

CAJ's submission no. S437

CAJ's Submission to the Committee for the Office of the First Minister and Deputy First Minister inquiry into "Building a United Community"

October 2014

Written Evidence to the Committee for the Office of the First Minister and deputy First Minister inquiry into ‘Building a United Community’

Committee on the Administration of Justice (‘CAJ’)

October 2014

CAJ is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies 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 obligations in international human rights law.

Background: the ‘T:BUC’ strategy

The Northern Ireland Executive’s *‘Together: Building a United Community’ Strategy*, (‘T:BUC’) was published on May 23 2013.¹ This strategy has been commonly referred to as community relations, anti-sectarianism, integration or peace building strategy, and superseded the earlier Programme for Cohesion, Sharing and Integration consulted on in 2010.²

The *T:BUC* strategy proposes legislation to potentially take forward two matters:

- Proposed changes to turn the Equality Commission into an ‘Equality and Good Relations Commission’ and add a ‘good relations’ section into Equality Impact Assessments;
- The incorporation of a definition of sectarianism in law;

Related to the T:BUC process was the establishment of a Panel of Parties to address matters such as parades and protests; flags, symbols and emblems and related matters; and dealing with the past. This led to the Haass-O’Sullivan talks and consequent Proposed Agreement published at the close of 2013.³

The Committee’s Inquiry

In summer 2014 the Committee for the Office of the First Minister and deputy First Minister announced it would undertake an inquiry into ‘Building a United Community’ with the purpose of informing the Executive’s approach in the actions it takes to tackle sectarianism,

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

² See CAJ’s [submission no. S. 269](#) ‘CAJ’s response to the Office of First Minister and Deputy First Minister’s consultation on Cohesion, Sharing and Integration’ November 2010.

³ See [CAJ briefing to Haass on T:BUC s418](#) (August 2013), ‘[Proposed Agreement Among the parties of the Northern Ireland Executive](#)’ 31 December 2013 (Haass-O’Sullivan Proposed Agreement) and Holder, Daniel ‘[The Haass / O’Sullivan Proposed Agreement on parades and flags: analysis from a human rights perspective](#)’ *Rights NI* 13 January 2014

racism and other forms of intolerance as well as recommendations on policy on integration. Among the terms of reference are an examination of theory and practice with regard to ‘good relations’ and seeking views on what ‘good relations’ means.⁴ This CAJ submission will focus on these questions in relation to the two areas envisaged for potential T:BUC legislation, namely ‘good relations’ policy and the definition of sectarianism.

‘Good relations’ and T:BUC

The T:BUC strategy proposes transforming the Equality Commission into an ‘*Equality and Good Relations Commission*’ and granting the body additional ‘good relations’ powers. In addition, and the focus of this section, the T:BUC strategy proposes changes to the ‘Equality Impact Assessments’ (EQIAs) required under the existing ‘section 75’ statutory equality duty. The change, if implemented, would formally include ‘good relations’ considerations within such impact assessments. This revives an aborted proposal envisaged by the ill-fated direct-rule ‘*Shared Future*’ strategy almost a decade ago, albeit with a different formulation. In this instance the proposal is for a ‘good relations’ section in EQIAs to measure the implementation of the T:BUC strategy itself. T:BUC proposes:

An augmented [Equality] impact assessment will be developed that assesses the extent to which policies and other interventions contribute to meeting the objectives of [T:BUC]⁵

It is worth noting T:BUC does not provide for ‘good relations’ impact assessments to be on a par with the counterpart equality considerations, rather envisaging a good relations ‘section’ in EQIAs. T:BUC itself also references the intended primacy of the equality duty in the current formulation of Section 75. However, in CAJ’s view the proposals as they stand, even if these caveats are honoured, still risk undermining the equality duty. When T:BUC proposals were formally released, CAJ published our own research – ‘*Unequal Relations*’⁶ which collated evidence about how ‘good relations’ considerations were already being interpreted in existing EQIAs. Although not required by law some public authorities have already included ‘good relations’ impact considerations in EQIAs. The key finding of the CAJ research was that equality and rights goals were being undermined by the then interpretation and application of ‘good relations’ in EQIAs. The research concluded that this would be exacerbated if ‘good relations’ criteria were further formalised into EQIAs in an ill-defined and subjective manner. At worst our concern is that the good relations duty, rather than being a duty focusing on tackling sectarianism and other forms of racism as originally anticipated, essentially becomes a crude political veto by taking a lay definition that the ‘good relations’ duty is engaged by any action which is politically contentious, even if such action is precisely in pursuit of the equality and rights based goals EQIAs were designed to promote.

⁴ Terms of Reference available at: <http://www.niassembly.gov.uk/Assembly-Business/Committees/Office-of-the-First-Minister-and-deputy-First-Minister/Inquiries/Building-a-United-Community/Terms-of-Reference/> [October 2014].

⁵ T:BUC para 6.30, also pages 8 and 31. Reference is also made to an enhanced good relations ‘section’ in Equality Impact Assessments on page 6 and page 27.

⁶ [CAJ ‘Unequal Relations: Policy, the Section 75 duties and Equality Commission advice: has ‘good relations’ been allowed to undermine equality?’ May 2013](#)

What is ‘good relations’?

CAJ notes that the T:BUC strategy references the concept of ‘good relations’ 179 times but does not define it. ‘Good Relations’ is also not defined in law in Northern Ireland, despite having been defined in the counterpart duty in Great Britain for some time. The statutory duty under the Equality Act 2010 across England, Scotland and Wales, defines ‘good relations’ as being primarily about tackling prejudice and promoting understanding across all the equality groups in that legislation.⁷ The Committee seeks views as to what good relations should mean. CAJ advocates that the existing legal definition in GB is adopted in a format consistent with Northern Ireland legislation and that the following definition is adopted into law:

**good relations ...means having regard, in particular, to the desirability of —
(a) tackling prejudice, and (b) promoting understanding.**

CAJ regards as untenable the contradictory position that ‘good relations’ is both highly important but that it is undesirable or impossible to define it. In our view the above definition would not only help prevent misinterpretation of the duty but would also assist in supporting a framework for existing good practice in good relations work.

Should ‘good relations’ be clearly defined as above we would also suggest going beyond restricting the concept to the current three categories and covering the full range of equality categories. The section 75(2)⁸ duty at present only covers the three grounds of religious belief, political opinion and racial group⁹ and does not extend, for example, to gender. The only similar current duty in Northern Ireland on other grounds is the duty, among other matters, to promote positive attitudes to persons with disabilities, under disability discrimination legislation.¹⁰

Good Relations and ‘tackling prejudice and promoting understanding’

In relation to what being ‘in particular’ (i.e. not exclusively but primarily) about tackling prejudice and promoting understanding means the Explanatory Notes to the GB Equality Act 2010 give examples of what is intended in practice.¹¹ In relation to ‘tackling prejudice’ strategies to tackle homophobic bullying in schools are mentioned (as the good relations duties in GB cover sexual orientation). In relation to ‘promoting understanding’ the example of measures to facilitate understanding and conciliation between different communities is referenced. The above definition therefore provides for a duty which encompasses tackling sectarianism and other forms of racism as well as other anti-prejudice initiatives and, where appropriate, also provides for reconciliation initiatives as part of ‘promoting understanding’.

⁷ s149 of the Equality Act 2010

⁸ Of the Northern Ireland Act 1998.

⁹ There is also a duty on district councils to promote good relations between persons of different racial groups under section 67 of the Race Relations (Northern Ireland) Order 1997.

¹⁰ s49A Disability Discrimination Act 1995 (as amended).

¹¹ [Explanatory Notes](#), Equality Act 2010, paragraph 484.

To take a practical example defining good relations as ‘*tackling prejudice and promoting understanding*’ could contribute to tackling the causes of the ‘segregated’ nature of housing in our communities, whereby persons are effectively prevented from moving into certain areas in which they would be a minority.¹² If the categories were extended the duty could also contribute to tackling prejudice, and hence resultant hostility, against other equality groups.¹³

The above formulation of ‘tackling prejudice and promoting understanding’ also concurs with and hence can assist with the implementation of the state’s human rights obligations. Rather than promoting a ‘Northern Ireland exceptionalist’ approach, framing ‘good relations’ in this way allows interpretation of the concept to draw on international instruments and good practice. Such instruments are themselves an important interpretative instrument to flesh out the meaning of terms such as ‘promoting understanding’. Some relevant duties include:

¹² There are differing approaches in the good relations sphere in relation to addressing the goal of more integrated housing, depending in part on the analysis of the cause of the problem. As a crude ‘ideal type’ if there is an understanding that the cause of segregation is individual choice, that persons in single identity areas are culturally insular and do not wish to mix, a ‘good relations’ policy response would be one of seeking to engender shared housing communities through quotas or similar mechanisms. To CAJ this is not the right approach. In addition to questions as to whether such an understanding of the causes of segregation is in itself based on prejudice, such approaches will conflict with the equality duty where there are existing inequalities and parity or quota based approaches replicate or exacerbate them. In seeking to implement *A Shared Future* government proposed to amend legislation to remove protection against religious/political to facilitate the envisaged shared or mixed housing schemes (see *Shared Future Triennial Action Plan*, 2006 p18). CAJ at the time noted that if there were an equal playing field the worthwhile goal of integrated housing could be pursued without conflict with equality imperatives, however in the context of clear differentials, the allocation of ‘shared’ housing on the basis of (religious) quotas would perpetuate inequalities, allocating resources away from those in greatest objective need, which we argued in itself would surely, in lay terms, undermine ‘good relations’ (CAJ, *Rhetoric and Reality*, 2006, page 95.) Such an initiative in our view would not be an appropriate interpretation of ‘good relations’ duties in the context of housing policy. Alternatively if the understanding of the primary cause of segregation is that persons do not move into a particular area where they would be in a minority, largely because of a real and genuine fear of sectarian or racist intimidation on account of their background, the ‘good relations’ approach to remedying the problem, and hence lessening segregation, is precisely to tackle sectarianism, other forms of racism and those who advocate it. Such an approach facilitates everybody’s right to housing and promotes more integrated communities by tackling the actual causes of segregation. In addition, opposition to needs based approaches to housing provision and regeneration on the grounds they can generate community ‘tension’ can be mitigated by a duty to ‘tackle prejudice and promote understanding’ which would require a public authority to explain its approach of putting in resources to an area is on the basis of objective need rather than one which unduly favours a particular group.

¹³ For a positive example of the impact in Great Britain of framing the good relations duty this way see the outworking of the [Core Issues Trust v Transport for London \(TfL\) \[2013\] EWHC 651](#) judicial review. This upheld the decision of the London authorities not to carry adverts on its buses which insinuated people could be cured of being gay. The court found that not only was this a justified restriction on freedom of religious expression to protect the rights of others, but also related to discharging the properly formulated ‘good relations’ duty to tackle prejudice and promote understanding. The Court concluded “under the Equality Act 2010, TfL was under a duty to eliminate discrimination and harassment against gays and to ‘foster good relations’ ‘tackle prejudice’ and ‘promote understanding’ between those who have same-sex orientation and those who do not. Displaying the advertisement would have been in breach of that duty” [paragraph 177]. Earlier the judgement elaborated “In my judgment, TfL would be acting in breach of its duty under section 149 if it allowed the Trust’s advertisement to appear on its buses, as it encourages discrimination, and does not foster good relations or tackle prejudice or promote understanding, between those with same-sex sexual orientation and those who do not” [144].

- ‘State Parties undertake to adopt immediate and effective measures... with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups...’ (Article 7 [UN] *International Convention on the Elimination of All Forms of Racial Discrimination* ICERD)
- State Parties to: ‘raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities; To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life; promote awareness of the capabilities and contributions of persons with disabilities.’ (Article 8 *UN Convention on the Rights of Persons with Disabilities*, UNCRPD)
- Parties to ‘encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons’ ethnic, cultural, linguistic or religious identity,’ (Article 6 Council of Europe *Framework Convention for National Minorities*, FCNM).
- ‘The Parties undertake to promote, by appropriate measures, mutual understanding between all the linguistic groups of the country and in particular the inclusion of respect, understanding and tolerance in relation to regional or minority languages’... (Article 7(3) Council of Europe *European Charter for Regional or Minority Languages* ECRML).

A ‘good relations’ duty *can only contribute* to the above goals however if it is actually interpreted and implemented compatibly with them. In the present context whereby good relations has not been defined in law there has been poor experience in this regard to the extent that a Council of Europe committee itself raised concerns that the concept of ‘good relations’, in the T:BUC predecessor policy, had taken a direction of substituting conceptual human rights goals. The FCNM Advisory Committee also raised concerns that ‘good relations’ was reportedly being used to veto minority rights initiatives:

...the CSI Strategy has developed the concept of ‘good relations’ apparently to substitute the concept of intercultural dialogue and integration of society. The Advisory Committee has been informed that, in some instances, the need for keeping good relations has been used as justification for not implementing provisions in favour of persons belonging to minorities...¹⁴

CAJ recalls that the Equality Commission (ECNI) in 2005 produced a working definition of good relations, focusing on the growth of relationships and structures for Northern Ireland that acknowledge its religious, political and racial context.¹⁵ The ECNI subsequently recommended public authorities adopted a definition of good relations but were (rightly) not proscriptive that it should be this particular definition.¹⁶ The ECNI working definition is lengthy and not

¹⁴ Advisory Committee on the Framework Convention for National Minorities (Third Opinion on the UK adopted 30 June 2011) ACFC/OP/III(2011)006, paragraph 126.

¹⁵ The full text is “The growth of relationships and structures for Northern Ireland that acknowledge the religious, political and racial context of this society, and that seek to promote respect, equity and trust, and embrace diversity in all its forms.” ECNI, Guide to the Statutory Duties, 2005, p81.

¹⁶ Promoting Good Relations, Guide for Public Authorities 2007, paragraph 3.26.

itself designed for legislation. CAJ notes the ECNI is now advocating support for a definition to be adopted in legislation, that its stakeholders have a ‘clear desire’ for such a definition and had expressed support for the GB definition.¹⁷ CAJ is of the view that it has become clear that legal certainty needs to be brought to the concept of good relations and that the definition in law in Great Britain should be adapted into Northern Ireland law. CAJ would regard this as an essential pre-requisite to any addition of a ‘good relations’ section into Equality Impact Assessments. As recommended in our *Unequal Relations* research, CAJ would also recommend that an appropriate tailored methodology, duly subordinate to and compatible with equality assessments and international obligations, would also be developed for such a purpose, and that a duty is placed on the oversight body, the ECNI, to interpret good relations compatibly with human rights standards.¹⁸

T:BUC states that ‘good relations’ is to refer to meeting the aims and commitments in the T:BUC strategy itself. Whilst this may be less problematic than a subjective, face value concept of good relations, it is difficult to see how this would be operationalised. The alternative is to formulate the meaning of good relations on the face of the legislation to give it specific meaning drawing on the existing definition in law in Great Britain as we have suggested above.

The T:BUC strategy also foresees the transformation of the Equality Commission into an Equality and Good Relations Commission.¹⁹ The TBUC strategy enumerates 11 new statutory duties the new Commission is to discharge. It is debatable as to whether the implications of the powers envisaged in T:BUC have been thought through and CAJ is concerned that such proposals could be retrogressive to the ECNI’s equality remit. To give one example these new duties include one to *“To enforce and investigate as appropriate where there is a failure to comply with section 75(2)”*. This presumably means that the Commission will have new powers to investigate and enforce the existing good relations duty. However it is not clear how this differs from the ECNI’s current enforcement powers over the s75(2) duty. These powers were exercised recently in its investigation report into the naming of the Raymond McCreech park in which the ECNI held there had been a breach of the ‘good relations’ duty.

In summary, and in addition to the above matters, CAJ urges the Committee to recommend the incorporation into Northern Ireland law of the following definition of good relations:

**good relations ...means having regard, in particular, to the desirability of
(a) tackling prejudice, and (b) promoting understanding.**

In order to provide further evidence as to our view on the need for the definition of ‘good relations’ to be taken forward an appendix to this paper provides further background information on the subject of ‘good relations’ in EQIAs.

¹⁷ TBUC / Good Relations – Stakeholder Event (26 June 2014): Translating policy to practice Summary of Key Points raised in discussion (available at: <http://www.equalityni.org/ECNI/media/ECNI/TBUC/workshop1.pdf> accessed October 2014)

¹⁸ CAJ, *Unequal Relations*, 2013, p64.

¹⁹ Paragraph 6.29

Definition of sectarianism

The *T:BUC* strategy states that appropriate consensus will be sought around including a definition of sectarianism in draft legislation. 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.²⁰ It is notable that whilst a draft interim definition is included in the *T:BUC* strategy this definition is itself restricted to individual behaviour and appears derived not from a definition of sectarianism per se but rather from a definition of sectarian chanting at sports matches.²¹

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.²² 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.²³ The Commission has also stated “This does not mean that

²⁰ For example 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.*”

²¹ *T:BUC* states “*For the purposes of this Strategy, sectarianism is defined 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.*”, (paragraph 1.36, see also paragraph 5.28). Section 37 of the Justice (Northern Ireland) Act 2011 makes chanting at a major sports match an offence if it is ‘sectarian’ or specifically “consists of or includes matter which is threatening, abusive or insulting to a person by reason of that person’s colour, race, nationality (including citizenship), ethnic or national origins, religious belief, sexual orientation or disability” (subsection 3(c)). Despite discussion during its legislative passage ultimately the Act did not provide a definition of sectarian chanting.

²² 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 *T:BUC* 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).

²³ 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

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”²⁴ 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.”²⁵

It follows that it is 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 addressing 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’.²⁶ 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.²⁷

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,²⁸ 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.

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.

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

²⁵ 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.

²⁶ 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.*

²⁷ 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).*

²⁸ 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

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.²⁹

CAJ urges the definition of sectarianism in legislation to draw on international standards relating to racism. We draw attention to the above definition which is derived from recommendations from the Council of Europe specialist agency as an option to this end.³⁰

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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.

²⁹ 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.

³⁰ An alternative definition is provided by the Institute of Conflict Research as follows “Sectarianism should be considered as a form of racism specific to the Irish context. Sectarianism is the diversity of prejudicial and discriminatory attitudes, behaviours and practices between members of the two majority communities in and about Northern Ireland, who may be defined as Catholic or Protestant; Irish or British; Nationalist or Unionist; Republican or Loyalist; or combinations thereof.” See Jarman, Neil. 2012 ‘Defining Sectarianism and Sectarian Hate Crime’ Belfast: ICR, p10.

Appendix: Good Relations and Equality Impact Assessments, some background

The current ‘good relations’ duty was not provided for in Belfast/Good Friday Agreement. The Northern Ireland Office nevertheless included it in the Agreements’ implementation legislation as section 75(2) of the Northern Ireland Act 1998. Unlike its nine ground equality counterpart under section 75(1) of the same Act, the good relations duty is restricted to the three grounds of political opinion, religious belief and racial group.

At the time of the legislation there was considerable concern among equality focused NGOs and trade unions that a subjective ‘good relations’ duty would be open to interpretations in a manner which would actually undermine equality initiatives on the grounds they might lead to ‘community tensions’. An example from Great Britain, from the *Commission for Racial Equality (CRE)*, illustrates this point well:

...in one area, officers recommended that regeneration funding should be allocated to a predominantly ethnic minority area, based on strong evidence of need. The council refused to approve this and redirected the funding to predominantly white British areas. A number of interviewees in this area felt this was motivated by fear of a ‘white backlash’.³¹

The fear was that an undefined ‘good relations’ duty could be used to institutionalise a practice whereby equality and rights initiatives were blocked on the grounds that there were objections to them. In effect the duty could become a veto-mechanism for the opponents of rights and equality to stifle positive action. Back in 1998 the Labour Government agreed to put safeguards on the face of the legislation to address these concerns. The main two safeguards were first ensuring the equality limb of the duty had primacy and second formulating equality impact assessments so they were about equality. More recently, in light of this being insufficient there has been discussion on defining ‘good relations’ on the face of the legislation to bring a measure of legal certainty to its use.

The legislation was formulated in a way that ensured primacy for the equality duty, with the good relations duty to be undertaken, for example, ‘without prejudice’ to it. The purpose of this was to introduce the safeguard that ‘good relations’ could not trump equality of opportunity considerations. There have been a number of attempts over the years to reverse this. This includes two recent proposals by the Alliance Party to introduce equality and good relations considerations without this safeguard into the Local Government Bill.³² On both occasions the Petition of Concern mechanism was used to prevent this formulation and protect the safeguards over the equality duty. Instead the SDLP Minister put forward a clause

³¹ Commission for Racial Equality (CRE) *Formal Investigation into Regeneration and the Racial Equality Duty* September 2007, page 24. In the above CRE ‘white backlash’ regeneration scenario the correct ‘good relations’ response would have been not to divert funding to the dominant ethnic group but to go out into the community and explain that resources were being put into ethnic minority areas on the basis of objective need, i.e. *to tackle prejudice and promote understanding*.

³² Insofar as the community planning functions of the new councils would consider both equality and good relations among the long term objectives for improving social wellbeing. See Official Report (Hansard) Northern Ireland Assembly Consideration stage (18-19 March 2014) and Further Consideration Stage (1 April 2014).

which stated “the reference to improving the social well-being of the district includes promoting equality of opportunity in accordance with section 75 of the Northern Ireland Act 1998 and, without prejudice to this, having regard to the desirability of promoting good relations” which, as the Minister told the assembly was “framed to ensure that the type of existing safeguards between equality and good relations in section 75 of the Northern Ireland Act 1998 are maintained.”³³ Ultimately all parties accepted this formulation which now stands as section 66(3)(a) of the Local Government (Northern Ireland) Act 2014.

The second safeguard of note in the legislation is that the processes for Equality Impact Assessment, and identifying ‘adverse impacts’ and consequent alternative policies and mitigating measures apply to the ‘equality of opportunity’ duty only and not its more subjective ‘good relations’ counterpart. To this end the Equality Commission recommended a seven-stage methodology for EQIAs in its guidance on the equality duty. There have also been a number of attempts over the years to change this. The introduction of a ‘good relations impact assessment’ had been proposed under the NIO 2005 *Shared Future Strategy*, in this instance ‘to assess impacts on the promotion of sharing.’ This proposal was never legislated for. The Equality Commission in 2007 nevertheless recommended that public authorities do include ‘good relations’ considerations in their EQIAs, and that that public authorities use the same seven-stage methodology that had been carefully tailored and designed for equality, for their good relations assessments. However, the risk in applying such objective equality methodology to good relations is that simple negative perceptions, ‘impacts’ or ‘tensions’ which do not actually objectively reach the threshold of adverse impact, could in a lay sense be considered as such. Consequently it could then be read that the public authority is ‘required’ to take measures against such an ‘adverse impact’ on good relations grounds.

At worst CAJ has expressed concerns that interpreting the good relations duty in this way can turn EQIAs on their head and allow them to become a veto for equality and rights initiatives, including anti-poverty, housing and other policies based on targeting objective need. There are examples of this happening in the *Unequal Relations* research, which also cites Council of Europe human rights experts, as well as our local Human Rights Commission, having also raised concerns about ‘good relations’ considerations being used to thwart initiatives to promote the Irish language taken in accordance with treaty based obligations the UK has signed up to. In such scenarios it is often the opposing views of a section of the political constituency, ‘attitudinal’ differences across the community or even statistics showing that more Catholics than Protestants speak Irish which are put forward as ‘evidence’ of ‘adverse impacts’. This risks prejudice or differentials which are not ‘adverse’ becoming the basis for policy. For example, in advice to Magherafelt Council the Equality Commission cites both ‘mixed views’ among councillors and a public attitudes survey from which it highlights that ‘Of note’ are ‘differing views of Protestant and Roman Catholic communities towards the Irish Language’ and goes on to caution against policies which are ‘divisive’.³⁴ In response to this the Equality Coalition expressed concern about the potential impact of such a policy approach meaning advice could be given to caution against any equality initiative subject where there

³³ Official Report (Hansard) Northern Ireland Assembly Further Consideration Stage (1 April 2014).

³⁴ ECNI Comments on Magherafelt Council’s Draft Irish Language Policy 25 June 2012.

are political differentials in support, highlighting for example the implications for LGBT rights of such an approach.³⁵

Some elected representatives have taken the view that ‘good relations’ as a concept has been misused. For example, in an Assembly debate on the duties in 2010 Stephen Farry MLA of the Alliance Party, stated that any use of the concept of good relations to veto equality initiatives was indicative of a “misunderstanding of the concept of good relations, which has been used and abused by certain politicians.”³⁶ Since then there has been most prominently ‘good relations’ discourse over housing on the Girdwood barracks site. In 2011 the DSD Minister overturned an earlier decision to build around 200 new homes on the site, most of which would have likely been allocated to Catholics on the basis of objective need. The rights based NGO Participation and Practice of Rights (PPR) report the Minister used as a justification for his decision a prerequisite of ‘cross community agreement’ for revised proposals.³⁷ However, any approach which in effect is stating that houses cannot be built in an area on the grounds the ‘other’ might live in them, until the ‘community’ in that area agrees, is clearly not human rights compliant. Such a position would be similar to stating that ethnic minorities should not be allowed into the workplace until the majority white workforce agrees. In a rights-based approach rights to housing and employment should never be subject to such considerations.

Breaches of the existing ‘good relations’ duty: the Raymond McCreesh playpark report

The Equality Commission’s April 2014 investigation report into Newry Council’s decision, originally in 2001, to name a Council-run play park after IRA hunger striker Raymond McCreesh also provides some insight in the evolving application of the existing good relations duty.³⁸ The decision was unusual in that it found *substantive*, rather than *procedural* (e.g. failure to conduct an EQIA) breaches of both the equality and good relations duties. The decision provides an insight into how the Commission may interpret any expanded ‘good relations’ duties without the concept being further defined.

McCreesh significantly moves on the precedents of what the Commission is likely to find as a substantive breach of an Equality Scheme. Citing developments in equality case law in Great Britain, the Commission highlights the meaning of ‘regard’ and ‘due regard’, in the context that the public authority under the existing legislation is to have regard to the ‘good relations’ duty and due regard to the equality duty. Such mandatory commitments are contained within Equality Schemes. The report includes case law derived Baker-Brown principals of “due regard” which it summarises as follows:

³⁵ Correspondence from Co-Conveners of Equality Coalition 9 September 2013, to Chief Commissioner ECNI and response of 19 September 2013.

³⁶ [Official Record, Northern Ireland Assembly](#), Equality and Good Relations Motion, 28 September 2010.

³⁷ PPR [Background Briefing on the North Belfast Housing Inequality](#) [There is also some further indication of a ‘good relations’ considerations on the Minister’s own blog](#)

³⁸ Equality Commission for Northern Ireland, Investigation under Paragraph 11, Section 9, Northern Ireland Act 1998, Newry and Mourne District Council [Final Investigation Report](#), March 2014. For further analysis see [CAJ Community Relations Week Commentary: Briefing Paper no 2](#): The Equality Commission’s Raymond McCreesh Park investigation implications and analysis for proposed ‘Equality and Good Relations Impact Assessments’.

...the decision maker must be aware of the duty; the statutory goals must be taken into consideration; “due” regard means the amount that is appropriate in the circumstances of the case; it is NOT a duty to achieve a particular outcome or result; the duty must be fulfilled at the time the decision is being considered; it must be exercised in substance, with rigour and an open mind; it is non delegable; it is a continuing duty; and it is good practice to keep records³⁹

The Commission also states:

In general terms “to have regard” to a factor means that, when making a particular decision or formulating a policy, the decision maker must “take into account” or “give consideration to” that factor. To have “due regard” generally refers to the amount of regard i.e. “proportionate regard”.⁴⁰

The Commission elaborates that case law implies that elected representatives “cannot approach decision making in a biased way, with a closed mind and without impartial consideration of all relevant issues.”⁴¹ The Commission also holds that in order to fulfil the statutory duties “there must be evidence that the duty was exercised in substance, with rigour and an open mind.”⁴² This provides a broader framework for how substantive breaches of the statutory duties will be considered and has significant implications as its application in the *McCreesh* case demonstrates.

In *McCreesh* the ECNI held that the Equality Duty had been engaged as the play park name presented a ‘significant chill factor’ for families of a Protestant/Unionist background in relation to a using a council facility. It is this and the failure to adequately consider it which appears at the centre of the Commission’s finding that the equality of opportunity duty had been breached. This has quite significant implications for a number of public authorities who would run their facilities in a manner which may constitute a ‘significant chill factor’ to others. The obvious example would be Council’s who continue to fly the Union Flag from their leisure facilities. The Equality Commission has already cautioned against the flying of the Union Flag on places other than Council headquarters.⁴³ The *McCreesh* decision implies however is that there is now an arguable case that doing so constitutes a breach of the Council’s Equality Scheme.⁴⁴ An obligation on public authorities to run their facilities and functions in a manner which does not unduly constitute a significant chill factor to a section 75 group will be broadly

³⁹ McCreesh Final Investigation Report, paragraph 4.9, emphasis in original.

⁴⁰ McCreesh Final Investigation Report, paragraph 4.7.

⁴¹ McCreesh Final Investigation Report, paragraph 4.10.

⁴² McCreesh Final Investigation Report, paragraph 4.14.

⁴³ “...while it is acceptable and appropriate, in the Commission’s view, for a local Council to fly the Union Flag at its Civic Headquarters, the rationale for its display at every Council location, facility and leisure centre would be questionable” Promoting a Good and Harmonious Working Environment, A Guide for Employers and Employees’, Equality Commission, October 2009, page 7.

⁴⁴ This could also be the case for flags flown on Council headquarters should they present a similar ‘chill factor’. *McCreesh* makes clear that the facility in question is not exempt from the chill factor consideration merely because it is in an area predominantly used by one side of the community (paragraph 4.5).

welcomed. However unless this is more tightly defined across a broader range of policies CAJ views risks of subjective interpretation. This is not least in the potential for ‘chill factor’ complaints become a vehicle for successful objections, including to minority rights initiatives themselves, based on prejudice or even mere association of something with the ‘other side.’ In our view the risks of subjective interpretation are however enhanced in relation to the ‘good relations’ limb of the duty.

As referenced above, rather than tying it to a specific definition and hence set of identifiable duties one approach is to give ‘good relations’ its literal and face value meaning. In effect this means ‘good relations’ is engaged by anything the ‘other side’ takes umbrage with. In our experience such good relations discourse does not tend to make reference to grievances of the representatives of ethnic minorities, and hence in practice is about the competing views of the representatives of unionism and nationalism. The approach which is reflected in the *McCreesh* investigation is similar to this position. The ECNI states that the good relations duty is ‘certainly engaged’ in the context of both a complaint by the Orange Order to the Council and that there has been ‘much public discussion in the context of good relations and a shared future’ which itself is seen as ‘indicative of the potential for good relations to be damaged’.⁴⁵ The Commission concludes that the ‘good relations’ duty has been breached by the decision to maintain the *McCreesh* park name. The decision is however not entirely clear as to *how* and *what in particular* has breached the ‘good relations’ duty beyond stating that both equality and good relations duties had been breached as they had not been ‘exercised in substance, with rigor and with an open mind.’⁴⁶

As alluded to above the Commission did cite case law that elected representatives should be impartial and not show bias in decision making, and the decision states “In this particular case, the Council’s decision appears to be based on Councillors views on the wishes of one section of a divided community rather than on how this decision will impact on good relations”.⁴⁷ This indicates that a factor in the decision was the manner in which the decision only reflected the views of ‘one section of a divided community’. Taking a step back from the specificities of the *McCreesh* park this particular statement itself could set a significant precedent as to how the Equality Commission interprets the duty. One of the findings of the CAJ *Unequal Relations* report was that the Commission itself, for example, in its advice on policies to promote the Irish language had cautioned *against* proposals on the grounds of real or perceived objections from unionism. This highlighted the risk of the good relations duty becoming a political veto. One interpretation of the *McCreesh* decision, in holding the process was flawed as it only paid regard to the views of one side of the community, is that it does implicitly imply that real or perceived objections from ‘one section of a divided community’ should no longer be sufficient in themselves to block rights-based policy initiatives.⁴⁸

⁴⁵ *McCreesh* Final Investigation Report, paragraph 4.5.

⁴⁶ *McCreesh* Final Investigation Report, paragraph 5.4.

⁴⁷ *McCreesh* Final Investigation Report, Paragraph 4.1.

⁴⁸ Such a change in approach is far from guaranteed as the research observed that there were significant inconsistencies in how the Commission advised on the implications of the ‘good relations’ duty in different policy areas. For example the research noted “Within the advice on flying the Union Flag the good relations duty is rarely mentioned. By contrast in advice on Irish language policy good relations considerations, which the ECNI

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The ECNI investigation decision does not however state how objections should be filtered to ensure that views based on intolerance or prejudice do not become the basis of policy. The absence of such safeguards increases the risk of the duty being used as a veto, including for equality and rights based initiatives.

The *McCreesh* jurisprudence on decision making on the wishes of one side of the community does present a further conundrum. Namely what public authorities do when different sections of a divided community take different positions. A Council could be caught in a situation whereby a decision either way could be challenged as having breached the good relations duty if they ultimately, regardless of having considered both options in substance, with rigor and an open mind, are left in circumstances where there is not an obvious third way with having to take a decision which will match one or the other positions and ‘adversely impact’ on the other. Overall the *McCreesh* decision highlights unless some parameters are put on how the ‘good relations’ duty is to be interpreted in impact assessments there is significant risk of subjectivity.

From an equalities perspective there is also the risk that undefined ‘good relations’ issues could become the focus of EQIAs and displace the bread and butter and more objectively defined equalities issues EQIAs were designed to address.

Defining ‘good relations’ in law, previous initiatives

Since the publication of T:BUC there have been initiatives at both Westminster and the Assembly to seek a definition of good relations on the face of legislation drawing on the formulation in Great Britain of ‘tackling prejudice and promoting understanding’.

During the passage of the Northern Ireland (Miscellaneous Provisions) Act 2014 at Westminster an amendment was tabled by Mark Durkan MP to define ‘good relations’. There was support for the amendment at Westminster with the Shadow Minister stating the Labour Party were ‘extremely sympathetic’. The UK Government stated however that whilst it did not oppose the amendment in principle the matter should be best dealt with by the devolved institutions.⁴⁹

More recently the Northern Ireland Assembly had the opportunity to debate defining ‘good relations’ insofar as it related to the new community planning functions on local councils. The Minister, the SDLP’s Mark H Durkan, stated on the official record (Hansard) that good relations in local government bill in the context of community planning:

...are intended to be interpreted in line with the definition of good relations that has been in legislation in Great Britain for a number of years under the Equality Act 2010

regards as an important consideration of language policy, are often prominent and decisive.” (Unequal Relations, page 57.)

⁴⁹ UK Parliament Official Record (Hansard) Public Bill Committee, Northern Ireland (Miscellaneous Provisions) Bill [Tuesday 16 July 2013, Column 33](#).

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as meaning across the grouping in section 75 and as primarily being about tackling prejudice and promoting understanding.⁵⁰

The Minister went further by seeking to place this definition on the face of the legislation. With the exception of the Alliance Party, there was broad support from other political parties that the concept should be defined. The SDLP and Sinn Féin voted for the above definition to be placed on the face of the legislation after the debate. The Unionist parties, whilst not opposing a definition per se advocated for more work to be done on the wording (DUP), a ‘proper, full and detailed debate’ (NI21) or that the definition ‘may be a bit narrow and a bit too focused’ (UUP). In this context the amendment fell. The Alliance Party also called for wider discussion, expressed the view that they were not convinced there was a need for a definition, but also indicated that if there was one, it should be broader to encompass matters of ‘reconciliation, integration or sharing’.⁵¹ It may be therefore that we are finally moving towards defining the concept which dominates the T:BUC strategy.

⁵⁰ Official Report (Hansard) Northern Ireland Assembly Further Consideration Stage (1 April 2014).

⁵¹ Official Report (Hansard) Northern Ireland Assembly Further Consideration Stage (1 April 2014).