to “remove the cause of tension by eliminating pluralism, but to ensure the competing groups tolerate each other...”²⁷ It is worth stressing, as set out in a Human Rights Commission briefing, that there is little human rights case law relating to flag flying per se by public authorities and that there is neither a right to have *a flag flown for you* nor to *not have a flag flown at you*. Rather the certain limited circumstances where ECHR ‘rights of others’ considerations may arise relate not to flag flying per se but the reasons and contexts for which flags are flown.²⁸ As such the most common consideration in the framework will match that of the aforementioned threshold of ‘sectarian harassment’ provided for in domestic ‘fair employment’ legislation.

A proposal for a statutory duty for equality of treatment and esteem was contained in a 1990 review of equality law presented to Parliament by the then official human rights commission, who in addition singled out the treatment of the Irish language as a ‘touchstone’ measure of whether the existence of two traditions was being treated seriously.²⁹ The 1995 *Joint Declaration between the British and Irish Governments* reflected this approach committing to principles that institutions should afford both communities satisfactory ‘political and symbolic expression’ and that future arrangements “...should respect the full and equal legitimacy and worth of the identity, sense of allegiance, aspiration and ethos of both the unionist and nationalist communities.” The statutory duty on equality of treatment has however not been introduced. Police reform did lead to the *Police Emblems and Flags Regulations (Northern Ireland) 2002* which largely prevents the PSNI from flying any flag other than its own service

flag. In response to nationalist ministers declining to fly the Union Flag over their departments (which had been undertaken by custom and practice rather than legislation) the UK government introduced the *Flags (Northern Ireland) Order 2000* and its subsequent regulations which obliged all government departments to fly the Union Flag on the ‘designated days’ it was flown on government buildings in Great Britain but not to fly it at any other time. This did not extend to local Councils which have differing policies, although none presently has a two flags policy (as is the case in for example Scotland or Catalonia). **CAJ therefore recommends the implementation of the statutory duty and other outstanding rights based commitments from the Agreements.**

²⁶ For example in the Council of Europe Framework Convention for National Minorities, as well as promoting a spirit of tolerance and intercultural dialogue and measures to promote mutual respect, provides for state to adequate measures, where necessary measures to provide full and effective equality in arenas including political and cultural life, which are to take into account the specific conditions of majority and minority groups Article 4(2).

²⁷ *Agga v Greece*, 2002 [§60]; *Barankevich v Russia* 2007 [§§30-31].

²⁸ NI Human Rights Commission ‘Flag Flying: Briefing Paper on Human Rights Compliance and Commission Policy’ February 2011. One case listed is *Osmani and Others v the Former Yugoslav Republic of Macedonia* (admissibility decision of 11 October 2001).

²⁹ Standing Advisory Commission on Human Rights (SACHR) Command Paper CM 1107 ‘*Religious and Political Discrimination and Equality of Opportunity in Northern Ireland: Second Report*’ (HSMO, 1990) see conclusions on Communal Rights and Recognition paragraphs 12.61-7. Separate from the issues of flags, symbols and emblems also unimplemented and of relevance to the field of pluralistic expression are minority language measures, in particular those to end the historic exclusion of the Irish language from public authority space. The commitment to Irish language legislation under the St Andrew’s Agreement has however also not been taken forward.

Parades and Protests

Amending the decision-making criteria for parades

As it deals with a deliberation on a civil right, CAJ supports decision-making on parades and their counter protests continuing to be undertaken by an independent body. CAJ sees no need to extend existing notification requirements to other forms of public assembly as had been proposed in 2010.³⁰

CAJ recommends amendments to the legislation governing decision-making on restrictions on parades and their counter protests to more explicitly align the criteria with the ECHR ground of ‘protecting the rights and freedoms of others’ to move away from reliance on public order considerations, and to provide an objective framework in which we would like to see decisions taken and explained, on human rights grounds, in greater detail.

Background to current regulation

During and before the conflict in Northern Ireland marches and other assemblies were strictly regulated, with bans and a strong political dimension in decision making not uncommon.³¹ CAJ would not want to see a return to this and stresses everyone’s right to peaceful assembly, including the right to parade and protest. CAJ also recognise the importance of addressing and protecting persons from the expressions of sectarianism which are often associated and manifest, in particular, with the marching season. We believe a human rights framework based around the provisions of ECHR Article 11 is the vehicle to strike the balance in addressing both sets of rights.

Following the *North Report* the Parades Commission was established and under s8(6) of the Public Processions (Northern Ireland) Act 1998 (PPA) and empowered to take decisions on restrictions on parades, a power subsequently extended to counter protests. Restrictions must be proportionate and compatible with one of the legitimate aims under Article 11(2) ECHR which deals with restrictions on freedom of assembly. However, the only Article 11(2) ground currently explicitly reflected in s8(6) of the PPA which the Parades Commission guidelines are to have particular regard to relates to the prevention of disorder. Among the purposes of the PPA was to move away from decision-making on the grounds of disorder or threats of disorder, and further criteria for decision-making were introduced under s8(6) relating to disruption of community life and impact on relationships within the community etc. However, the categories explicitly match the ECHR criterion of protecting the rights and freedoms of others.

Whilst ultimately unsuccessful (for other reasons) there have been a number of initiatives to align the decision-making criteria in the PPA more closely with the ECHR. Further to the *St Andrews Agreement*

³⁰ The Draft Public Assemblies, Parades and Protests Bill 2010 proposed 37 day notification requirements being extended to numerous other forms of public assembly. Following an outcry the proposal was ultimately dropped from the bill.

³¹ From the establishment of Northern Ireland to the onset of the modern ‘Troubles’ there were periodic bans on assemblies largely targeting republican/nationalist events, civil rights marches and a number of assemblies by organisations representing the unemployed. 90 bans were issued under Special Powers Regulations between 1922 and 1950 (Donohue, Laura K. ‘Regulating Northern Ireland: The Special Powers Acts 1922-1972’ (1999) 41(4) *The Historical Journal* 1089-1120); Following this the public Order Act (Northern Ireland) 1951 introduced notice requirements were for parades, but exempted most loyal order parades (through a provision excluding parades ‘customarily held along a particular route’), an exemption not repealed until 1987. During this period nationalist assemblies were generally confined to residential areas.

2006 the British government commissioned the *Strategic Review of Parading*, chaired by Lord (Paddy) Ashdown, which agreed an interim report in 2008. This report set out a decision-making framework based around the ECHR Article 11 and the protection of the rights of others, inclusive of the ‘right to freedom from sectarian harassment’ which had been included in the Belfast/Good Friday Agreement. The Strategic Review did not publish its final report but its proposals were to be the building block of a ‘new and improved’ framework for regulating parades envisaged under the 2010 *Agreement at Hillsborough Castle* between the DUP and Sinn Féin. This was to include the ‘key principle’ of “Respect for the rights of those who parade, and respect for the rights of those who live in areas through which they seek to parade. This includes the right for everyone to be free from sectarian harassment.”³² Draft legislation was published.³³ It was subsequently clarified that the decision-making framework would be based on the ECHR.³⁴ The legislation however was not ultimately introduced.³⁵ The power to amend the PPA currently sits with Westminster and not the Northern Ireland Assembly.³⁶

Legal certainty in the exercise of powers

An additional issue is the question of the circumstances when powers to press charges against persons under the PPA for *unnotified* parades or counter protests (or other offences under the PPA or related matters such as blocking roads) will be used. Figures reported to Policing Board members in March 2013 indicate 150 persons have been charged with such offences under the PPA in the last three years,³⁷ yet when asked by CAJ the PSNI confirmed they had no Service Procedure in relation to the circumstances in which persons will be charged. There will be circumstances when charges are incompatible with ECHR rights to assembly, as well as legal certainty questions as to what constitutes a ‘public procession’ or counter protest for the purposes of the legislation.³⁸

CAJ recommends a policy framework be introduced to ensure that powers to sanction persons for unnotified processions / counter protests, or related offences, are exercised in a consistent and ECHR compatible manner.

³² Agreement at Hillsborough Castle 5 February 2010, Section 2.

³³ Draft Public Assemblies, Parades and Protests Bill 2010.

³⁴ Office for the First and Deputy First Minister (OFMdfM) ‘Robinson and McGuinness outline changes to Parades Bill’ 12 August 2010 [available at: <http://www.northernireland.gov.uk/index/media-centre/news-departments/news-ofmdfm/news-ofmdfm-august-2010/news-ofmdfm-120810-robinson-and-mcguinness.htm>]

³⁵ For a full chronology see July 2011 ‘Parades and Counter-Protests’ briefing paper by the Northern Ireland Human Rights Commission at <http://www.nihrc.org/documents/advice-to-government/2011/parades-and-counter-protests-consolidation-august-2011.pdf>

³⁶ Northern Ireland Act 1998, schedule 3 paragraph 10(1) (as amended by the Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010).

³⁷ See ‘Robinson: I will not be silenced’ *Irish News* 8 March 2013, p12.

³⁸ In *R v Muldoon* an anti-racism protestor had been charged and prosecuted for an unnotified parade. The defendant contested however that following a static protest she was involved in leading anti-racism protestors safely away, under PSNI direction, from a BNP counter protest at the BBC premises in Ormeau Avenue, and was consequently acquitted by the Court. Among other matters this case raises questions of why the PSNI and PPS had categorised this as a procession and had sought sanction in a manner likely to be ECHR incompatible.

Definition of sectarianism

The *Together* strategy states that appropriate consensus will be sought around including a definition of sectarianism in the draft legislation emerging from the strategy. CAJ welcomes this important aim, and stresses the importance of correctly defining sectarianism in legislation. In the present context despite the term being regularly used by public authorities there is often no official definition or restrictive or vague definitions are adopted, that tend to defer to limited interpersonal *manifestations* of sectarianism (e.g. hate crimes) rather than defining sectarianism per se.³⁹ CAJ believes it is not sustainable to argue ‘sectarianism’ here is a unique phenomena, beyond definition.

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.⁴⁰ 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.⁴¹ The Commission has also stated “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, anti-Semitism or Islamophobia”⁴² and the UN has emphasised that in tackling sectarianism care should be taken not to neglect tackling other forms of racism experienced by “vulnerable ethnic minority groups in Northern Ireland.”⁴³

³⁹ Section 37 of the Justice Northern Ireland) Act 2011 prohibits chanting which is of a ‘sectarian’ nature at major sporting occasions, despite discussion during its legislative passage ultimately neither the Justice Act nor other legislation provide a definition of sectarianism. The PSNI, in its published ‘hate crimes definitions’ states “*The term ‘sectarian’, whilst not clearly defined, is a term almost exclusively used in Northern Ireland to describe incidents of bigoted dislike or hatred of members of a different religious or political group. It is broadly accepted that within the Northern Ireland context an individual or group must be perceived to be Catholic or Protestant, Nationalist or Unionist, or Loyalist or Republican.*” The *Together* Strategy itself defines sectarianism as “*threatening, abusive or insulting behaviour or attitudes towards a person by reason of that person’s religious belief or political opinion; or to an individual as a member of such a group.*”

⁴⁰ 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 “inter-sectionality” between religion and racial discrimination*” (paragraph 1(e) UN Doc CERD/C/GBR/18-20, List of themes on the UK). Later in the same year the Council of Europe Advisory Committee on the Framework Convention for National Minorities directly addressed the approach in the predecessor draft strategy to *Together* raising concerns that the Committee “*finds the approach in the CSI Strategy to treat sectarianism as a distinct issue rather than as a form of racism problematic, as it allows sectarianism to fall outside the scope of accepted anti-discrimination and human rights protection standards*”. *Third Opinion on the United Kingdom adopted on 30 June 2011 ACFC/OP/III(2011)006*, paragraph 126.

⁴¹ The Commission elaborated “This risks non-human rights compliant approaches, and non-application of the well-developed normative tools to challenge prejudice, promote tolerance and tackle discrimination found in international standards. In particular, it seriously limits the application of ICERD to Northern Ireland, and therefore obligations on the state to tackle sectarianism along with other forms of racism.” Northern Ireland Human Rights Commission, ‘*Parallel Report on the 18th and 19th Periodic Reports of the United Kingdom under the International Convention on the Elimination of All Forms of Racial Discrimination*’ (ICERD), paras 17-23.

⁴² Northern Ireland Human Rights Commission ‘*Parallel Report to the Advisory Committee on the Third Monitoring Report of the United Kingdom on the Framework Convention on National Minorities*, February 2011 paragraph 59.

⁴³ Concluding observations of the UN Committee on the Elimination of Racial Discrimination on the UK, 1 September 2011, CERD/C/GBR/CO/18-20, paragraph 20.

It follows that it is both quite clear what sectarianism is and that its definition should draw on such international standards. The benefit of this is that such standards also provide a tested framework in relation to address sectarianism.

The UN International Convention on the Elimination of all forms of Racial Discrimination (ICERD) does not provide a definition of racism per se but defines ‘racial discrimination’.⁴⁴ The 1978 UN declaration on Race and Racial Prejudice does provide a lengthy definition of racism, and sets out a broad range of phenomena which would encompass manifestations of racism.⁴⁵

The Council of Europe specialist body in the field, the European Commission Against Racism and Intolerance (ECRI) in its recommendation on key elements of legislation against racism and racial discrimination, defines racism as follows:

“racism” shall mean the belief that a ground such as race,⁴⁶ 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.

This definition could be drawn upon and tailored to define sectarianism in Northern Ireland for example as follows:

“Sectarianism” shall mean the belief that a ground such as religion, political opinion, language, 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.⁴⁷

CAJ urges the definition of sectarianism in legislation to draw on international standards relating to racism and draws attention to the above definition, itself derived from recommendations from the Council of Europe specialist agency. *Committee on the Administration of Justice Ltd, August 2013*

⁴⁴ In Article 1(1): *In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*

⁴⁵ Article 2(1): *Any theory which involves the claim that racial or ethnic groups are inherently superior or inferior, thus implying that some would be entitled to dominate or eliminate others, presumed to be inferior, or which bases value judgments on racial differentiation, has no scientific foundation and is contrary to the moral and ethical principles of humanity; (2) Racism includes racist ideologies, prejudiced attitudes, discriminatory behavior, structural arrangements and institutionalized practices resulting in racial inequality as well as the fallacious notion that discriminatory relations between groups are morally and scientifically justifiable; it is reflected in discriminatory provisions in legislation or regulations and discriminatory practices as well as in anti-social beliefs and acts; it hinders the development of its victims, perverts those who practice it, divides nations internally, impedes international co-operation and gives rise to political tensions between peoples; it is contrary to the fundamental principles of international law and, consequently, seriously disturbs international peace and security; (3) Racial prejudice, historically linked with inequalities in power, reinforced by economic and social differences between individuals and groups, and still seeking today to justify such inequalities, is totally without justification. Declaration on Race and Racial Prejudice, 27 November 1978 Adopted and proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO at its twentieth session, on 27 November 1978).*

⁴⁶ The recommendation elaborates in relation to the use of the term race: *“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.*

⁴⁷ Council of Europe CRI(2003)8 *ECRI General Policy Recommendation No. 7 On National Legislation To Combat racism And Racial Discrimination Adopted On 13 December 2002.*