

# **Submission to Mid Ulster Council Draft Policy for the Management of Bonfires on Council Property**

**September 2018**

## **About CAJ**

The Committee on the Administration of Justice (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.

## **In summary – a human rights approach**

- This is a response to the Summer 2018 consultation by Mid Ulster Council on its draft policy on the management of bonfires held on Council property. Most of the bonfires on Council land are Loyalist bonfires traditionally held on the 11 July each year. The policy also aims to encourage others to adopt a similar policy approach to bonfires;
- In the context of such bonfires being a form of political and cultural expression, they engage the protection of rights to freedom of expression, including cultural expression, of organisers and participants protected under human rights law;
- Such rights to freedom of expression are not unlimited and public authorities are permitted and at times required to proportionately restrict such expression where necessary in a democratic society for a reason permitted under human rights law (the most relevant in this instance being ‘public safety’, ‘the rights of others’ and ‘health’);
- In this context problems associated with bonfires in recent years across Northern Ireland have included issues of environmental damage and health and safety, but also regular instances of the display and burning of items in a manner which constitutes sectarian, racist, homophobic expression;
- Evidence of such problems on bonfires in the Mid Ulster Council area does constitute a ‘pressing social need’ required to justify regulation, on the above terms, under human rights standards, and we concur this should lead to the Council adopting policy to intervene to prevent such harms;

## **In summary, the detail of the proposed Council policy:**

- The draft Policy explicitly recognises bonfires as a form of cultural expression and its aim is set out to promote the ‘safe management’ of bonfires on Council land;
- The draft Policy contains fairly clear and specific provisions in order to prevent environmental damage and promote health and safety at bonfires, including provision for protocols to prevent storage and use of toxic or hazardous material, and for intervention through, health and safety risk assessments, and the removal of materials;
- The draft Policy is however not specific enough in relation to aims and processes to ensure the prevention of for example racist or sectarian expression. The issue is not explicitly named in the aims or objectives of policy, and the processes within the policy to address same should be more precise to ensure legal certainty;

- The ‘general principles’ of the policy would commit the Council to only permitting a bonfire where unspecified conditions are met in relation to the type of materials to be burned (specifying ‘flags/emblems/posters’ etc). The action section defers to draft guidelines and a check list that would require that no ‘emblems/flags/posters or images’ are placed around the site or bonfire;
- The risk with such a formulation is that it is not linked explicitly to expression that is racist, sectarian, homophobic etc and carries both the risk of not capturing some such material (by virtue of it falling outside the above categories) and also of prohibiting materials that are harmless and protected expression within the above categories – in essence the policy would ban all flags, emblems posters and images in the vicinity of the bonfire. As such the policy is susceptible to inviting legal challenge that it is disproportionate;
- Whilst it could be argued that the Council would apply the policy selectively and only seek to remove material which was problematic, such an approach is unlikely to meet the requirements of legal certainty under human rights law;
- We therefore suggest amendments to the policy, set out later in this document, which would ensure such restrictions on materials were contextual and content-based rather than category based, and explicitly targeted to counter expression the Council has a duty to counter;
- The policy should also include specific provisions on intervention to remove materials constituting hate expression, with a due interface with other agencies;
- There are significant amendments that should also be made to improve the draft Equality Screening exercise on the policy, at present the screening exercise understates and under explores the potential for positive impacts of the policy;
- The draft policy should also further consider and develop inter-agency arrangements to ensure the protection of Council staff. There has already been concerning attempts to intimidate Council staff in relation to the Council having a draft policy, and preparations should be made to ensure the safety and protection of Council staff during its implementation;

### **Detail of policy and consultation**

Mid Ulster Council opened consultation on the draft Policy on the 4 June 2018, and ran it until the 6 September 2018.

### **Legal duties**

The Equality Screening exercise rightly references legislative provisions on environmental matters such as the Clean Air (NI) Order 1981. This section should be augmented to include binding duties in both international and domestic law on the council in relation to tackling intolerance, prejudice and discriminatory expression, including:

- The Section 75(2) Northern Ireland Act 1998 ‘good relations’ duty;
- Section 76 Northern Ireland Act, which outlaws public authorities aiding another person to discriminate on grounds of religious belief or political opinion;

- The good relations duty on the council under the Race Relations NI Order 1997, and related duties under the Disability Discrimination Act 1995;
- The Human Rights Act 1998, and in particular the positive obligations under Article 8 of the European Convention on Human Rights (ECHR);
- The (UN) International Convention on the Elimination of all Forms of Racial Discrimination (ICERD);
- International Covenant on Civil and Political Rights (ICCPR), Article 20;
- The (Council of Europe) Framework Convention for National Minorities;
- Relevant provisions on removal of items under local government legislation;

Firstly, in relation to legal duties Councils and other public authorities are under a positive obligations intervene to counter racist, sectarian, homophobic, misogynist and other forms of hate expression on protected grounds.

It has been established that there are positive obligations under Article 8 ECHR to tackle racist discourse, this would include sectarian discourse (which is considered a form of racism by both the UN and Council of Europe anti-racism treaty bodies).<sup>1</sup> In addition, the European Court has held that sexual orientation and gender identity are protected by Article 8.<sup>2</sup>

Article 6 of the (Council of Europe) Framework Convention for National Minorities obliges public authorities to:

“undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.”

In relation to good relations there are duties on NI public authorities under Section 75 of the Northern Ireland Act (NIA) 1998 to “have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group”. Unlike its counterpart in Great Britain<sup>3</sup> -which focuses on “tackling prejudice and promoting understanding”- good relations is not defined in NIA but it is increasingly being defined in

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<sup>1</sup> Both the UN Committee on the International Covenant for Elimination All Forms of Racial Discrimination (ICERD) and the Council of Europe Advisory Committee on the Framework Convention for National Minorities (FCNM) have both emphasised that sectarianism in Northern Ireland is to be treated as a form of racism (rather than simply a limited to consideration of political factionalism.) See ICERD Concluding observations on UK, CERD/C/GBR/CO/18 (2011) “Sectarian discrimination in Northern Ireland attract the provisions of ICERD in the context of “intersectionality” between religion and racial discrimination; the FCNM Advisory Committee stated: ‘[treating] sectarianism [in Northern Ireland] as a distinct issue rather than as a form of racism [is] problematic, as it allows sectarianism to fall outside the scope of accepted anti discrimination and human rights protection standards.’ Advisory Committee on the Framework Convention for the Protection of National Minorities, ‘Third Opinion on the United Kingdom for the Protection of National Minorities’ ACFC/OP/III (2011)006.

<sup>2</sup> The increased codification of Article 8 ECHR rights as providing for positive obligations for intervention to protect against actions that include being subjected to racist expression has been a feature of Strasbourg jurisprudence (see for example *Asku v Turkey* (app no 4149/04, 41029/04) 15 March 2012, and *Király and Dömötör v. Hungary*, 2017.). In relation to sexual orientation and gender identity falling within the ambit of Article 8 see *Bensaid v UK* (Application no. 44599/98) [47]

<sup>3</sup> s149 of the Equality Act 2010 – for an example of where this positive duty has been used to tackle homophobic discourse see the case of *Core Issues Trust v Transport for London* where the public authority had prevented adverts from being placed on its buses implying persons could be cured from being gay. The applicants argued this interfered with free religious expression but the court disagreed arguing that the ‘rights of others’ limitations on free religious expression, but also that the London authorities had positive obligations under the ‘good relations’ duty to intervene.

similar terms.<sup>4</sup> It is very welcome that the Council has in its Equality Screening methodology characterised specifically consideration of ‘tackling prejudice and promoting understanding’ as part of its good relations duties.

There is also the general duty under the Disability Discrimination Act 1995 (s49A) to have due regard to the need to promote positive attitudes towards disabled persons, and a duty under Article 67 the Race Relations NI Order 1997 to promote good relations between different ‘racial groups’.

Under the Section 75(1) equality duty there is a due regard duty to promote equality of opportunity across nine protected grounds, this could be engaged for example by items constituting hate expression placed on council property that may (for legitimate reasons not related themselves to prejudice and intolerance) deter persons from using council facilities.

### **Procedural Duties under Equality Schemes**

In addition to the above public authorities have a number of binding duties under equality schemes in relation to the policies they adopt on matters within their functions.

The Equality Commission for Northern Ireland (ECNI) has held in exercising its enforcement powers (in Schedule 9 of the NIA) that a public authority allowing an item placed by a third party on its property to remain constitutes a *policy decision* that requires equality screening. The ECNI rejected the position of the public authority (a district Council) that screening was not required, in doing so they noted that the concept ‘policy’ in the Equality Scheme and guidance includes both written and unwritten policies. The ECNI also alludes to the definition of policy cited in its guides to the statutory duties as including “a course of action adopted or proposed...” The ECNI holds that the item being placed by a third party does not negate the matter falling within the Council’s functions, nor did the passage of time as the item had been there for some time.<sup>5</sup> The ECNI also held that in circumstances where policy decisions have ‘significant implications for equality of opportunity,’ there is also a duty to conduct an EQIA.

The precedent set by this decision is that a public authority allowing an item such as a flag, placard or other item to remain on its property is taking a policy decision that requires screening. If the item in question has significant implications for equality of opportunity – as

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<sup>4</sup> The Council of Europe has defined good relations as: “Promoting good relations between different groups in society entails fostering mutual respect, understanding and integration while continuing to combat discrimination and intolerance” see ECRI GR2(revised), paragraph 21: [http://hudoc.ecri.coe.int/eng#{"ECRIIdentifier":\["REC-02rev-2018-006-ENG"\]}](http://hudoc.ecri.coe.int/eng#{) See also Equality Commission advice on Good Relations in local Councils’ 2015 which references the ‘tackling prejudice, promoting understanding definition’ in the Equality Act 2010 but also states “Good relations can be said to exist where there is a high level of dignity, respect and mutual understanding; an absence of prejudice, hatred, hostility or harassment; a fair level of participation in society.

<sup>5</sup> *Gerald Marshall & Omagh District Council* investigation (ECNI, 2007) This particular investigation which was triggered by a complaint by a Dromore resident against Omagh District Council in relation to the presence of a memorial to the 1981 IRA hunger strikers in the town’s Old Church Grounds and graveyard. The memorial had been constructed by a third party in 2001 but this land was owned by the Council who had not removed it. The Council argued there was no duty to screen as there was no policy established. The Investigation rejected this, finding among other matters that whilst the Council were not responsible for the initial placement of the memorial the Council had adopted a *de facto* policy of allowing it to stay, and should have conducted a screening exercise and a consequent EQIA on the policy. The Investigation therefore held the Council had failed to comply with its equality scheme and should conduct an EQIA.

many items inciting hatred/constituting hate expression will, there is a duty to conduct an EQIA.

This of course would not mean that a Council would have to conduct screening (and where needed an EQIA) on every item placed on its property -provided if it has already duly followed screening and other processes in its Equality Scheme that set out an overarching policy on how the Council will deal with such matters (rather than screening on a case by case basis).

### **Further Relevant powers of Councils**

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

- any **graffiti** which, in the opinion of the council, is detrimental to the amenity of any land in its district;
- **any placard or poster** which is displayed in its district and which, in the opinion of the council, is so displayed in contravention of [Planning regulations]<sup>6</sup>

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

There are further powers under the Clean Neighbourhoods and Environment Act (Northern Ireland) 2011, in relation to graffiti<sup>7</sup> and fly posting. This includes powers to issue ‘**Defacement Removal Notices**’ (DNR) when a council is satisfied that a “a relevant surface in the district of the council has been defaced by graffiti or any poster or placard” (which does not have planning permission) AND that the “**defacement is detrimental to the amenity of that district or is offensive**” the concept of ‘offensive’ is defined in Departmental Guidance as directly relating to hate expression:

‘Offensive’ applies where graffiti is (or is perceived to be) racially offensive, hostile to a religious group, sectarian in nature, sexually offensive, homophobic, depicts a sexual or violent act or is defamatory. Offensive graffiti should be prioritised for speedy removal...<sup>8</sup>

There are powers to issue notices on persons responsible for the surface requiring removal within 28 days. If DNR is not complied with Councils can remove or otherwise remedy the defacement. The powers relate to most surfaces on public land. Councils under the same Act have powers to issue fixed penalty notices for graffiti and fly posting, but these powers exempt offences motivated by racial or religious hostility.<sup>9</sup> Councils also have a number of prosecution powers over graffiti and ‘fly posting’ in relation to relevant offences under road traffic and planning legislation.<sup>10</sup>

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<sup>6</sup> This power does not cover items displayed within a building or land owned by another public authority.

<sup>7</sup> “‘graffiti’ includes painting, writing, soiling, marking or other defacing by whatever means,”

<sup>8</sup> Department for Environment “Guidance for District Councils on Sections 31 to 35 of the Clean Neighbourhoods and Environment Act (Northern Ireland) 2011, Paragraph 2.6

<sup>9</sup> Section 26 (2) But an authorised officer shall not give a notice under subsection (1) if the officer considers that the commission of the relevant offence was motivated (wholly or partly) by hostility— (a)towards a person based upon that person's membership (or presumed membership) of a racial or religious group, or (b)towards members of a racial or religious group based on their membership of that group.

<sup>10</sup> See DoE ‘Graffiti and Fly-posting Offences Prosecution Powers’ guidance

## Relevant powers of Departments (Formally Environment)

Under Article 87 of the Roads (Northern Ireland) Order 1993 any person who (without lawful authority) “paints or otherwise inscribes or affixes any picture, letter, sign or mark” on the surface of a road or upon any tree, structure or other works in or on a road, commits an offence punishable by a fine. The Department has powers to remove any of the above items (and recover reasonable costs from responsible persons) and serve removal notices. The powers of the Department have been characterised as covering to ‘street furniture’ such as lampposts which are part of the property of the public authority. Under Article 84(2) of the Planning (Northern Ireland) Order 1991 there are also powers vested in the Department to require the removal of ‘advertisements’ being in conflict with planning regulations, and relevant offences for not doing so.

## Duties on the PSNI

The PSNI have human rights (and no doubt) common law duties to support and protect other public sector officials in carrying out their functions where there is a risk of acts of intimidation or violence from third parties. The PSNI are also bound, along with others, by the aforementioned positive duties to tackle racism and other forms of hate expression.

In addition, the PSNI are under specific duties under section 32 of the Police (Northern Ireland) Act 2000 and common law to prevent the commissioning of criminal offences, as well as related duties to collect and retain evidence of same. This entails a further duties to intervene to remove items which may constitute criminal offences.<sup>11</sup>

Relevant criminal offences include those legislated for to help meet international obligations to tackle ‘*incitement to hatred*’<sup>12</sup> under Part III of the Public Order (NI) Order 1987. This covers offences of ‘stirring up hatred’ or ‘arousing fear’ against a group of persons on grounds of religious belief, sexual orientation, disability, colour, race, nationality (including citizenship) or ethnic or national origins. The categories of sexual orientation and disability were added in 2004.<sup>13</sup>

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<sup>11</sup> This legal principle was recently tested in the 2017 UK Supreme Court ruling in the *DB v the PSNI* case that related to weekly unnotified loyalist flags marches in late 2012 and 2013 past the nationalist Short Strand area of east Belfast where the PSNI had contended they had no legal power to intervene. The Supreme Court found otherwise, holding that in light of non-notification being a criminal offence, the PSNI’s duty to prevent the commissioning of offences (s32 Police NI Act 2000 and common law) did provide them with such a legal power. The PSNI were therefore legally empowered and under a duty to intervene as a *criminal offence* was being committed. What follows is the PSNI are also legally empowered to intervene to remove items whose display (or at times the display alongside any behaviour likely to accompany the display, including the burning of items on a bonfire) is likely to constitute a criminal offence. The Supreme Court recognised that notwithstanding the legal powers to intervene there was operational discretion on the part of the PSNI regarding what action to take. However, it importantly noted that such discretion was constrained by both judicial oversight and ECHR rights themselves, specifically in the DB case this referred to the Article 8 rights (private and family life) of Short Strand residents. In this context not only were there legal powers for the PSNI to intervene but positive obligations to do so. (The engagement of Article 8 rights of residents was not by the Assembly per se but given “There was substantial violence and disorder as the parade went through that nationalist area. Sectarian abuse was directed at the residents of Short Strand; stones and other objects were thrown at them; and their homes were attacked” *DB v PSNI* [12]).

<sup>12</sup> The UK is also party to Article 20 of the International Covenant on Civil and Political Rights (ICCPR), which provides that “*Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*”, as well as other provisions under ICERD.

<sup>13</sup> Offences under this legislation include (with some caveats) threatening, abusive or insulting words or behaviour, or displaying written material which either intend to stir up hatred or arouse fear (on one of the listed grounds), or which, having regard to all the circumstances, are likely to have that effect. The legislation therefore already does not require proof of ‘intent’, rather defers to a contextual context. Part of the contextual

In relation to interpreting ‘incitement to hatred’ legislation there have been considerable international developments in recent years in codifying a threshold for intervention test, including the test provided for within the UN Rabat Plan of Action. The UN International Convention for the Elimination of All Forms of Racial Discrimination (ICERD) Committee has issued General Recommendation 35 which also codifies a threshold test. The (Council of Europe) European Commission against Racism and Intolerance (ECRI) has also produced a General recommendation (15) on combating hate speech, which also codifies in its explanatory notes a threshold test.

In relation to other relevant legislation to ‘hate expression’<sup>14</sup> there is no legislation in Northern Ireland that makes ‘hate crimes’ per se an offence. However, at times, forms of hate expression which may not constitute incitement to hatred may engage other criminal offences, for example:

- Intimidation – under s1 of the Protection of the Person and Property Act (Northern Ireland) 1969;<sup>15</sup>
- Harassment – requiring a course of conduct under the Protection from Harassment (Northern Ireland) Order 1997;<sup>16</sup>

There are relevant offences relating to criminal damage (e.g. in the case of graffiti) or trespass, in the case of placing of items on the property of others, that may be relevant. Such offences where ‘aggravated by hostility’ on a protected ground under Article 2 of the Criminal Justice (No. 2) (Northern Ireland) Order 2004 could come within the scope of constituting ‘hate expression’ which there may be duties to remove.

### **Duties in relation to the Council providing funding to third parties**

Councils and other public authorities providing funding are under international legal obligations to ensure funding does not to further racist, sectarian, and by extension homophobic, disablist, misogynist etc expression. In relation to racism, sectarianism and disablism the aforementioned domestic ‘good relations’ duties, along with the equality duties,

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

<sup>14</sup> The above ECRI general recommendation defines hate expression (i.e. speech but also other forms of expression) and its protected grounds as follows: “Hate speech for the purpose of the Recommendation entails the use of one or more particular forms of expression – namely, the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well any harassment, insult, negative stereotyping, stigmatization or threat of such person or persons and any justification of all these forms of expression – that is based on a non-exhaustive list of personal characteristics or status that includes “race”, colour, language, religion or belief, nationality or national or ethnic origin, as well as descent, age, disability, sex, gender, gender identity and sexual orientation.

<sup>15</sup> <https://www.legislation.gov.uk/apni/1969/29/section/1>

<sup>16</sup> This refers to generic harassment offences (where aggravated by hostility on protected grounds) there is no equivalent of offences of racially-religiously aggravated harassment as exist in England & Wales  
<https://www.legislation.gov.uk/ukpga/1998/37/section/32> (and Scotland  
<https://www.legislation.gov.uk/ukpga/1998/37/section/33>).

also provide a binding legal framework in this area. As alluded to above Section 76 NIA also outlaws public authorities aiding another person to discriminate on grounds of religious belief or political opinion. UN and Council of Europe human rights treaties on countering racism (including sectarianism) contain a number of provisions placing duties on public authorities to counter racist expression. This includes through the prevention of public funding for organisations and activities that involve racist/sectarian discourse and duties on public authorities (including councils and devolved bodies) to take effective steps to promote respect and tolerance; and counter acts of discrimination, hostility or violence. Some of these duties are also relevant to the above issues of duties to intervene. Article 4 UN ICERD provides that public authorities are:

- to ‘undertake to adopt immediate and positive measures designed to eradicate all incitement to or acts of racial discrimination’;
- to ‘prevent the provision of any assistance to racist activities, including the financing thereof’ and
- banned from promoting or inciting racial discrimination.

ICERD has interpreted ‘racial discrimination’ as including sectarian discrimination in Northern Ireland. In addition Article 6 of the (Council of Europe) Framework Convention for National Minorities obliges public authorities 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, in particular in the fields of education, culture and the media”

The issue of public funding for racist/sectarian/homophobic expression has manifested itself in recent years most in relation to contestation over funding for bonfire related activity. Such funding at times has been provided without conditions that reasonable steps are taken to prevent such events being a platform for such expression. Some public authorities do attach conditions to funding, yet there are not necessarily accompanying enforcement mechanisms.

### **Boundaries between protected freedom of expression and hate expression**

Both protecting freedom of expression and prohibiting advocacy of ethnic and religious hatred have long been complementary aims of international human rights standards. Similar principles have increasingly been held to apply to such advocacy of hatred on other recognised protected grounds –such as sexual orientation, disability or gender/ gender identity. The question that has long been posed is how the boundary between the two is drawn i.e. the need to protect freedom of expression (speech but also other forms of expression including assembly-related expression and religious expression) on the one hand and restrict or sanction (administratively or criminally) hate expression on the other.

The question of drawing the boundary between protected freedom of expression on the one hand and prohibiting advocacy of ethnic and religious hatred on the other has been debated internationally and locally for some time. ECHR jurisprudence has also long made clear that free expression is protected when it ‘*shocks, offends or disturbs*’<sup>17</sup> or when it is capable of ‘*creating a feeling of uneasiness in groups of citizens or because some may perceive them as disrespectful.*’<sup>18</sup> But it does draw a distinction between this and expression which ‘*spreads,*

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<sup>17</sup> Handyside v UK 1976[49]

<sup>18</sup> Vajnai v. Hungary (2008) [57].

*incites, promotes or justifies hatred based on intolerance*<sup>19</sup> or matters such as *‘the promotion of discrimination or ethnic division*<sup>20</sup> Article 10 includes the ‘rights of others’ as one of its grounds for legitimate restriction. The ‘rights’ of others include other ECHR rights. It has been held under Article 8 of the ECHR (right to private and family life) that there is, under certain circumstances, a positive duty on the state to protect persons from racist expression.<sup>21</sup>

The ECHR case of *Vona v Hungary* related to anti-Roma marches, in this instance by the far-right Magyar Gárda grouping. The European Court cited the domestic judgments which regarded Magyar Gárda as having “*created an anti-Roma atmosphere by verbal and visual demonstrations of power*” and held that public authorities are entitled to take restrictive measures “*if the right to freedom of assembly is repeatedly exercised by way of intimidating marches involving large groups*” and the measures are necessary to avert large-scale, coordinated intimidation related to the advocacy of racially motivated politics. The Court held, particularly when ethnic groups are singled out, the state can protect the right of targeted groups to live without intimidation. The Court emphasized that although there was no actual violence at the march, its paramilitary nature was problematic given as this meant the group’s discriminatory message was “*accompanied by the physical presence of a threatening group of organized activists*” and hence that it was capable of “*conveying the message to those present that its organizers had the intention and the ability to have recourse to a paramilitary organization to achieve their aims, whatever they may be.*” The Court contextualized this threat by reference to the historic context of the group’s association with past racist violence, and held that paramilitary demonstrations, accompanied by racist discourse, “*must have an intimidating effect on members of a racial minority.*” The Court considered that the repeated organization of the rallies was capable of intimidating others and affecting their rights and it elaborated that this was “*notably given the location of the parades*” which had been held in proximity to Roma populations. Ultimately the court upheld that the decision of the domestic authorities to outlaw the group had not breached the ECHR.<sup>22</sup>

The emerging jurisprudence therefore points to a manner in which relevant policies and laws could be codified to protect the rights of others in such circumstances, without becoming a further mechanism for the undue restriction of legitimate protests and expression. This risk and important distinction is explicitly recognized by ICERD whose treaty body has stated that:

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

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<sup>19</sup> *Erbakan v Turkey* (1999)[57].

<sup>20</sup> *Vona v Hungary* (application no. 35943/10), (2013) [66]

<sup>21</sup> *Aksu v. Turkey* [GC], application nos. 4149/04 and 41029/04, § 58, ECHR 2012. In one case in the context of anti-Roma protests organised by right-wing groups in predominantly Roma neighbourhoods, in which a woman and her child had been subject to racist abuse, the Court reiterated the positive obligations under Article 8, including circumstances where there are duties to protect an individual from the acts of another -*R.B. V. Hungary* (no. 64602/12) 12 April 2016 [99]

<sup>22</sup> *Vona v Hungary* (application no. 35943/10), (2013)

used as a pretext to curtail expressions of protest at injustice, social discontent or opposition.<sup>23</sup>

### **Problems with bonfires and the display/burning of material**

In relation to bonfires in Northern Ireland in recent years a number of types of materials have been either on display near bonfires, or have been burned on bonfires that engage the question of hate expression or otherwise promote ethnic division. These have included:

- Graffiti or slogans on placards or otherwise displayed that advocate genocide against the nationalist or unionist communities (Kill all Taigs, Kill all Huns, etc); or contain racist and homophobic incitement or terms of abuse;
- The practice of burning items on bonfires that in the context will represent a protected group including migrants and LGBT (Polish/other migrant community and Rainbow flags), items that in the context collectively represent the nationalist community (Celtic shirts, election posters, effigies etc), and the placing or burning of the names of victims murdered in the Northern Ireland conflict on bonfires;
- The placing of affixing items on lampposts, other ‘street furniture’ or elsewhere which are either racist per se (e.g. in recent years in NI in general flags including the Apartheid South Africa flag, the Nazi flag and Confederacy flag); or items (including paramilitary or other flags) that are placed in contexts to intimidate persons from using a facility;

It should be noted that criticism of individual politicians or opposing the policies of a state (including through desecration of symbolic materials) is likely to be protected expression. However, in a context where such practices are targeted at a protected group as a whole, they will constitute hate expression on such grounds.

### **Application of the Councils policy to the above principles**

The overarching legal framework for the Councils policy is ECHR Article 10 on freedom of expression and its limitations, the most relevant provisions are:

#### **Article 10 Freedom of expression**

1. **Everyone has the right to freedom of expression.** This right shall include freedom to hold opinions and to receive and **impart information and ideas** without interference by public authority and regardless of frontiers. ...
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such **formalities, conditions**, restrictions or penalties as are **prescribed by law** and are **necessary** in a democratic society, in the interests of national security, territorial integrity or **public safety**, for the **prevention of disorder or crime**, for the protection of **health** or morals, for the **protection of the reputation or rights of others**, ...

The Council’s policy rightly recognises in the draft Policy that “bonfires are a means of cultural expression within local communities”. Whilst not alluded to in the policy which applies to all bonfires on council land (and encouragement of other landowners to take a similar approach) it appears most of the bonfires on council land are loyalist bonfires. This

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<sup>23</sup> CERD/C/GC/35 General Recommendation 35, (Combating racist hate speech), paragraph 20.

was for example the contention of unionist elected representatives who initially sought to ‘call in’ the policy.<sup>24</sup>

The provisions of Article 10(2) above permit regulation and conditions on bonfires provided that there is clear policy as to what they are (“prescribed by law”) and that the restrictions are proportionate and meet a pressing social need (“necessary in a democratic society”) and that they pursue one of the permitted legitimate aims (e.g. public safety) listed above.

The most relevant limiting ‘legitimate aims’ for the environmental and safety issues the Council raises are ‘public safety’ and ‘health’ and also ‘prevention of crime and disorder’. In relation to duties to tackle hate expression the ‘rights of others’ is the most relevant ground. This ground refers to the *ECHR* rights of others, and other recognised (i.e. in international standards) human rights where there is a compelling reason to include them.

Whilst not privy to the full evidence base or the extent to which many of the above issues have been prevalent specifically in the council area, we are aware of concerning incidence and are of the view in general that the proposed draft Policy is proportionate, necessary and meets a pressing social need.

Whilst the provisions on environmental damage are reasonably clear (and are not our main area of expertise) we do not consider the provision designed to prevent racist and sectarian and related expression as having been drafted clearly enough in the policy to meet the requirements of legal certainty.

The aim of the policy to tackle such expression is not explicit in the actual draft Policy, although it is directly alluded to in the consultation questionnaire the introduction of which states that the Council “recognises the damage that bonfires can cause to good relations within the district, and the potential hate crimes that can occur, particularly the placement of flags and effigies.”

The General Principles in the draft Policy state that the Council commits to:

Develop bonfire management conditions and guidance, which sets out the minimum requirements for a safe, well managed bonfire / event. A proposed bonfire on Council land would only be considered when the event organiser demonstrates that the event will be managed safely and conditions relating to collection / type of materials to be burned, site / public safety, emblems / flags posters etc. will be achieved.

The ‘Actions’ appendix of the draft policy states:

A proposed Bonfire event on Council land would only be considered when the event organiser demonstrates that the event /site will be managed safely and conditions relating to collection/type of materials to be burned, public safety, emblems/flags will be achieved in accordance with Event Management guidelines. Council will take such steps as deemed necessary to regulate the use of its property.

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<sup>24</sup> See <http://www.tyronecourier.uk.com/articles/news/63943/unionist-legal-challenge-to-council-s-new-bonfire-policy/>

This appears to limit the scope of the policy to items to be burned and not those otherwise displayed on or in the vicinity of the bonfire. Although the checklist in the Event Management questionnaire also provided with the consultation is different to the policy alluding to the placing of materials around the site or on the bonfire. The actions section also references conditions that are not set out.

In addition to the inconsistencies the risk with such a formulation is that it is not linked explicitly to expression that is racist, sectarian, homophobic etc and carries both the risk of not capturing some such material (by virtue of it falling outside the above categories) and also of prohibiting materials that are harmless and protected expression within the above categories. In essence the policy may ban all flags, emblems posters and images in the vicinity of the bonfire. As such the policy is susceptible to inviting legal challenge that it is disproportionate. Whilst it could be argued that the Council would apply the policy selectively and only seek to remove material which was problematic, such an approach is unlikely to meet the requirements of legal certainty under human rights law. We therefore recommend that the policy is amended in a manner that focuses on the ‘content’ of unprotected expression and not the category of material it is placed on.

Specifically, we recommend the following changes to the body of the draft policy (and consequential amendments to the action plan:

**Recommendation 1:** amend the policy aim and objectives to include the aim of tackling hate expression, for example:

3.1 Policy Aim: To provide clear guidance to ensure the safe management of bonfires held on Council land **and to tackle hate expression.**

**Recommendation 2:** add a policy objective specifically focusing on duties to tackle racism etc, for example take the following the latter part of which draws on text from FCNM:

3.2 Policy Objectives:

- **To tackle racism, sectarianism and homophobia and other forms of hate expression on protected grounds, and protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity;**

**Recommendation 3:** amend the General Principles the Council commits to ensure that restrictions on materials are based on content and not category; ensure the duties to intervene and remove materials are clearly set out; that the conditions for authorising bonfires are similarly precise, as are the conditions on organisers in relation to the content of expression:

- Where bonfires are on Council land and where communities are not in support of a bonfire taking place and/or the organiser(s) are not adhering to safety or environmental requirements, **or there are materials which in context will constitute expression which is racist, sectarian, homophobic or otherwise promotes discrimination or ethnic division**, the Council shall take steps to manage its property accordingly **and where required remove such materials, where necessary with the support of other agencies.** In doing so Council will undertake a Health and Safety risk assessment with regard to the removal of materials to ensure the protection of staff, contractors and the public;

- Develop bonfire management conditions and guidance, which sets out the minimum requirements for a safe, well managed bonfire / event. A proposed bonfire on Council land would only be considered when the event organiser demonstrates that the event will be managed safely and all reasonable steps will be taken to prevent expression at the bonfire which is racist, sectarian, homophobic or otherwise promotes discrimination or ethnic division.

Finally, the policy should also allude to referral mechanisms to other public authorities who have relevant related duties such as the PSNI, Department for Infrastructure and others. This includes referrals to protect Council staff from any intimidatory materials or behaviour.

### **The equality screening exercise**

There are significant additions that can be made to the Equality Screening exercise that has rightly accompanied the consultation exercise. As alluded to earlier the Screening template lists relevant legislation but limits this to environmental issues and not legislation relevant to tackling racism as set out earlier in this submission.

The potential for positive impacts of the policy are understated in the screening. Most persons adversely affected by bonfires in relation to safety and environmental damage and any accompanying intimidation of residents, will be members of the Protestant/unionist community, where most of the bonfires in question are located. Therefore, greater regulation to address such matters will constitute a likely positive impact on those groups within the section 75 categories of religious belief and political opinion. At present this appears only recognised in the category of Age. Should the policy be amended as suggested to effectively tackle racist, sectarian and homophobic expression linked to bonfires there will be a positive impact on the groups such expression is targeted at.

It should be explicitly recognised also that loyalists, in the category of political opinion, will be the most adversely affected by the policy given most of the regulated bonfires will be loyalist bonfires, which were not previously subject to regulation. We consider it reasonable to categorise this as a 'minor' adverse impact as the policy is proportionate and provides for the continued building of bonfires on council land, only regulating matters that there is a pressing human rights case for regulating, and in general constituting a positive impact.

**September 2018**