

# **Submission from the Committee on the Administration of Justice (CAJ) to the UN Committee on the Elimination of All Forms of Racial Discrimination on the 21-23 Periodic Reports of the UK**

**July 2016**

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

CAJ welcomes the opportunity to submit this report on the UK's compliance with the International Convention on all forms of Racial Discrimination (ICERD). This submission will focus on five issues in relation to Northern Ireland, in summary:

- **Implications of UK exit from the EU the risks of racial profiling within the (UK-Ireland) Common Travel Area**

CAJ is concerned that following the UK decision to leave the EU (in which Ireland remains) there will be increased 'ad hoc' immigration checks on the land border between Northern Ireland and the Republic of Ireland and on internal journeys between Northern Ireland and Great Britain which will target perceived non-British and Irish citizens on the basis of racial profiling.

- **Paramilitary racist violence and intimidation in Northern Ireland**

CAJ is concerned at the involvement of loyalist paramilitaries in far-right racist attacks, at the state response, and the general increase in racist attacks since the EU referendum. We urge that the state party ensure the new *Independent Reporting Commission* set up by the British and Irish governments to monitor paramilitary activity includes racist activity within its remit; further controls to prevent police informants in paramilitary groups being involved in racist attacks and reform of the state response to racist intimidation from housing.

- **Incitement to Hatred legislation in Northern Ireland**

CAJ is concerned that the present legislation in Northern Ireland outlawing incitement to hatred falls short of the requirements of Article 4 ICERD and has led to only one sole conviction since it was enacted in 1987. We urge a review of the legislation by the Northern Ireland Department of Justice.

- **NI Stop and Search Powers ethnic monitoring**

CAJ is concerned that Northern Ireland remains the only place in the UK where ethnic monitoring of stop and search powers is not mandatory.

- **Definition of sectarianism in Northern Ireland**

CAJ is concerned that despite the recognition by the Committee, its Council of Europe counterpart and the NHRI that sectarianism in Northern Ireland be treated as a form of racism, a commitment to define sectarianism in legislation and implement the Committee's previous recommendations, have not been taken forward.

## **Implications of UK exit from the EU the risks of racial profiling within the (UK-Ireland) Common Travel Area (Article 2(a)(c) & 5 and General Recommendation 31)**

1. A referendum was held across the state party, including Northern Ireland, on membership of the European Union on the 23 June 2016. In Northern Ireland 56% of votes were in favour of remaining in the EU with 44% against. In the state party as a whole 'leave' won by 52% to 48% with majorities in England and Wales to leave, and a majority to remain in Scotland. In general CAJ is concerned about the manner in which the campaign was fought, in particular in relation to it fuelling racial prejudice. In our statement immediately after the 'BREXIT' vote, CAJ stated:

*“Alienated by years of austerity and the routine violation of their social and economic rights, the majority in [England and Wales] voted Leave in the context of a campaign that scapegoated immigrants for all their problems. Those voices leading the Leave campaign majored not on democratic or socio-economic deficits in the EU project but rather on nationalistic sentiment, xenophobia and thinly veiled racism. This result will embolden them and place them in the ascendancy.”*

2. The UK government has taken the position that it will implement the decision to at a UK-wide level. In relation to Northern Ireland there is a complex constitutional position shaped by the Belfast/Good Friday Agreement (GFA). The GFA is composed of a bilateral treaty between the UK and Ireland and was also approved by referendum in both jurisdictions on the island of Ireland. The treaty commits both states to principles of non-discrimination in all areas of rights; that sovereign power be exercised with 'rigorous impartiality' and that people in Northern Ireland can identify as Irish or British or both and accordingly hold both British and Irish citizenship.<sup>1</sup> There are a series of cross-jurisdictional arrangements for the exercise of Executive power in specified areas, and Irish citizens have rights of settlement in the UK, with British citizens having similar rights in the Republic of Ireland.
3. An arrangement known as the Common Travel Area (CTA) exists providing for freedom of movement across the UK and Ireland (and Isle of Man and Channel Islands), with British law preventing routine passport controls on such journeys. Save for a decade-long period of suspension around WWII a form of CTA has existed since the partition of Ireland in 1921 and was maintained throughout the recent Northern Ireland conflict. The arrangement is however complex, changing and not copper-

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<sup>1</sup> In Article 1(vi) of the GFA treaty the British and Irish states recognised the birthrights of 'the people of Northern Ireland' to self-identify and be accepted as Irish or British (or both), and 'accordingly' the right to hold both British and Irish citizenship, a right which the GFA provides will "not be affected by any future change in the status of Northern Ireland". The preceding Article 1 (v) also provides that the power of the sovereign government with jurisdiction will be exercised with 'rigorous impartiality' on behalf of all the people in the diversity of their identities and be founded on full respect for economic, social and cultural, civil and political rights as well as 'freedom from discrimination for all citizens'.

fastened by any treaty or the (absent) NI Bill of Rights<sup>2</sup> but rather is left to convention between the UK and Ireland and domestic legislation.<sup>3</sup>

4. The CTA pre-dates and is separate to EU freedom of movement, but its future is far from secure. As recently as 2008 the state party sought to amend its legislation and end the CTA in all but name. The amendment would have permitted full border controls, but this was not the then policy intention given their cost and practical complexity. Rather the plan was to introduce 'ad hoc' checkpoints targeting *non British and Irish citizens* on the border, whilst assurances were simultaneously given that *British and Irish citizens* would still not have to carry passports.
5. This proposal (contained in what became the Borders, Citizenship and Immigration Act 2009) raised concerns about the risks of such practices leading to widespread racial profiling, where persons are singled out for scrutiny on the basis of skin colour or other ethnic indicators. The NHRI – the Northern Ireland Human Rights Commission- intervened in the debate raising concerns that the planned legislation risked racial discrimination in a situation whereby ethnic minorities north and south crossing the border were to be forced to carry passports or face potential arrest and detention. The UK government also planned to supplement the 'ad hoc' controls with similar arrangements on flights and ferries between Northern Ireland and Great Britain, which would constitute internal immigration control within the UK. These concerns were reflected in the upper chamber of the UK Parliament (the House of Lords) which voted down the proposals. Opposition within the primary chamber (House of Commons) in the UK Parliament led to the attempt to legislate being abandoned at the time. There is a significant risk however the proposals will be revisited following the EU referendum.
6. Despite the above defeat in the legislature UK immigration officers (who are part of an agency under the UK Home Office) nevertheless continue selectively question and ask some persons coming to and from Great Britain for passports at Northern Ireland ports and airports, despite having no statutory power to do so. This practice known as 'Operation Gull' been highly controversial, with serious concerns regarding racial profiling. By way of example the Equality Commission for Northern Ireland recently supported a woman in obtaining an out-of-court settlement from the UK Home Office for having been singled out and questioned by an immigration official at a Belfast Airport for 'looking foreign'. The victim, a British citizen who was not even a passenger but was dropping off a relative, maintained she was singled out and subject to questioning as she is black.<sup>4</sup> The latest year for which figures are available records that a concerning almost 500 people who had been accused of being irregular migrants were detained over a 12 month period. Even before the EU referendum and in response to these figures the UK Independence Party (UKIP) has

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<sup>2</sup> The 1998 Belfast/Good Friday Agreement committed to legislation in the UK Parliament to adopt a Bill of Rights, containing rights supplementary to the ECHR, to reflect the particular circumstances of Northern Ireland. Despite repeated calls from UN committees to do so the legislation has still not been introduced.

<sup>3</sup> In the UK Section 1(3) of the Immigration Act 1971 provides that arrival in and departure from the UK from elsewhere in the CTA cannot be subject to (passport) control.

<sup>4</sup> See *Belfast City Airport: Black woman 'stopped for looking foreign'* BBC News Online 20 July 2016.

called for such checks to be increased and for troops to be deployed on the land border, with helicopter support, to assist them.<sup>5</sup>

7. CAJ regards such practices as incompatible with a number of provisions of ICERD. Including the following:

Article 2(a): Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

Article 2(c): Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

General Recommendation 31 paragraph 20: States parties should take the necessary steps to prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person's colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion.

Article 5: In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:....(inter alia) The right to freedom of movement and residence within the border of the State;

8. Whilst the provision on freedom of movement is specifically tied to the borders of a State the complex constitutional context of Northern Ireland in light of the CTA and the mutual recognition rights regarding Irish or British citizenship, as well as the north-south and east-west arrangements under the GFA, provide an arguable case that the right to freedom of movement should be considered as applying across the CTA rather than just the UK State. This issue is also contextualized by the preferential arrangements Irish citizens have historically had in relation to the UK (and vice versa), which has led to Irish citizens having rights to work, settle and vote in the UK, and British citizens having a similar status in Ireland. Most persons in Northern Ireland will continue to be or are entitled to be Irish citizens and hence EU citizens despite the UK's EU exit.
9. In addition to concern about ongoing practice the context of the UK exiting the EU and Ireland remaining in the EU means the future of the CTA is being revisited in a popular and political context whereby there is even greater hostility to migrants. It appears unlikely that the state party will seek to introduce full fixed controls across the land border given both the costs and political implications this would entail. UK Ministers have consistently to date ruled out this option. However, the UK is more likely to either increase current 'ad hoc' checks and may seek to legislate for them.

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<sup>5</sup> See *Northern Ireland ports: Rise in illegal immigrants [sic] intercepted trying to reach other parts of UK* BBC News Online 31 July 2015.

Internal immigration controls between Northern Ireland and Great Britain may also be increased.

10. There is also the question of the extent future arrangements between the UK and an Irish state within the EU will require customs controls. Such controls had been abolished in the context of both states being EU members, but will likely be reintroduced unless a customs arrangement can be reached between the UK and EU. Whilst this in itself may not engage the Convention, it should be noted that customs officers and immigration officers are now part of the same agency, the UK Border Force. Even if this agency is therefore deployed on the border officially for customs purposes there is a significant risk of 'mission creep', given its immigration role.
11. In light of the above context CAJ is concerned that existing practices of racial profiling in informal immigration enforcement within the Common Travel Area will be exacerbated, increased and placed on a statutory footing.

**The Committee may wish to seek assurances from the UK that it will not legislate to permit selective immigration controls within the Common Travel Area, and will take all steps to curtail racial profiling including the discontinuing of current such operations.**

### **Paramilitary racist violence and intimidation in Northern Ireland (Articles 2, 4, 5 & 6, and General Recommendation 15)**

12. CAJ echoes the comments of the Northern Ireland Council for Ethnic Minorities (NICEM) submission to the Committee that "*Disturbingly, there is a paramilitary component to racist hate crime in NI, with both the PSNI [Police Service of Northern Ireland] and the [UK Parliament] Northern Ireland Affairs Committee acknowledging 'significant loyalist\* paramilitary involvement in racist violence'*".<sup>6</sup>
13. Article 5 of the Convention, which also provides for rights without discrimination in relation to housing and residence covers "*The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.*" Article 2 commits state parties to bring to an end by all appropriate means racial discrimination by any organisation, Article 4 outlaws incitement to such discrimination, Article 6 provides for effective protection and remedies, and General Recommendation 15 notes "*Because threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response.*"<sup>7</sup>

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<sup>6</sup> NICEM March 2016 submission to CERD paragraph 10.2 citing Committee for Justice, 'Report on the Committee's Inquiry in the Criminal Justice Services Available to Witnesses and Victims of Crime in Northern Ireland' (2012), para.683. \*Loyalist refers to loyalty to the British Crown. The largest groups are the Ulster Volunteer Force (UVF) and Ulster Defence Association (UDA) both of which remain proscribed organisations under the Terrorism Act 2000.

<sup>7</sup> CERD General Recommendation 15, paragraph 2.

14. The NICEM submission to the Committee also notes that there has been a significant level of increase in racist hate crime in recent years. Whilst the main loyalist paramilitary groups have been officially on ceasefire since 1994 involvement in activity including organized racist violence since this time has been well documented. As part of the outworking of the 2015 *Fresh Start Agreement* involving the UK and Irish governments and parties in the Northern Ireland Executive, the two governments have committed to establishing an *Independent Reporting Commission* involving persons of international standing to monitor and report on ongoing paramilitary activity in Northern Ireland.<sup>8</sup> In 2016 the UK Parliament legislated to establish this Commission and has committed to progressing its commencement with the Irish government.<sup>9</sup>
15. The new Commission is not the first time there have been official bodies established to monitor paramilitary activity in Northern Ireland. A body known as the Independent Monitoring Commission (IMC) ran from 2004-2011. A significant criticism of previous reports is the manner in which they have downplayed paramilitary involvement in racist (including sectarian) violence. Racist attacks have been an increasingly prominent issue since the 1998 Belfast/Good Friday Agreement, with Belfast notoriously being dubbed the ‘Race Hate Capital of Europe’ in 2004, following documented Loyalist involvement in racist violence.<sup>10</sup> Despite this the issue has at best been downplayed in assessments of paramilitary activity, leading to charges of an institutional racist approach. A report published by NICEM in 2006, – *The Next Stephen Lawrence*– concluded:

It is astounding, for example, that reports by the Independent Monitoring Commission (IMC), which is intended to monitor violence by loyalist and republican groups, have almost completely ignored loyalist paramilitary involvement in racist violence. For example, their most recent *Tenth Report* (IMC 2006: 17-18, 36) at least acknowledges an issue with the UDA and UVF "targeting ethnic minorities" but this is in a context in which racist violence perpetrated by loyalists has become routine. It follows a mountain of evidence – including that of the [Police Service of Northern Ireland-PSNI] and the [Northern Ireland Affairs Committee] – indicating Loyalist paramilitary involvement in racist violence. Given that the IMC comment extensively on other aspects of loyalist and republican involvement in criminality, it is far from clear – and certainly unacceptable – that racist crime is almost totally ignored.<sup>11</sup>

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<sup>8</sup> ‘*A Fresh Start: The Stormont Agreement And Implementation Plan*’, Northern Ireland Office, 17 November 2015. Paragraph 5.1 provides “A four member international body including persons of international standing will be established by the UK and Irish Governments. The UK Government and the Irish Government will nominate one member each and the [Northern Ireland] Executive shall nominate two members. The body will: report annually on progress towards ending continuing paramilitary activity connected with NI (or on such further occasions as required); report on the implementation of the relevant measures of the three administrations; and consult the UK Government and relevant law enforcement agencies, the Irish Government and relevant law enforcement agencies and, in Northern Ireland, the Executive, PSNI, statutory agencies, local councils, communities and civic society organisations.”

<sup>9</sup> Northern Ireland (Stormont Agreement and Implementation Plan) Act 2016, sections 1-5.

<sup>10</sup> See for example Rolston, Bill ‘Legacy of intolerance: racism and unionism in south Belfast’ Institute of Race Relations, 10 February 2004.

<sup>11</sup> McVeigh, Robbie ‘The Next Stephen Lawrence? Racist Violence and Criminal Justice in Northern Ireland’ (NICEM, 2006) Paragraph 4.11.

16. Some Northern Ireland oversight bodies including the Criminal Justice Inspection (CJINI) and the Northern Ireland Human Rights Commission (NIHRC) in their reports have named the issue. The Human Rights Commission its 2011 parallel report to the Committee cites the 2010 CJINI report into hate crimes in Northern Ireland and the ‘critical incidents’ it records in that 12 month period of *“the intimidation of Polish and Eastern European residents in the ‘Village’ area of South Belfast following the behaviour of football supporters attending the Northern Ireland v Poland football match in Belfast; a sectarian murder in Coleraine; and the intimidation of Roma families in South Belfast and the exodus of some 100 Roma back to Romania.”*<sup>12</sup>
17. The Human Rights Commission raised the *“context of the involvement of illegal paramilitary groups [in racist violence], with evidence having emerged that orchestrated racist attacks have involved elements of Loyalist paramilitarism.”* The Human Rights Commission makes reference to paragraphs 3.32-5 of the Eighth Independent Monitoring Commission report, published by the state party stating that an *“important step would be for loyalist paramilitaries, including the UDA [Ulster Defence Association], to stop targeting (Irish) nationalists and members of ethnic minorities”*, but the Human Rights Commission concludes: *“It is a matter of concern that this context is only intermittently referred to in official policy and strategy.”*<sup>13</sup> Since that time the links between elements of loyalism and other elements of the British far-right became even more apparent and visible during the flags protests that initiated in December 2012.<sup>14</sup> The Police Service of Northern Ireland (PSNI) in 2014 went as far to refer to racist attacks, which it attributed to the Loyalist Ulster Volunteer Force (UVF), as ‘ethnic cleansing’.<sup>15</sup>
18. Following two murders of Republicans in 2015, which led to allegations of involvement by the largest Republican armed group (the IRA) the UK government commissioned a panel to produce a new report assessing the extent of ongoing activity by groups officially on ceasefire. This report *Paramilitary Groups in Northern Ireland* was published in October 2015. Remarkably despite the above context the report overlooks any reference to racism. Paragraph 8 of the report lists a range of other areas of crime which are attributed to members, including some senior members, of the UDA as *“drugs dealing, robbery, extortion and the distribution of counterfeit and contraband goods.”* Reference is also made to *paramilitary-style assaults, street disorder and violent protests*. Paragraph 5 in relation to the UVF states that members, including senior members, are ‘extensively involved’ in organised crime including *‘drug-dealing, extortion and smuggling’*. Despite these lists

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<sup>12</sup> NIHRC, Submission to the Committee on the Elimination of Racial Discrimination, Parallel Report on the 18th and 19th Periodic Reports of the United Kingdom under the ICERD (2011) paragraph 83 citing: Criminal Justice Inspection (2010) *Hate Crime: A Follow-up Inspection of the Management of Hate Crime by the Criminal Justice System in Northern Ireland*, page 3.

<sup>13</sup> NIHRC, as above, paragraph 84.

<sup>14</sup> This followed a decision by Belfast City Council to cease the hitherto practice of flying the UK flag (the Union Flag) from its headquarters 365 days a year and the adoption of a policy whereby the flag would only be flown on a number of designated days.

<sup>15</sup> See ‘UVF ‘behind racist attacks in south and east Belfast’: Loyalist paramilitary group behind attacks says PSNI’ *Belfast Telegraph* 3 April 2014.

of other areas of crime there is no reference to racist violence anywhere in the assessment report.<sup>16</sup>

19. The report was drafted by the Police Service of Northern Ireland (PSNI) and the UK internal Security Service (MI5). Since 2007 MI5 have officially had primacy for covert policing of republicans. This role does not extend to loyalists (as only the former and not the latter are seen as a threat to 'national security'). The section of the report on loyalist activity can be reasonably be presumed as largely having been drafted by the PSNI. The omission in relation to racist activity was quickly picked up by the Northern Ireland Policing Board (a statutory accountability body for the PSNI set up as a result of the peace settlement) at its meeting following the report (November 2015) the following question on racist attacks was tabled:

Given previous police assessments linking loyalist paramilitaries to racist attacks including the assessment delivered to the Board in April 2014 of UVF involvement in orchestrating racist attacks in south and east Belfast that the [Assistant Chief Constable] considered constituted a 'deeply unpleasant taste of a bit of ethnic cleansing' and had contributed to a 70% rise in hate crime in the city, could the Chief Constable explain why the joint PSNI/MI5 drafted report 'Paramilitary Groups in Northern Ireland' of the 19 October 2015, whilst referencing other areas of alleged criminality, makes no reference or no assessment whatsoever as regards paramilitary involvement in racist violence and intimidation?<sup>17</sup>

20. The head of the police service (PSNI), the Chief Constable, responded by assuring the Board that hate crime was a priority for the PSNI, and that the report had made general reference to paramilitary violence and intimidation.
21. In light of the context of previous assessments at best downplaying the issues of racist violence there is a risk that the new Independent Reporting Commission may also do so. A recent action plan by the Northern Ireland Executive into tackling paramilitary activity also does not name and single out tackling racist activity specifically.<sup>18</sup>

**The Committee may wish to seek assurances from the state party that the Independent Reporting Commission will include a strand within its reports on the extent of paramilitary involvement in racist violence, and that appropriate follow up action will be taken.**

#### **Paramilitary agents/informants and racist violence**

22. A long term area of concern in Northern Ireland, particularly during the conflict, has been the role of police and other security service informants within paramilitary organisations, and the rules governing their conduct to restrict involvement in criminal activity. It is now known that during the conflict informants (now officially known as Covert Human Intelligence Sources or 'CHIS') were permitted, facilitated

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<sup>16</sup> 'Paramilitary Groups in Northern Ireland: An assessment commissioned by the Secretary of State for Northern Ireland on the structure, role and purpose of paramilitary groups focusing on those which declared ceasefires in order to support and facilitate the political process' (Northern Ireland Office: 2015).

<sup>17</sup> NIPB Questions to the Chief Constable, Roisin McGlone, Racist Attacks, November 2015, page 59.

<sup>18</sup> 'Tackling Paramilitary Activity, Criminality and Organised Crime' NI Executive Action Plan, July 2016.

and even directed to take part in serious crime, including killings.<sup>19</sup> Significant steps were taken regarding policing reform as part of the peace settlement, but some accountability measures over covert policing were not implemented.<sup>20</sup> Following an investigation by the Police Ombudsman (an independent official complaints body) which uncovered practices of collusion between the police Special Branch and loyalist paramilitaries, the PSNI instigated a 'major review' of informants in 2003 which resulted in around a quarter of all informants being let go, half of them as they were deemed "too deeply involved in criminal activity".<sup>21</sup> The review references a system of Covert Deployment Authorisations, whereby a senior police officer would have to authorise the involvement of an informant in any criminal offence over and above membership or support of a paramilitary organisation.<sup>22</sup>

23. There remains controversy as to what types of criminal offences informants are allowed to participate in, and an inconsistent approach by the PSNI in clarifying policy. For example the PSNI have denied that they would ever tolerate drugs dealing in exchange for information.<sup>23</sup> However, following the PSNI themselves raising concerns that loyalist paramilitaries had been involved in violent racist attacks, members of the Policing Board sought an assurance that Covert Deployment Authorisations were not granted to allow informants to participate in racist incidents. The PSNI limited its response to stating it would not comment in relation to covert deployments.<sup>24</sup>

**The Committee may wish to ask the state party to issue binding publicly-available guidance to assure that authorisations will not be issued to allow informants to participate in racist (including sectarian) attacks or other actions contrary to the Convention.**

#### **Paramilitary intimidation from housing**

24. A further area of ongoing paramilitary activity is that of violent intimidation from housing. In relation to the official response to this we are concerned at both the obfuscation of data as to which paramilitary groups are responsible for such intimidation, and the potential of processes adopted to deal with such intimidation not meeting the requirements of the Convention.

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<sup>19</sup> For detailed account see CAJ *'The Policing You Don't See'* December 2012.

<sup>20</sup> The report of the independent commission on police reform established as part of the Belfast/Good Friday Agreement (the Patten Commission) recommended in its report that ECHR-compliant Codes of Practice on all aspects of policing, including covert law enforcement, be adopted and that the legal and ethical guidelines governing 'all aspects of police work...including... the handling of informants' be publicly available. To date no such document has setting out the ethical boundaries of informant conduct has been published. See 'A New Beginning: Policing in Northern Ireland'. The Report of the Independent Commission on Policing in Northern Ireland' (Patten Report) September 1999, paragraphs 4.8 and 6.38.

<sup>21</sup> 'Statement by the Police Ombudsman for Northern Ireland into her investigation into the circumstances surrounding the death of Raymond McCord Jr and related matters' (Operation Ballast Report), Nuala O'Loan, Police Ombudsman for Northern Ireland, 22nd January 2007, Appendix A, paras 8-10.

<sup>22</sup> Operation Ballast Report, as above, paras 14-15.

<sup>23</sup> 'Poots says police assure 'no untouchables' over drugs' BBC News Online, 2 July 2013.

<sup>24</sup> Northern Ireland Policing Board, Questions to Chief Constable, Racist Crime (Pat Sheehan), September 2014.

25. In relation to data the PSNI were not able to answer the following question put to them in by the Policing Board earlier in 2016: *“To ask the Chief Constable to give a breakdown, in terms of area and organisation responsible, of intimidation which results in people having to move out of their home. Could he also tell us the process of verification in such instances?”*<sup>25</sup> The PSNI responds that the issue was a ‘complex’ matter, they had sought further clarity regarding the question and a response would be ‘worked on’ and provided as soon as possible.
26. The Northern Ireland Policing Board Annual Human Rights Report cites PSNI statistics recording that 1,262 certificates were issued by the PSNI Chief Constable in respect of persons intimidated from their homes between the time of the Belfast/Good Friday Agreement (1998) and 2015. However, these figures only refer to owner-occupiers, and only those issued with certificates for a scheme known as SPED (Special Purchase of Evacuated Dwellings).<sup>26</sup> Some annual SPED figures were given to the Policing Board in 2014, but despite conducting the assessment and issuing the certificates the PSNI was unable to give statistics on which paramilitary organisation was considered responsible.<sup>27</sup> This was further probed by the Policing Board’s Performance Committee in February 2015, which noted this was not an accurate reflection of people having to leave homes, as it did not reflect those who had left rented property (both state and private sector), those who had not applied for a SPED certificate or situations where one family member, such as a child or young person, moves out due to threats. The Performance Committee sought information to be gathered by the PSNI to ‘more accurately reflect the extent of paramilitary intimidation’ in relation to housing. The PSNI responded that although there may be liaison between the PSNI and the Housing Executive (the statutory housing authority) locally they did not collate statistics, and whilst they could gather more data the PSNI asserted that it was ‘not clear what policing purpose this would serve.’ They also indicated that the Housing Executive may ask for PSNI corroboration on particular cases but this may also be done through a ‘mediation body’, or both.<sup>28</sup>
27. Whilst the PSNI figures for 1,262 Chief Constable SPED certificates since 1998 equates to an average of around 70 a year, the numbers given to the Policing Board for 2009-2014 average at around 29 SPED certificates a year, with the numbers reducing annually over this period. However, this is clearly a small fraction of the actual number of cases where persons are intimidated from their homes. Statistics released under Freedom of Information to *The Detail* investigative journalist website from the Housing Executive document 1,842 cases of persons made homeless through intimidation over a three year period between 2012-2015. This means an average of 600 a year, or almost 2 a day among a small population of around 1.7 million persons. 70% of these cases were classed as ‘paramilitary’ intimidation. In close to 900 of the cases of paramilitary intimidation the Housing Executive “was

<sup>25</sup> NIPB Questions to Chief Constable, Intimidation which results in people having to remove [sic] out of their home (Pat Sheehan), question published 3 March 2016 at:

<sup>26</sup> NIPB Human Rights Annual Report, 2015, p171.

<sup>27</sup> NIPB Questions to Chief Constable, Paramilitary Style Attacks (Performance Committee), December 2014, p29.

<sup>28</sup> NIPB Questions to the Chief Constable, Extent of Paramilitary Intimidation, February 2015, p7-8.

obliged to seek new accommodation for individuals deemed to be at risk of death or serious injury if they returned to their homes.” The Housing Executive would not provide data on the paramilitary organisation responsible. Data was provided on the geographical location where the cases had been reported. The geographical data overall led the *The Detail* to conclude ‘most cases were reported in areas that are mainly unionist or loyalist,’ although it did state areas where republican paramilitaries may be active also figure among the statistics. The statistics seemed to separate racist, sectarian and homophobic incidents from those attributed to paramilitaries. Clearly as these categories are not mutually exclusive it is unclear why the statistics are presented in this way as the question of ‘motive/victim’ on the one hand and suspected ‘perpetrator group’ are separate questions.<sup>29</sup> It is therefore unclear the extent to which proportion of paramilitary attacks are motivated by racism.

28. Risk assessments of death or serious injury from paramilitaries are surely assessments made by the PSNI and in any case would likely be reported to the PSNI. Clearly in making such an assessment that paramilitaries were involved there must be a level of knowledge in the PSNI as to which paramilitary organisation has thought to be involved. Given the need to map paramilitary activity in order to effectively counter it, it therefore merits explanation why statistics are not apparently even being gathered.
29. The process involved to verify claims can involve an intermediary ‘verifying’ with the perpetrator organisation on behalf of a public authority that the threat is credible and then the public authority general moving the victim and not taking action against the perpetrator. Whilst understanding the primary duty under ECHR Article 2 is to take all reasonable steps to preserve life it is unclear why, particularly in times of relative peace, further action cannot be taken against paramilitary groups involved in racist intimidation.

**The Committee may wish to recommend that the state party properly record and counter racist intimidation from housing by paramilitaries.**

#### **Incitement to hatred legislation in Northern Ireland (Article 4)**

30. Despite widespread and high profile problems with incitement to racial hatred in Northern Ireland it appears there has only been one conviction under incitement to hatred legislation here since its enactment in 1987. In part due to the high threshold the law and its interpretation sets. During the reporting period there have been record high figures for racist hate crime, an increase in prejudice against minority ethnic groups, and a number of high profile incidents including statements by senior figures in the establishment.<sup>30</sup>

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<sup>29</sup> McCaffery, Stephen ‘Paramilitaries in Northern Ireland forcing hundreds from their homes each year’ 25 June 2015.

<sup>30</sup> The NICEM submission to the Committee (paragraphs 10.1-4) cites police figures and the Northern Ireland Life and Times surveys in 2010 to 2014, which among other matters indicate the number of persons who

31. Article 4 of the Convention provides that:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

32. 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”, and within the Council of Europe human rights system to Article 6(2) of the Framework Convention for the Protection of National Minorities provides that state parties will “undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.”

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would accept an ‘Eastern European’ person as part of their family having dropped from just over ¾ of persons to just under ½ of the population. A similar question relating to Muslims saw a drop from just over ½ to 34% of persons. This NICEM partially attribute to “inflammatory political rhetoric around ethnic minorities.” In one incident Northern Ireland’s then First Minister, Peter Robinson MLA, had said he would only trust Muslims ‘to go down to the shop for me, to give me the right change ...’. The First Minister made his remarks in an interview with a newspaper in the context of defending evangelical Pastor James McConnell for a widely publicised address at a Belfast Church in which he stated ‘Islam is heathen, Islam is satanic, Islam is a doctrine spawned in hell’ and warned of the ‘new evil’ of ‘cells of Muslims.’ The First Minister complained Pastor McConnell had been demonised and stated ‘I’ll be quite honest, I wouldn’t trust them [Muslims] in terms of those who have been involved in terrorist activities. I wouldn’t trust them if they are devoted to Sharia Law. I wouldn’t trust them for spiritual guidance’ but did say Muslims were trustworthy in matters like going to the shops for him. Pastor McConnell was prosecuted for his remarks, not under the incitement to hatred provisions but under other legislation outlawing malicious communications. He was acquitted. No charges were brought against the First Minister.

33. The UK lodged an ‘interpretive declaration’ in relation to Article 4 of the Convention stating in essence it will only implement the prohibition insofar it is compatible with freedom of expression. Such a concern is unfounded and there has been considerable work in recent years to clarify the ‘threshold’ question regarding the factors and contexts of where protected freedom of expression ends and where unprotected racist expression begins. Most notably this includes the UN Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence proposed a six-part threshold test for defining incitement to hatred in relation to application of Article 20 of the ICCPR. This involved determinations of assessing the severity and harm advocated of the speech in relation to matters which should face criminal sanction.<sup>31</sup> The Committee’s previous report on the UK states that:

The Committee accordingly regrets that the State party continues to maintain its restrictive interpretation of the provisions of article 4 of the Convention which the Committee has determined as being of a mandatory character in its General Recommendation 15 (1993) on article 4 of the Convention, which, inter alia, deals with organized violence based on ethnic origin (articles 2, 4 and 6).<sup>32</sup>

34. In Northern Ireland Part III of the Public Order (Northern Ireland) Order 1987 prohibits incitement to hatred. 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 having been added in 2004). 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.
35. However, as alluded to above it is believed that there has only been one single conviction under this legislation since its enactment. This conviction came in late 2015 and related to racist messages placed on a loyalist bonfire.<sup>33</sup> Statistical data released by the police under Freedom of Information indicates there have only been a small number of arrests and charges under the legislation since its inception.
36. In 2014 the office of the Attorney General for Northern Ireland issued statutory human rights guidance to prosecutors.<sup>34</sup> This guidance, which is legally binding, references the UN Rabat Plan of Action and, at paragraph 31, includes the six-stage threshold test for incitement to hatred within the guidance. This provides therefore

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<sup>31</sup> *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence* see also Article XIX Policy Brief Prohibiting incitement to discrimination hostility or violence, December 2012.

<sup>32</sup> CERD Concluding observations on UK, 2011 CERD/C/GBR/CO/18-20, Paragraph 11.

<sup>33</sup> See ‘X convicted over racist slogan on loyalist bonfire’ BBC News Online 8 September 2015.

<sup>34</sup> Guidance by the Attorney General for Northern Ireland pursuant to Section 8 of the Justice (Northern Ireland) Act 2004 No. 4 HUMAN RIGHTS GUIDANCE FOR THE PUBLIC PROSECUTION SERVICE Laid before the Northern Ireland Assembly on 21 March 2014.

a framework the PPS should have regard to when considering charges under Part III of the 1987 Order.

37. Despite these developments the Northern Ireland legislation and its interpretation continue to set a relatively high threshold for charges for advocacy of hatred and, despite the ongoing manifestations of racist violence and expression in the jurisdiction, is unlikely to prove effective. In September 2015 the Chief Constable of the Police Service of Northern Ireland (PSNI) told the Northern Ireland Policing Board that the PSNI wished for a review of the legislation with a view to the legal regime being simplified. The Chief Constable urged the 'legislative authority in Northern Ireland to consider this matter urgently.'<sup>35</sup>

**The Committee may wish to ask the NI Department of Justice to conduct a review of the Part III of the Public Order (Northern Ireland) Order 1987, with a view to providing a stronger legislative base to tackle advocacy of hatred and compliance with Article 4.**

### **Northern Ireland Stop and Search powers and ethnic monitoring (Articles 2 & 5, General Recommendation 31)**

38. CAJ would like to draw attention to Northern Ireland being the only part of the UK which does not have mandatory ethnic monitoring of stop and search powers as part of its legal framework. The absence of this key tool for combating discrimination is particularly problematic in a context where by specific 'emergency' type stop and question/search powers still exist in Northern Ireland that do not require the usual threshold of individual reasonable suspicion to be met in their exercise.<sup>36</sup>
39. The Committee in its previous Concluding Observations on the UK held:

In light of General Recommendation 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee urges the State party to review the impact of "stop and search" powers on ethnic minority groups under various pieces of legislation in the State party. It recommends that the **State party ensure that all stops are properly recorded**, whether or not leading to searches, and **that a copy of the record is provided to the person concerned for all such incidents** in order to safeguard the rights of the people subject to these laws and to check possible abuse. The Committee requests the State party to provide in its next **periodic report detailed statistical data disaggregated by ethnicity and community origin on the use of stop and search powers** and its effectiveness in crime prevention [emphasis added].

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<sup>35</sup> Northern Ireland Policing Board, Questions to the Chief Constable, 3 September 2015. 'The placing on bonfires of election posters, effigies and other images of public figures (Pat Sheehan)'

<sup>36</sup> Under the Justice and Security (Northern Ireland) Act 2007, which is drafted explicitly as a power to search for munitions and transmitters, and to question mainly over identity and movements. Whilst following the case of *Gillan & Quinton v UK*, the power was amended by the Protection of Freedoms Act 2012 to introduce an additional requirement that a senior police officer issue a general authorisation, which is both time and geographically bound, to allow their use, it has subsequently emerged in the courts that there had in fact been continuous authorisations in place for the whole of Northern Ireland since the requirement was introduced (In the matter of an application by Stephen Ramsey for judicial review (Summary of Judgment), 2014 NIQB 59).

40. Unlike other stop and search powers those under the Justice and Security Act (Northern Ireland) 2007 were operated without a regulatory 'Code of Practice' for five years. Following CAJ research on the issue a Code of Practice was consulted upon and ultimately adopted through an urgent procedure in May 2013 after the courts found that exercising the powers in its absence was not compatible with the ECHR.<sup>37</sup> Uniquely the Code of Practice for the exercise of powers under this legislation in Northern Ireland does not have binding ethnic monitoring requirements which oblige record keeping of self identified or perceived ethnic background. This contrasts with every Code of Practice in Great Britain which contains such binding requirements.<sup>38</sup> This is despite the context of such monitoring being commonplace in other spheres in Northern Ireland such as employment and service delivery. Whilst the main point of resistance to this is likely to relate to the monitoring of the two largest ethnic groups,<sup>39</sup> the lack of provision impacts on all ethnic groups. The lack of binding ethnic monitoring requirements also extends to stop and search under the Terrorism Act 2000 in Northern Ireland- but not the same legislation in Great Britain.<sup>40</sup>
41. The following recommendation made by the Northern Ireland Policing Board in a thematic review of stop and search in 2013 remains unimplemented:
- [The Police Service for Northern Ireland] should as soon as reasonably practicable but in any event within 3 months ... consider how to include within its recording form the community background of all persons stopped and searched under sections 43, 43A or 47A of the Terrorism Act 2000 and all persons stopped and searched or questioned under section 21 and 24 of the Justice and Security (Northern Ireland) Act 2007.<sup>41</sup>
42. In March 2015 a question to the PSNI Chief Constable from the Northern Ireland Policing Board confirmed that there was no legislation preventing the PSNI from monitoring community background.<sup>42</sup> Despite a number of commitments to take the recommendation forward, the codes of practice have still not been amended. A

<sup>37</sup> In the matter of an application by Fox, McNulty and Canning for judicial review [2013] NICA 19,

<sup>38</sup> The TACT Code of Practice in Great Britain and the PACE legislation in Great Britain both contain recording provisions which ensure "[A] note of the self defined ethnicity, and, if different, the ethnicity as perceived by the officer making the search, of the person searched or the person in charge of the vehicle searched (as the case may be)..." see 'Terrorism Act 2000, Code of Practice (England, Wales and Scotland) for the Authorisation and Exercise of Stop and Search Powers relating to Section 47A of Schedule 6B to the Terrorism Act 2000' Home Office, 2011, paragraph 5.4.1; 'Police and Criminal Evidence Act 1984 Code A Code of Practice for Exercise by Police Officers of Statutory Powers of Stop and Search' Home Office 2010, paragraph 4.3(a).

<sup>39</sup> Usually identified through the use of Protestant or Catholic religion as an ethnic indicator or the 'political opinion' categories of unionist or nationalist.

<sup>40</sup> Terrorism Act 2000 'no suspicion' stop and search powers were repealed due to incompatibility with the ECHR in the *Gillian and Quinton v the UK* case, but have rarely been used with the Justice and Security NI Act 2007 powers being preferred.

<sup>41</sup> 'Report of the Northern Ireland Policing Board: Human Rights Thematic Review on the use of police powers to stop and search and stop and question under the Terrorism Act 2000 and the Justice and Security (NI) Act 2007' 15 October 2013.

<sup>42</sup> Policing Board, Questions to the Chief Constable, Monitoring Stop and Search by Community Background (Caitríona Ruane), Question to Chief Constable, March 2015.

three month pilot of ethnic monitoring in one police area did commence in December 2015 and is due to be evaluated.<sup>43</sup>

**The Committee may wish to ask when ethnic monitoring will be introduced to all stop and search powers in Northern Ireland.**

### **Defining sectarianism in law (Articles 2 & 4)**

43. It is welcome that in previous reports both the Committee and the Council of Europe Advisory Committee on the Framework Convention for National Minorities 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.<sup>44</sup> This has already been very helpful to civil society in advocating that responses to sectarianism are grounded in international standards and in particular the framework provided for by the Convention.
44. The Committee's previous Concluding Observations invited the state party to examine the *"legislative and policy framework for dealing with the situation in Northern Ireland could not benefit by being underpinned by the standards, duties and actions prescribed by ICERD and the Durban Declaration and Programme of Action on inter-sectionality between ethnic origin, religion and other forms of discrimination"* and inform the Committee of this in the current periodic report.<sup>45</sup>
45. The implementation of this recommendation by the Committee remains outstanding. During the reporting period the Northern Ireland Executive adopted an anti-sectarianism / community relations strategy, entitled 'Together: Building a United Community' which contained a commitment to *defining* sectarianism in Northern Ireland law. 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.<sup>46</sup>

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<sup>43</sup> Northern Ireland Policing Board, Human Rights Annual Report 2015, page 53.

<sup>44</sup> Following the UN Committee on the Elimination of Racial Discrimination (2011) and Council of Europe (2011). As CERD suggests: 'Sectarian discrimination in Northern Ireland and physical attacks against religious minorities and their places of worship attract the provisions of ICERD in the context of "inter-sectionality" between religion and racial discrimination; as the Advisory Committee suggests: '[treating] sectarianism 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'.

<sup>45</sup> CERD Concluding observations on UK, 2011 CERD/C/GBR/CO/18-20, paragraph 20.

<sup>46</sup> Section 37 of the Justice (Northern Ireland) Act 2011 prohibits chanting which is of a 'sectarian' nature at major sporting occasions, despite discussion during its legislative passage ultimately neither the Justice Act nor other legislation provide a definition of sectarianism. The PSNI, in its published 'hate crimes definitions' states *"The term 'sectarian', whilst not clearly defined, is a term almost exclusively used in Northern Ireland to describe incidents of bigoted dislike or hatred of members of a different religious or political group. It is broadly accepted that within the Northern Ireland context an individual or group must be perceived to be Catholic or Protestant, Nationalist or Unionist, or Loyalist or Republican."* The Together Strategy itself alludes to sectarianism as *"threatening, abusive or insulting behaviour or attitudes towards a person by reason of that person's religious belief or political opinion; or to an individual as a member of such a group."*

46. 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, has defined racism in legislation as follows:

“racism” shall mean the belief that a ground such as race,<sup>47</sup> 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.<sup>48</sup>

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

“Sectarianism” shall mean the belief that a ground such as religion, political opinion, language, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.

47. The Institute of Conflict Research (Northern Ireland) has also developed the following definition of sectarianism in Northern Ireland:

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.<sup>49</sup>

**The Committee may wish to seek implementation by the state party of its previous recommendation and urge the adoption of a definition of sectarianism in Northern Ireland in legislation and that draws on and is compatible with ICERD.**

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<sup>47</sup> The recommendation elaborates in relation to the use of the term race: “*Since all human beings belong to the same species, ECRI rejects theories based on the existence of different “races”. However, in this Recommendation ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to “another race” are not excluded from the protection provided for by the legislation.*”

<sup>48</sup> 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.

<sup>49</sup> Jarman, N. 2012 ‘Defining Sectarianism and Sectarian Hate Crime’ Belfast: ICR, page 10.