



BrexitLawNI

Policy Report:

Brexit, Xenophobia and
Racism in Northern Ireland

brexitlawni.org



BrexitLawNI

Brexit and Northern Ireland: The Constitutional, Conflict Transformation, Human Rights and Equality Consequences.

About BrexitLawNI:

BrexitLawNI is a collaborative ESRC-funded research project between the Law Schools of Queen's University Belfast and Ulster University, and the region's leading human rights organisation, the Committee on the Administration of Justice (CAJ). Our project examines the constitutional, conflict transformation, human rights and equality consequences of Brexit.

Northern Ireland (NI) (along with Scotland) voted to remain in the European Union (EU); it is the region of the United Kingdom (UK) most likely to be negatively affected by the decision to leave the EU. Many complex questions have been arising, with significant legal and constitutional consequences that demand considered reflection. This initiative has aimed to meet this need by disentangling the legal elements of Brexit with regard to Northern Ireland, and presenting and communicating the related implications for policy and practice in user-friendly formats.

The main outputs for this project are the policy reports covering the 6 themes of the project: the peace process; north-south relations; border controls and free movement in and between Northern Ireland, the Republic of Ireland and Britain; xenophobia and racism in Northern Ireland; the impact on socio-economic rights; and wider human rights and equality issues.

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Executive Summary

'Individual' Racism and Xenophobia Directed at Migrants and Perceived Migrants

Notwithstanding the material factors underpinning support for a Leave vote, the main mobilisation behind Brexit was driven by a section of the UK media and political establishment with a significant campaigning focus on migration control. The voting dynamics in NI were complicated. BrexitLawNI heard views within unionism that there had been a significant turnout for Leave in areas that previously had low electoral participation. That said, there were different opinions as to whether migration control or other issues were the main driving factor.

A mobilisation focused on migration control has specific implications for NI. Whilst attitudinal racism and anti-migrant racism in particular have been on the rise across Europe, NI has for some years had a particular problem with the well-documented involvement of elements of loyalist paramilitary groups in racist intimidation and attacks.¹ Despite this, official initiatives to monitor and tackle paramilitarism to date have tended to overlook or downplay this issue. In addition, an approach of 'tolerance' towards sectarian expression has had crossover implications for the way other forms of racist expression are dealt with.

Individuals providing testimony to BrexitLawNI indicated that their experiences of racist abuse and intimidation have been exacerbated in the context of Brexit. We have encountered qualitative examples of racist abuse and intimidation that are directly linked to the referendum - directed at migrants regardless of whether they were in fact from the EU. BrexitLawNI also heard testimony that migrants are more reluctant to report racist abuse following the referendum, given a perception that anti-migrant sentiment, which had hitherto been considered as the preserve of a few, had now become quite widespread.

There is significantly more that could be done by public authorities, including (but not limited to) criminal justice bodies, to tackle racism and sectarianism effectively. Whilst not specifically examined by the research, mention should be made of the significant examples of anti-racism work across all communities.

¹ See, for example, Angelique Chrisafis, 'Racist war of the loyalist street gangs' *The Guardian* (10 January 2004) <<https://www.theguardian.com/uk/2004/jan/10/northernireland.race>>; David Lister, 'Loyalists links to Ulster's rise in race crimes' *The Times* (10 January 2004) <<https://www.thetimes.co.uk/article/loyalists-links-to-ulsters-rise-in-race-crimes-sjvfzvjgwhv>>; Brendan Hughes, 'Paramilitary and racist displays put on Antrim loyalist bonfire' *The Irish News* (11 July 2016) <<http://www.irishnews.com/news/2016/07/11/news/paramilitary-and-racist-displays-put-on-loyalist-bonfire-599868/>>; Anonymous, 'UVF "behind racist attacks in south and east Belfast": Loyalist paramilitary group behind attacks says PSNI', *Belfast Telegraph* (3 April 2014) <<https://www.belfasttelegraph.co.uk/news/northern-ireland/uvf-behind-racist-attacks-in-south-and-east-belfast-loyalist-paramilitary-group-behind-attacks-says-psni-30153199.html>>.

Institutional and Structural Racism and Discrimination

Notwithstanding the potentially life changing impact of racist attacks on directly-affected individuals, it became clear in our engagement activities that there has also been a shift in the treatment of migrants and perceived migrants in relation to their interactions with public and private services in NI since the referendum. More specifically, we heard evidence that there had already been a significant shift in the treatment of EU26 nationals in relation to the querying of their entitlements and difficulties in accessing essential public services. This included delays and increased evidential requirements where processes, for EU nationals at least, had previously been more straightforward. It is not always clear if such changes are the result of formal policy changes or the result of attitudinal changes among decision makers.

The government also has a stated strategy to use 'in country' checks to regulate migration in NI following Brexit. This includes the use of the 'hostile/compliant environment' powers in the 2014 and 2016 Immigration Acts. We heard testimony from EU migrant workers around injustices and unnecessary distress that existing 'hostile/compliant environment' measures had caused them, and that this had also worsened significantly since the referendum.

As covered in more detail in our report on the border and free movement, the UK Position Paper only committed not to introduce 'routine' border controls on journeys within the Common Travel Area (CTA). Despite official assurances to the contrary, we encountered multiple complaints of racial profiling (the form of discrimination whereby persons are singled out on basis of skin colour or other ethnic attributes) in existing checks on such routes, relating to both the UK and Irish authorities. EU migrants have also reported significant changes in experiences when arriving home into Belfast airports from visits to home countries and being subject to unnecessary questioning.

A further issue is that of emerging differential entitlements of access to services, or even employment in NI for British and Irish citizens. As things stand, when the EU treaties cease to apply, legislation will not permit Irish citizens to access a number of essential services in NI. Whilst political intention to remedy this has been articulated, to date nothing concrete has been taken forward. This context, alongside moves to treat EU26 differently from non-EU migrants, and different categories of EU26 differently to each other, is going to create complex and multiple different hierarchies of entitlements, with a likely outworking of significant increased discrimination.

Recommendations:

- Official initiatives to **monitor and tackle paramilitarism** should include specific work on tackling racist (including sectarian) expression, intimidation and violence.
- Public authorities, including those with an education function, should ensure they **define and interpret the good relations duty as including positive obligations to tackle racism and sectarianism** and take forward concerted and effective action to achieve this goal.
- A **strategic policy switch from tolerance to zero tolerance of incitement to hatred** - this can in part be taken forward through the current Department of Justice review and the PSNI reviewing their interpretation of the legislation.
- The PSNI and Housing Executive review and **improve practices in relation to dealing with racist and sectarian housing intimidation**.
- The PSNI, Councils, Housing Executive, Department of Infrastructure and other relevant public authorities should develop and adopt policies providing for intervention, within their competencies, to **remove items that constitute incitement to hatred or hate expression on protected grounds**.
- Public authorities also need to introduce safeguards and take all reasonable steps to **ensure funding or facilities they provide or endorse are not used for activities which are likely to be the sites of racist expression**.
- **NI needs equality legislation** that evolves in step with international standards and best practice in a post-Brexit, such provision should be underpinned with the implementation of a **Bill of Rights for NI**.

As set out in the Border Controls and Free Movement paper:

- **EU freedom of movement should be retained in NI**. It has so far not proven possible to envisage any other solution that is not going to create multiple new differentials in entitlements - making further racial profiling and broader discrimination even more widespread.
- The UK should desist from its planned roll out of **'hostile/compliant environment' measures in NI**, and retract those which have already been put in place.
- Specific safeguards should be introduced, in accordance with international best practice, to **prevent racial profiling across the public sector**.
- **Freedom of Movement in the CTA should be underpinned by an enforceable treaty. Domestic safeguards should also be introduced** that incorporate the UK position that there will be no passport checks in and out of NI and include the associated rights in the CTA. This would avoid the restriction of any NI public services and related entitlements to British citizens.

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Policy Report:

**Brexit, Xenophobia and
Racism in Northern Ireland**

A. Context

The Existing Problems of Xenophobia and Sectarianism in NI

Scope of the Report, and a Word on Terminology

This report will examine the impact of Brexit on racism in NI. Given the focus on xenophobia the analysis will cover, in particular, racism directed at migrants and perceived migrants (whether from the EU26 or elsewhere). There will also be reference to sectarianism, a localised variant of racism that has been recognised as such by both UN and Council of Europe anti-racism treaty bodies.²

The paper will encompass consideration of ‘personal’ forms of racism, including racist expression, abuse, intimidation, discrimination and attacks (whether by individuals or groups, including paramilitary groups) but also the implications for structural or institutional forms of racism.³

There is a significant interface between these areas and the subject matter of the BrexitLawNI policy papers on the implications for the peace process (particularly in relation to sectarianism) and border controls and freedom of movement (in relation to ‘racial profiling’ in both port/airport and ‘in country’ immigration controls), and human rights and equality (in relation to differentials in EU rights for British and Irish citizens in NI, and EU law protections in general).

Paramilitary involvement in racist violence – living the peace process in reverse?

In an analysis on racist violence and British nationalism in NI a year before the Brexit referendum, Dr Robbie McVeigh characterised the experience of people of colour and migrant workers in NI as one of ‘living the peace process in reverse.’ Arguing that whilst past security policy had been grounded in countenancing a ‘manageable’ level of paramilitary activity, such practices were to end with the Belfast/Good Friday Agreement (B/GFA), but:

2 Both the UN Committee on the Elimination of Racial Discrimination (CERD) and the Council of Europe Advisory Committee on the Framework Convention for National Minorities (FCNM) have emphasised that sectarianism in NI 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 NI] 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.

3 The Institute of Race Relations has provided the following definition: ‘Institutional racism is that which, covertly or overtly, resides in the policies, procedures, operations and culture of public or private institutions - reinforcing individual prejudices and being reinforced by them in turn.’ www.irr.org.uk.

... Over the last fifteen years, however, Northern Ireland has been dubbed 'the race hate capital of Europe' with the 'targeting of ethnic minorities' by loyalist paramilitaries characterised as 'ethnic cleansing' by the police. The demography of Northern Ireland is changing, with eastern EU and non-white migrant workers arriving, which accentuates the reversing Protestant/Catholic differential and further undermines the 'Protestant majoritarianism' on which the state was founded. Alongside 'flags protests', racist violence has become one of the principal manifestations of unionist unease.⁴

There have of course been some attacks in mostly nationalist areas, and racist attitudes to varying degrees exist across the community, as does positive anti-racist work. There is also a significant rise in racism across Europe. The specific context of NI, however, is that of paramilitary involvement in orchestrated racist attacks, which has been well documented for some time.⁵ As alluded to above, in 2014 the PSNI went as far to describe Ulster Volunteer Force (UVF) involvement in racist attacks in south and east Belfast as constituting a 'deeply unpleasant taste of a bit of ethnic cleansing' and contributing to a 70% rise in hate crime in the city.⁶ Into 2018, the PSNI Chief Constable George Hamilton, alluding to involvement in broader organised crime, stated:

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.⁷

Paramilitary Intimidation from Housing

The statistics on paramilitary intimidation from property in NI are staggering, yet have a surprisingly low profile. Figures obtained from the Housing Executive by The Detail investigative journalist website document 1,842 cases of persons made homeless through intimidation over the three years before the Brexit referendum (2012-2015). This equates to an average of 600 per year, or almost two per day. 70% of these cases were classed as 'paramilitary' intimidation. In close to 900 paramilitary intimidation cases the Housing Executive 'was obliged to seek new accommodation for individuals deemed to be at risk of death or serious injury if they returned to their homes'.⁸ There are significant gaps in the data, which confusingly separates out racist, sectarian and homophobic incidents from those which are 'paramilitary'. Statistics on suspected perpetrator groups or categories of victims are either not collated or made available.

4 Robbie McVeigh, 'Living the peace process in reverse: racist violence and British nationalism in Northern Ireland' (2015) 56 *Race & Class* 3.

5 See, for example, from 2004 Bill Rolston 'Legacy of intolerance: racism and unionism in south Belfast' Institute of Race Relations (10 February 2004) <<http://www.irr.org.uk/news/legacy-of-intolerance-racism-and-unionism-in-south-belfast/>>.

6 See 'UVF 'behind racist attacks in south and east Belfast': Loyalist paramilitary group behind attacks says PSNI' *Belfast Telegraph* (3 April 2014).

7 'Police chief says "hard Brexit" Irish border would be paramilitary target' *The Guardian* (7 February 2018).

8 Steven McCaffery, 'Paramilitaries in Northern Ireland forcing hundreds from their homes each year' *The Detail* (25 June 2015).

Racist and Sectarian Expression

A further context to intimidation is the interrelationship with hate expression, in particular expression which constitutes incitement to hatred, on protected grounds. This can be found in sectarian and racist graffiti (including the genocidal 'Kill all Taigs' and 'Kill all Huns', or the anti-migrant 'locals only') but also in other forms of expression particular to NI. In recent years there has been a focus on actions at bonfires, some of which have involved racist expression including the burning of Polish or other flags of migrant workers. One incident in 2014 led to a landmark prosecution for incitement to racial hatred. This followed the placing of racist (and sectarian) slogans on a bonfire in Ballycraigy, County Antrim. This bonfire was on public land and had received public funding. Incidents like this have focused concerns about the use of public funds or facilities for activities and organisations that may ultimately facilitate racist expression.⁹ Whilst many of the above issues have been present for some time, it is important to point out that it is in this context that the Brexit campaign, with its significant focus on migration, occurred.

Racism and the Brexit Mobilisation

The Leave vote in England and Wales has been characterised by CAJ as having been largely carried by sections of the population that had seen their living standards eroded over a 30-year period from de-industrialisation to the 2008 financial crisis. The NGO has argued, however, that regardless of the underlying material causes of the Brexit vote, the leadership behind the main *mobilisation* for Brexit was situated in powerful sections of the right-wing of the UK political and media establishment.¹⁰ This mobilisation had a significant focus on immigration control and the scapegoating of migrants.¹¹

The UN Committee on the Elimination of Racial Discrimination, consequently expressed concerns about Brexit discourse and its concurrent effect on attacks on ethnic minorities:

...the Committee is deeply concerned that the referendum campaign was marked by divisive, anti-immigrant and xenophobic rhetoric, and that many politicians and prominent political figures not only failed to condemn such rhetoric, but also created and entrenched prejudices, thereby emboldening individuals to carry out acts of intimidation and hate towards ethnic or ethno-religious minority communities and people who are visibly different.¹²

9 Robbie McVeigh 'Incitement to Hatred in Northern Ireland' Equality Coalition Report 2018, p 57 <<https://caj.org.uk/2018/04/27/incitement-to-hatred-in-northern-ireland-research-report-by-dr-robbie-mcveigh-for-the-equality-coalition/>>.

10 'Brexit and Rights: Discussion seminar on the human rights and equality implications of the EU referendum', MAC Belfast, 27th September 2016, introduction, CAJ. See also one recent study that sought to demonstrate the link between the exposure to austerity and the rise in support for the UK Independence Party (UKIP) and hence the Leave vote - Thiemo Fetzer, Did austerity cause Brexit? (2018) Working Paper. Coventry: University of Warwick. Department of Economics. Warwick economics research papers series (WERPS).

11 A study of 15,000 news articles about the referendum found that immigration (4,383 articles) was one of two dominant issues in the campaign, the other being 'the economy' (7,028 articles), albeit that towards the latter part of the campaign almost half of the economy articles also mentioned immigration, which was the most prominent issue on newspaper front pages (99 on immigration, 82 on economy). The study finds that: 'Coverage of the effects of immigration was overwhelmingly negative. Migrants were blamed for many of Britain's economic and social problems – most notably for putting unsustainable pressure on public services'. Martin Moore and Gordon Ramsay 'UK media coverage of the 2016 EU Referendum campaign Centre for the Study of Media, Communication and Power', May 2017.

12 UN CERD/C/GBR/CO/21-23 (Concluding Observations on UK) 2016, p 15.

The London-based Institute of Race Relations in its study on racial violence and the Brexit State, argues that such a Brexit mobilisation has a concurrent policy impact:

Whatever else Brexit means or does not mean, it certainly means racism. Born of fortuitous circumstances, lacking programme or policy, the government has had to find its 'mandate' in the twin Brexit themes: that immigration is unravelling of the nation, and anything foreign, except investment, is abhorrent to its ethos - thus giving a fillip to popular racism and elevating institutional racism to fully-fledged state racism.¹³

It is the specific implications of this context to the particular circumstances of NI that will be explored in this report.

Racial and Sectarian Differentials and Discrimination

A final contextual factor relates to the extent to which public authorities, private actors, and police are obliged to differentiate between different categories of people. Where different entitlements are complex there are a number of factors that can lead to racial discrimination and the related denial of rights to essential public services, or other social goods such as housing and employment.¹⁴ The form of racial discrimination where persons are subject to additional enquiry on the basis of skin colour or other ethnic indicators, is known as racial profiling.

The Pre-existing Hostile/Compliant Environment

Brexit occurred in the context of UK government policy to create a 'hostile/compliant environment' for people who become irregular migrants. This involved subcontracting duties to police immigration to a broad range of public and private sector actors (including banks and landlords), with the express intention of making the lives of migrants in an irregular status so miserable that they would voluntarily leave the UK. These policies, introduced by Theresa May as Home Secretary, were largely taken forward and rolled out incrementally in different areas under the 2014 and 2016 Immigration Acts. The policies have faced significant criticism and were brought to broader public attention by the 'Windrush' scandal whereby largely elderly British citizens who had migrated from the Caribbean as children were denied essential health care and even subjected to deportation.¹⁵

13 Jon Burnett 'Racial Violence and the Brexit State' Institute of Race Relations (IRR), April 2017, p 2.

14 For example, factors likely to inhibit access include: the setting of highly complex rules that are unclear to decision makers and affected person alike; the setting of requirements of proof through the production of documents many individuals are unlikely to readily have; sanctions for provision to persons not deemed entitled (which hence makes decision makers more likely to err on the side of refusing a service); public sector decision makers with insufficient training or knowledge; the 'subcontracting' of decisions to private actors who have no training in the subject at all; rules which are widely considered to be unfair or unworkable; racial and sectarian prejudice in decision making.

15 See collation of 'Windrush Scandal' articles in *The Guardian*, <<https://www.theguardian.com/uk-news/windrush-scandal>>.

Racial Equality Legislation in NI

Anti-discrimination legislation in NI protecting against racial and sectarian discrimination also has a particular history. Whilst 'fair employment' legislation covering the two largest communities was introduced in the 1970s, it was not until 1997 that broader racial discrimination was finally outlawed in NI - over 30 years after legislation had first been passed in GB. Whilst the B/GFA and the 'Section 75' statutory equality duty under the Northern Ireland Act 1998 had NI equality legislation 'ahead' for a period of time, the jurisdiction has long since regressed. In particular, NI does not have single equality legislation and the existing framework contains significant gaps. EU requirements do have to be mirrored but this will likely not be the case after Brexit. The NI Bill of Rights, which would have enshrined protections against discrimination, has also not been implemented.

In relation to other legislative duties, under Section 75(2) of the Northern Ireland Act 1998, there is the 'good relations' duty on designated public authorities in NI on grounds of political opinion, religious belief and racial group.¹⁶ In the counterpart legislation in GB, the good relations duty is defined as in particular concerning 'tackling prejudice and promoting understanding'.¹⁷ This means the duty essentially is a duty to tackle racism (and homophobia, misogyny and other grounds as the duty in Britain extends across all protected grounds.)

In NI however, the term 'good relations' is not defined in the Section 75 legislation. Whilst it would be reasonable to interpret the NI good relations duty in the same way, there is a concerning history of that not being the case. At times the duty has even been used to block equality and rights initiatives on grounds that they would lead to 'community tensions'.¹⁸ In 2016 a Council of Europe Committee examining UK compliance with treaty based commitments raised concerns that:

...unlike the rest of the country, Northern Ireland does not interpret the 'good relations' duty as including a duty to tackle racism, including sectarianism. Instead, the lack of proper definition allows this notion to be used rather as a 'tool' to set aside politically contentious issues, such as legislating on the Irish language, and to justify a 'do-nothing' attitude, eventually based on 'perceptions' rather than objective criteria.¹⁹

The Equality Commission for NI has a statutory function to advise on the Section 75 duties²⁰ and have issued advice to Councils regarding the definition of good relations. This alludes to the 'tackling prejudice, promoting understanding' formulation of the law in Britain, but also puts forward other

16 Without prejudice to the duty to promote equality of opportunity under s 75(1) this duty is to 'have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group'. There is also a similar duty on local councils (who are also subject to s 75(2) to *inter alia* promote good relations between different 'racial groups' under article 67 of the Race Relations NI Order 1997.

17 Under s 149 of the Equality Act 2010.

18 For examples see the report 'Unequal Relations? Policy, the Section 75 duties and Equality Commission advice: has 'good relations' been allowed to undermine equality?' CAJ (May 2013).

19 ACFC/OP/IV(2016)005 Fourth Opinion on the UK by the Council of Europe Advisory Committee on the Framework Convention for National Minorities, para 85 <<https://www.coe.int/en/web/minorities/-/united-kingdom-publication-of-the-4th-advisory-committee-opinion>>.

20 Northern Ireland Act 1998, para 1, sch 9.

factors as good relations indicators such as ‘an absence of prejudice, hatred, hostility or harassment’.²¹ More recently, the Council of Europe expert-body on racism have defined good relations as entailing ‘mutual respect, understanding and integration while continuing to combat discrimination and intolerance’.²² These definitions, if harnessed, would ensure the NI good relations duty is to be interpreted as a duty to tackle racism and sectarianism.

B. Themes

The remainder of this report on the impact of Brexit is structured around the following themes:

Racism and the Impact of the Brexit Campaign in NI

This theme will explore the extent to which there has been an impact resultant from the Brexit mobilisation on ‘personal’ forms of racism - whether conducted by individuals or groups (including paramilitary groups). It will discuss issues of ‘hate crimes’ and individual experiences, and whether such experiences are reported.

Tackling Racism and Sectarianism on the Ground – the State Response

This theme will examine the strengths and weaknesses of the state response to hate expression and incidents. It will explore the present response both of the criminal justice system to incitement to hatred, but also public authorities in general to intervention to prevent hate expression.

Institutional Racism and Sectarianism – a Question of Entitlement?

This section will focus on the question of differentials in entitlements for the EU26, non-EEA and British and Irish citizens that may flow from the implementation of Brexit, and the likely impact on the practices of institutions. It will examine the impact on individuals of the process to date, the likelihood of further differentials and the resultant risks of institutionalising discrimination.

21 Equality Commission advice on Good Relations in Local Councils, Equality Commission, 2015, p 4 <<http://www.equalityni.org/ECNI/media/ECNI/Publications/Employers%20and%20Service%20Providers/Public%20Authorities/GoodRelationsLocalCouncilAdvice.pdf>>.

22 European Commission Against Racism and Intolerance (ECRI) 1 CRI(2018)06 ECRI General Policy Recommendation No 2: *Equality Bodies to Combat Racism and Intolerance at National Level*, para 21, Explanatory Memorandum.

C. Impact of Brexit

Racism and the Impact of the Brexit Campaign in NI



Above left, image erected in the Tigers bay area of Belfast close to loyalist murals and flags, advocating a 'hard Brexit' alongside the flag ensigns of the RAF and Royal Navy, (Photo: BrexitLawNI). Above right, the 'breaking point' UKIP poster depicting mass migration, (Photo: Twitter).

Getting the Ethnic out? The Brexit Mobilisation in NI

In the run up to the referendum there was controversy when, still wearing a microphone as part of BBC filming, senior DUP MP Sammy Wilson responded 'you're absolutely right' to a member of the public who stated 'get the ethnics out too' in the context of a discussion on Brexit. The party distanced itself from the remarks and Mr Wilson subsequently maintained he was only agreeing with the member of the public on Brexit and not on that point.²³

The incident helps prompt the question as to the extent to which the mobilisation surrounding Brexit in NI was driven by the issue of migration - a central factor in the UK campaign - or by other factors. During the course of our research and work on Brexit, we heard from representatives of political unionism and community activists who generally concurred they felt there had been a high voter turnout for the referendum in 'loyalist' areas where it had previously been difficult to mobilise turnout.

²³ The footage is available at 'Sammy Wilson hits back over "ethnics out" comment', *BBC News*, 1 March 2016 <<https://www.bbc.co.uk/news/uk-northern-ireland-35693195>>.

This contrasted with nationalist voters, where a number of respondents considered there had been a general drop off in turnout for the referendum. Whilst both main nationalist parties supported remain, unionist parties took different positions in the referendum.

Although we did hear consistently that the new mobilised vote among loyalism had predominantly been for 'Leave' there were different views as to what had driven it. A number of respondents stated that the issue of controlling migration had been the most significant subject raised. Others however stated that immigration had not been predominant issue but rather questions of 'taking back control' of laws and money, had been at the top of Leave voters' concerns.

DUP MLA Christopher Stalford argued that the Leave vote would not have prevailed had the focus been on immigration. He stated that its success had been in marginalising that message which had been pressed by UKIP in an attempt to lose the referendum:

I do not believe if vote leave had been run as a UKIP/Aaron Banks type campaign that we would have won ... I don't believe that the leave campaign pitched itself to the lowest common denominator with politics that we saw, I think Farage actually tried to lose the referendum to be truthful, I don't think that he wanted us to win. I believe he wanted a tight result for remain so that UKIP continued to have a reason to exist. ... I actually think some of his contribution was designed to torpedo the campaign, that breaking point poster and things like that, I don't actually think he wanted to win. The success of vote leave was achieved by pushing that type of campaign and that type of base message actually to the side.²⁴

Mr Stalford also raised concerns that Leave voters had been unfairly stereotyped:

Immigration was an important issue and immigration control is an important issue in the referendum campaign but it wasn't the only issue and I think it's really actually offensive [...] the way in which 17.4 million people have been caricatured in terms of what made them [vote], they're old, white, xenophobic and they're ignorant is basically the caricature there has been of people that voted leave.²⁵

In response to a questions about the impact of Brexit on racism in NI, SDLP MLA Claire Hanna raised concerns that Brexit had 'empowered the primacy of perception' recalling:

²⁴ BrexitLawNI, Interview with Christopher Stalford, DUP MLA (Belfast, 7 February 2018).

²⁵ BrexitLawNI, Interview with Christopher Stalford, DUP MLA (Belfast, 7 February 2018).

I remember debating a senior DUP MP and we were both asked on a TV debate about immigration figures and he said “no I don’t know” and I know the figure and whatever it is net migration 2,000 or something and he said “it doesn’t matter what the numbers are, it’s what the perception is” ... it was said so casually ... It appears that the argument that actually migration is good for us economically and other ways has been lost.²⁶

Was there a ‘Spike’ in Racist Incidents Following the Referendum?

It is difficult to ascertain reliably the extent to which there was a ‘spike’ in racist incidents in the run up to and following the referendum in NI. In particular, the referendum occurred shortly before July, at a time where there is generally a sharp increase in racist and sectarian incidents.²⁷ Initially incidents reported to the PSNI, did not indicate a spike had occurred in NI with figures lower when compared to the same period of the previous year. PSNI Superintendent Paula Hilman stated:

Northern Ireland like some other regions in England and Wales is not seeing an increase in reporting that some regions have seen. We do, however, very much recognise the impact the hate crime reports and recent media coverage can have in terms of rising tensions and potential fear in communities.²⁸

This trend appears to have subsequently shifted. *The Guardian* reported in November 2017, that the annual period between July 2016 and June 2017, featured a significant increase in racist hate crime.²⁹ The actual figure during that time, according to the Policing Board, was an average of two every day.³⁰ *The Guardian* report, stated there was ‘strong evidence’ of a link between loyalist paramilitary groups and racist intimidation, and provided some examples:

So far this year there has been a spike in racist attacks in predominantly loyalist east Belfast, which have been directed against mainly eastern European immigrants. In a single night last month, there were three racially motivated hate crimes in a number of streets close by to each other. In what appeared to be a coordinated series of arson attacks, two cars and a minibus owned by immigrants were set on fire in the Woodstock/Ravenhill area.³¹

26 BrexitLawNI, Interview with Claire Hanna, SDLP MLA (Belfast, 20 February 2018).

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

28 ‘Hate crimes in north have fallen in wake of Brexit’ *The Irish News* (13 July 2016) 12.

29 ‘Racially motivated crimes now exceed sectarian ones in Northern Ireland’ *The Guardian* (12 November 2017) <<https://www.theguardian.com/uk-news/2017/nov/12/racially-motivated-crimes-now-exceed-sectarian-ones-in-northern-ireland>>.

30 ‘Policing Board sets recommendations to tackle Race Hate Crime’ (28 June 2017) <<https://www.nipolicingboard.org.uk/news-centre/policing-board-sets-recommendations-tackle-race-hate-crime>>.

31 *The Guardian* (n 29).

Were Victims more or less likely to Report Racist Incidents after the Referendum?

We heard views from a senior security and policing expert that the Brexit context had made victims of racist incidents less likely to report to the PSNI.³² This was attributed to the perception that anti-migrant attitudes being the preserve of a few had been replaced by a general climate of hostility to migrants. The expert argued that this context had led to a drop of in reporting, and was sceptical about any argument that there had not been a spike in attacks in NI after the referendum:

... when you look at the figures and when you speak to the people who had been actual victims post-Brexit, and they talk about [it], I ask them why they didn't report. They said they were less likely to report post-Brexit than before, so the numbers were actually decreasing. They said they were more frightened because they were less sure that the police would protect them.³³

Political views varied as regards racist incidents after the referendum. DUP MLA Christopher Stalford, in specific reference to the area he represents stated:

I represent the most diverse constituency in Northern Ireland, I think in South Belfast we have more than 100 nationalities living. I see no evidence in certainly in my constituency that since the referendum result there's been a spike or a rise, now there may well be police figures that contradict me on that but I have seen no evidence of that.³⁴

In contrast, SDLP MLA Claire Hanna did feel matters had deteriorated:

I think a lot of non-British or Irish people are feeling uncomfortable and I think anecdotally that things are being said to them a lot more and we know all those incidents in the first few months, 'are you still here', and 'we'll get rid of you soon'... if you see the little undercurrents of the hard right and Britain First and so on, maybe it's coincidence but there's a lot more of them and there seems to be a lot more open white supremacist stuff even locally on social media ... that maybe we just didn't notice two years ago.³⁵

32 BrexitLawNI, Interview with senior security and policing expert (4 December 2017).

33 BrexitLawNI, Interview with senior security and policing expert (4 December 2017).

34 BrexitLawNI, Interview with Christopher Stalford, DUP MLA (Belfast, 7 February 2018).

35 BrexitLawNI, Interview with Claire Hanna, SDLP MLA (Belfast, 20 February 2018).

Racist Incidents Directly Related to Brexit

What can be said for certain is that there have been racist incidents in NI directly linked to Brexit. Throughout our work we have encountered dozens of anecdotes of incidents of racist abuse with such links. One example relates to a group of nurses in a nursing home who were told by some of the people they had been looking after for some time 'Why are you still here? Go home! We voted!' the day after the referendum. The nurses in question were from the Philippines, not the EU. Another recounted 'friends of my daughters being told to "go home" the day after the referendum, even if they're [from the] Caribbean as if it had anything to do with the EU'. A further widely reported example was the abuse suffered by a nurse, a dual Palestinian-UK citizen, shortly after the referendum in Belfast:

On Saturday night, a man I have never met before said to me: 'You from the EU? F**k off back to your country. Get the F**k out of our country' he said. At first I thought he was joking, but then he continued the abuse and started shaking his fists at me. At that point I decided it was better to leave rather than have the incident escalate.³⁶

An interviewee argued that Brexit had changed the situation whereby persons who 'were either ambivalent, or a bit racist but wouldn't ever act on it' felt that 'suddenly they have permission ... to express views which are fairly repugnant'³⁷ and that the general sense among the Polish community was of 'the immediate sense of their welcome and their invitation being removed' and 'that they had been abandoned by the state'.³⁸ A recent Equality Coalition commissioned report focusing on *incitement* to hatred in NI specially addressed the Brexit context concluding:

The ongoing dynamics around 'Brexit' create a novel context for issues related to incitement. Whatever the long-term consequences of Brexit, the decision to leave the EU has been associated with a rise in offensive and hate speech across Northern Ireland. There is, therefore, a general 'mood music' associated with Brexit – for many people support for leaving the EU was 'about' race and immigration. There is clear evidence that the decision to leave operated as a 'green light' in terms of open expressions of racism. While it is difficult to attribute direct causality, there has been expression that situates recent racist abuse across Northern Ireland precisely in this context.³⁹

The experience of migrant respondents indicated was that attitudes had deteriorated since the referendum. It is also important to note that there were stories of anti-racist activism and support across communities. Whilst it should not be understated that racist (including sectarian) attacks can have potentially life changing impacts on directly affected individuals; it is also worth emphasising

36 'Palestinian nurse in Belfast suffers racist abuse after Brexit' *Irish News* (29 June 2016).

37 BrexitLawNI, Interview with senior security and policing expert (4 December 2017).

38 BrexitLawNI, Interview with senior security and policing expert (4 December 2017).

39 McVeigh (n 9) p 56.

that a far more prominent concern related to racial profiling and other forms of institutional discrimination through interactions with public and private services since the referendum. This issue is addressed later in this report.



Above, the flag of apartheid South Africa, in a Co Down village alongside loyalist paramilitary and other flags, (Photo: CAJ).⁴⁰

Tackling Racism and Sectarianism on the Ground – the State Response

This section will examine the scope and limitations of the state response to racist incidents in NI, with a focus on three areas: first, strategic policy to monitor and counter paramilitary involvement in racist violence; then analysis of the state response to hate speech and incitement to hatred; and finally, an overview of policy as to when public authorities will intervene to remove items expressing racist and sectarian messages.

Tackling Paramilitary Involvement in Racist Violence and Intimidation

A number of mechanisms have been set up to monitor and tackle paramilitary activity. From 2004 to 2011 a UK-Ireland Independent Monitoring Commission (IMC) was established through an international agreement to report on paramilitary activity. Further to the 2015 Fresh Start Agreement, a UK-Ireland treaty, set up a new Independent Reporting Commission (IRC) in 2016 with a remit of reporting annually on progress towards ending continuing NI paramilitary activity - in particular from groups declared to be on ceasefire.⁴¹ The Fresh Start Agreement also established a Panel report on a recommended strategy to disband paramilitary groups, from which the NI Executive would produce an action plan.⁴² A precursor to the IRC and Fresh Start Agreement was an October 2015 assessment of ongoing paramilitary activity, which was based on MI5 and PSNI intelligence, commissioned by

40 See also, racist graffiti in Banbridge which was linked by police to a tyre slashing and painting of the word 'out' on the car of a Bulgarian family in the local area, 'Banbridge hate crimes "could be linked"' BBC News Online 5 October 2017 <<https://www.bbc.co.uk/news/uk-northern-ireland-41505935>>.

41 UK Treaty, Ireland No. 1 (2016) Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland establishing the Independent Reporting Commission, Dublin, 13 September 2016, art 4(1).

42 A Fresh Start, The Stormont Agreement and Implementation Plan, NIO 2015, Section A.

the Secretary of State, and led by Lord Carlile.⁴³ The IRC was formally launched in September 2017 and its first annual report is awaited.⁴⁴

The original IMC faced criticism for downplaying involvement in racist violence in its assessment of paramilitary activity. A report by the NI Council for Ethnic Minorities (NICEM) in 2006, concluded it was 'astounding' that IMC reports:

... have almost completely ignored loyalist paramilitary involvement in racist violence. ... their most recent *Tenth Report* ... 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 ... 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.⁴⁵

The NI Human Rights Commission raised concerns in 2011 with the UN about loyalist involvement in orchestrated racist attacks makes reference to the an IMC report stating that an 'important step would be for loyalist paramilitaries, including the UDA, to stop targeting nationalists and members of ethnic minorities'; but the Commission concludes: 'It is a matter of concern that this context is only intermittently referred to in official policy and strategy.'⁴⁶

In 2015 the official Lord Carlile assessment of paramilitary activity contained no reference to racism or racist violence despite listing a broad range of other areas of crime attributed to paramilitary groups.⁴⁷ This omission was quickly picked up at the Policing Board, where the issue was raised with the Chief Constable.⁴⁸ The subsequent Fresh Start Panel report makes a reference to racist attacks in the context of the provision of figures for housing intimidation. There is no specific action however within the Executive Action Plan to tackle racist violence.

In relation to paramilitary involvement in racist and sectarian intimidation from housing, there are also issues with the absence of available data as to which paramilitary groups are responsible and

43 Paramilitary Groups in Northern Ireland, NIO, 19 October 2015.

44 'Press Release - Launch of the Independent Reporting Commission' IRC, 29 September 2017 <<https://www.ircommission.org/news-centre/press-release-launch-independent-reporting-commission>>.

45 Robbie McVeigh, 'The Next Stephen Lawrence? Racist Violence and Criminal Justice in Northern Ireland' (NICEM, 2006) para 4.11.

46 NIHRC, Submission to the United Nations Committee on the Elimination of Racial Discrimination Parallel Report on the 18th and 19th Periodic Reports of the United Kingdom under the International Convention on the Elimination of All Forms of Racial Discrimination (2011) para 84 <http://www.nihrc.org/uploads/publications/NIHRC_Submission_to_the_CERD_Committee_July_2016.pdf>.

47 Para 8 of the report lists a range of other areas of crime which are attributed to members, including some senior members, of the UDA: 'drug-dealing, robbery, extortion and the distribution of counterfeit and contraband goods'. Reference is also made to paramilitary-style assaults, street disorder and violent protests. Para 5 in relation to the UVF states that members, including senior members, are 'extensively involved' in organised crime including 'drug-dealing, extortion and smuggling'. ('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' NIO, 2015 <<https://www.gov.uk/government/publications/assessment-on-paramilitary-groups-in-northern-ireland>>).

48 'NIPB Questions to the Chief Constable, Roisin McGlone, Racist Attacks' (November 2015) p 59 <<https://www.nipoliceboard.org.uk/sites/nipb/files/media-files/written-response-to-questions-5-November-2015.pdf>>.

questions over the effectiveness of current processes adopted to deal with such intimidation. The Fresh Start Panel report records some statistics on the number of incidents.⁴⁹ Over a number of years however there have been questions raised at the Policing Board as to why the PSNI were not able to provide statistics as to which paramilitary organisations were considered responsible. This is all in the context of PSNI involvement in assessments, directly or at the request of NIHE, with involvement also of a ‘mediation body’ in corroboration of threats.⁵⁰

Responses to Hate Expression and Incitement to Hatred

Strictly speaking there is no such thing as a ‘hate crime’ in NI,⁵¹ as there is no specific ‘hate crimes’ legislation. There is a provision for increased sentencing for offences aggravated by hostility on a protected ground (including ethnic grounds) under Article 2 of the Criminal Justice (No. 2) (Northern Ireland) Order 2004. There is also legislation outlawing incitement to hatred in the Public Order (NI) Order 1987, which covers offences of ‘stirring up hatred’ or ‘arousing fear’ against a group of persons on protected grounds.⁵² There have only been a handful of prosecutions and even fewer convictions under this legislation.⁵³ Further to requests from the PSNI⁵⁴ and CAJ⁵⁵ for a review of the legislation the Justice Minister Claire Sudgeon MLA, initiated such a review within the Department of Justice before the collapse of the Northern Ireland Executive in early 2017.

One senior security and policing expert interviewed by the project took the view that the PSNI were not using the powers available to them to tackle incitement to hatred and hate crime, and that an approach to ‘tolerate’ sectarian hate crime was having a spill over effect in not effectively dealing with racism at a strategic level:

49 Namely that around 1,000 people were ‘driven out of their homes between 2012/13 and 2014/15’ by paramilitary intimidation, and provides figures for the same period of the NI Housing Executive accepting 176 cases linked to racist intimidation (99 to sectarianism and 77 to other forms of racism). Fresh Start Panel report, paras 2.12-13 <<https://www.northernireland.gov.uk/sites/default/files/publications/newnigov/The%20Fresh%20Start%20Panel%20report%20on%20the%20disbandment%20of%20paramilitary%20groups.pdf>>.

50 See ‘NIPB Questions to Chief Constable, Paramilitary Style Attacks (Performance Committee)’, (December 2014) p 29 <<https://www.nipoliceboard.org.uk/sites/nipb/files/media-files/written-response-to-questions-december-2014.pdf>>. ‘NIPB Questions to the Chief Constable, Extent of Paramilitary Intimidation’, (February 2015) pp 7-8 <<https://www.nipoliceboard.org.uk/sites/nipb/files/media-files/written-response-to-questions-February-2015.pdf>>.

51 Policing Board, *Thematic Review of Policing Race Hate Crime* (June 2017) p 46 <<https://www.nipoliceboard.org.uk/sites/nipb/files/media-files/race-hate-crime-thematic-review.PDF>>.

52 Namely 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. 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. Summary conviction can carry a fine or up to six months’ imprisonment, or on conviction on indictment a fine or imprisonment for a longer term.

53 McVeigh (n 9) p 5.

54 ‘NIPB Questions to the Chief Constable, The placing on bonfires of election posters, effigies and other images of public figures (Pat Sheehan)’ (September 2015) <<https://www.nipoliceboard.org.uk/sites/nipb/files/media-files/written-response-to-questions-3-September-2015.pdf>>.

55 Briefing Note, ‘Defining public duties to tackle incitement to hatred whilst respecting free expression: reviewing the legal & policy framework’ CAJ (October 2017).

I think the vast majority of ordinary cops are pretty good about race hate crime and sectarian hate crime, and they're appalled by it. But there seems to be a strategic decision to ignore it ... it's just too big ... everyone is doing it anyway ... The race hate stuff is a little bit easier for them to deal with because it tends to be more localised. But decisions about whether to remove a confederate flag are infected I think by their view about how they deal with sectarian hate crime. ... a confederate flag tends to be found in a loyalist area, ... [there is] a very clear link between race hate crime and loyalist paramilitaries in certain hotspots ... [but] even the attitude to EU and non EU people present on the island of Ireland is affected by the sectarian approach to sectarian hate crime... and they are also afraid to set an unhealthy precedent, that they will take down racist stuff but not take down sectarian stuff.⁵⁶

The 2018 Equality Coalition commissioned Incitement to Hatred in Northern Ireland report concludes that the current approach to addressing incitement is not working. Finding that despite 'copious evidence of hatred – particularly racism, sectarianism and homophobia' that generally 'this incitement is being tolerated rather than prohibited by the state'. It finds:

In response to rising racist violence, the state put in place an infrastructure based on foregrounding a particular construction of 'hate crime' *which has done little to address the seriousness of the violence involved*. Even when the seriousness of incitement to violence is not lost in the wider sweep of more general discussions of 'hate crime', this does nothing to address the specificity of incitement. This focus on 'hate crime' to the exclusion of incitement to hatred is the Northern Ireland variant of a wider fiction – the notion that states have begun to take violence seriously simply by undertaking public relations work around 'hate'.⁵⁷

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

Many expressions might be regarded as incitement to hatred in the context of international human rights standards. For example, it would be difficult not to regard at least some of the use of flags, bonfires and parading as examples of 'stirring up' hatred in the sense identified in legislation. These classically involve 'non-verbal forms of expression such as the display of racist symbols, images and behaviour at public gatherings' and are often 'sites' of incitement. In other words, we can begin any discussion by suggesting that contested expression is hard-wired into the social dynamics of rights and conflict in Northern Ireland.⁵⁸

⁵⁶ BrexitLawNI, Interview with senior security and policing expert (4 December 2017).

⁵⁷ McVeigh (n 9) p 55 (emphasis in original).

⁵⁸ *ibid* p 52.

The report advocates a move from ‘toleration’ towards a ‘zero-tolerance’ approach to any expression – including graffiti, flags and murals – that meets the threshold on ‘incitement to hatred’ noting that: ‘Fortuitously, there is a broad recognition across sectors that the approach needs to change.’⁵⁹

Specific issues that have arisen with the PSNI interpretation of the legislation include the PSNI assertion that hatred will not likely be stirred up if the audience are from one side of the community, but only if other members of the community are likely to be present.⁶⁰ This position was articulated in relation to the burning of effigies at bonfires and appears to be a regressive interpretation of the legislation linked to the high threshold of ‘clear and present danger’ rather than an interpretation that is in accordance with contemporary human rights standards.

Intervention to Remove Items Constituting Racist and Sectarian Expression

The physical manifestations of racist and sectarian expression prompts the question as to how and when public authorities will intervene to take Executive action to remove such items. In the alternative such expressions are simply left on display with no state intervention. One interviewee pointed to the harms of a non-interventionist approach:

I mean it’s terrifying. You see some of the symbols on bonfires, and street corners and confederate flags not being taken down, what on earth are you supposed to think? Coupled with a Brexit vote and the police saying that they will only intervene if there is a right to life issue ... it’s a fairly shocking situation we’re in.⁶¹

Paramilitary involvement in such expression means such items cannot often be removed by the public. The Equality Coalition report concludes that:

... there often appears to be a policy and practice vacuum in which no organisation is prepared to accept responsibility for removing materials – even when there is a broad acceptance that the materials are inciteful or unlawful.⁶²

The report calls for the ‘de facto toleration policy’ to cease and for removal to be prioritised, noting that the existing approach is often premised on a PSNI and local authority view they are not able to

59 *ibid* p 55.

60 ‘NIPB Questions to Chief Constable, Bonfires, (Gerry Kelly), (August 2016) <<https://www.nipolicingboard.org.uk/sites/nipb/files/media-files/Written-response-to-Questions-for-4-August-2016-Meeting.pdf>>.

61 BrexitLawNI, Interview with senior security and policing expert (4 December 2017).

62 McVeigh (n 9) p 55.

act.⁶³ Obligations on public authorities to intervene can be derived from international human rights standards to which the UK is a party.⁶⁴

There are also provisions under directly binding domestic law, including duties under the Human Rights Act 1998 giving further effect to Article 8 of the ECHR, and – where interpreted correctly – under the good relations duties.

Where expression constitutes a criminal offence, in our view, the PSNI have general duties to intervene to prevent the commissioning of such offences.⁶⁵ This will include relevant criminal offences on incitement to hatred and any other ‘hate expression’ that constitutes another criminal offence.⁶⁶ Whilst there will be a level of operational discretion this discretion is fettered by other legal obligations relating to harm to the rights of victims, most notably Article 8 ECHR, which places positive obligations on the police and others to tackle racist discourse (and by extension materials relating to other protected grounds).⁶⁷

However, the PSNI have taken a general policy position of non-intervention except in circumstances where there are ‘substantial risks to public safety’.⁶⁸ In 2015 the PSNI issued guidance on flags to district commanders, which the Policing Board were informed reiterates the position that:

... the removal of flags is not the responsibility of the PSNI and police will only act to remove flags in extreme circumstances, for example where life is at risk or there is a substantial, immediate risk of disorder and police action to remove flags would mitigate the risk.⁶⁹

At the launch of a Thematic Report on Race Hate Crime at the Policing Board the question of flags and graffiti on homes was raised. This included the police response to the circumstances whereby union or loyalist flags were placed outside the home of ethnic minorities or Catholics who had moved into a street. It was revealed that at times such flags had been removed, but on other occasions, despite the display constituting a crime, the PSNI had left such items in place.⁷⁰

63 *ibid.*

64 Take for example Article 6(2) of the Framework Convention for the Protection of National Minorities, which 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’.

65 Police (Northern Ireland) Act 2000, s 32.

66 For example, matters such as intimidation or harassment, or in strict legal terms trespass or criminal damage when aggravated by hostility on the same protected grounds.

67 Many of the above provisions were tested in *DB v Chief Constable of Police Service of Northern Ireland* [2017] UKSC 7.

68 The policy is not currently contained in a Service Procedure, Policy Directive or other formal policy document, but the position has been regularly set out to the media and Policing Board in the context of requests to remove flags. (The PSNI has adopted a detailed Service Procedure SP 16/12 - police response to hate incidents. This policy however focuses on investigations of incidents and does not deal with Executive Action). For examples in the media see <<https://www.irishnews.com/news/2017/05/18/news/police-will-not-intervene-to-remove-flags-at-train-station-near-belfast-city-airport-1029473/>> and <<https://www.larnetimes.co.uk/news/crime/removal-of-flags-not-responsibility-of-psni-1-8025569>>.

69 ‘NIPB Questions to the Chief Constable: Official policy for handling complaints concerning the public display of Union and loyalist paramilitary flags / erection of flags on Ormeau Road (Pat Sheehan)’ (September 2015) (n 54).

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

The primacy of a ‘prevention of disorder’ rather than a tackling hate expression approach is perhaps best illustrated by further anecdotal or reported evidence encountered of incidents where the PSNI on the ground have queried the removal of unlawfully placed flags (at times arresting those responsible), or accepted their removal when it was undertaken with paramilitary authority.

There are a number of other public authorities with duties to intervene in particular circumstances. This is especially the case when the item in question is left on the property or land of the public authority in question. There are also particular powers vested in Councils and other public authorities to remove graffiti, placards and posters or other items.⁷¹ However, it appears few public authorities have a policy in relation to the exercise of such powers to tackle hate expression.

Institutional Racism and Sectarianism– a Question of Entitlement?

This section deals with the question of Brexit and its contribution to institutionalised forms of racism, with a focus on the implications of increased differentials in entitlements and the context of enhanced monitoring by a range of public and private sector actors. One interviewee observed:

... there was xenophobia straight after the referendum, but now post-Brexit, with EU citizens, you have seen that there will be different laws for EU citizens and different laws for British people or Irish people living in Britain or people with indefinite leave to remain. So, for example, the Home Office uses public and private institutions to implement its immigration laws, so employers can be fined £20,000 if they haven’t checked the documents correctly of immigrants. So all EU citizens, post-Brexit will have to be documented by their employers and many, many employers will not be prepared for that, there will be many, many mistakes made. I absolutely can see that happening. It’s happening already with people wrongly assuming that EU citizens can’t work in Britain. It will be the same with landlords [who] can be fined £5,000 if they are renting a property to a third country national who is undocumented. EU citizens will become those and there will be many, many, many EU citizens who will not be documented, who will either refuse to fill in the forms or fill them in wrongly, won’t have the documents to fill in them in properly... there are going to be so many stories of mess ups. And I think people don’t know what the impacts will be on employers and employees.⁷²

This section will first consider the experiences of EU26 migrants, and subsequently the implications for differentials between British and Irish citizens in NI.

71 For example, the powers of District Councils to remove or obliterate graffiti, placards and posters (Article 18, Local Government (Miscellaneous Provisions) (NI) Order 1985); and powers of Transport NI to remove anything painted, inscribed, affixed or displayed on a road, or any tree, structure or other works in or on a road without lawful authority.

72 BrexitLawNI, Anonymous interviewee (23 April 2018).

The Present Experiences of EU26 and Other Migrants

In our consultation events on the implications of Brexit it has become evident that there has already been a significant shift in the treatment of EU26 (and perceived EU) nationals since the 2016 referendum. Treatment by Border Force officers, and in particular the experiences of racial profiling in border controls, are covered in detail in the BrexitLawNI report on Border Controls and Freedom of Movement. That report also outlines in some detail the proposed 'intensification' of 'hostile environment' measures in NI in the context of Brexit.

Many of the same experiences of racial profiling on the border had also been experienced in accessing essential public services in NI. In part this related to the existing roll out of hostile environment measures, which following Brexit can also be extended to EU26 nationals. In commenting on this prospect the Westminster Home Affairs Select Committee stated:

We are very concerned at the possibility that the hostile environment could be extended to include EEA nationals and apply to an estimated three million more people living legally in the UK without any evidence that the policy is working fairly and effectively. This has the potential to create further errors and injustices, which we have already seen causing unnecessary distress, and to increase the administrative burden on individuals, employers and landlords, without any evidence that the system works. It also cuts across the strong words of the Prime Minister that the UK wants EU citizens living here to stay, if the Government then chooses to subject them to a policy described as the 'hostile environment'.⁷³

During this project testimony was heard from EU migrant workers in NI regarding (to adopt the terms used by the Home Affairs Committee) errors and injustices and unnecessary distress that the existing hostile environment measures have already caused them.⁷⁴ This includes significant problems and costs in relation to interacting with banks and accessing public services where entitlements are increasingly questioned. It is apparent that the situation has deteriorated since the 2016 referendum. Again it is not always clear as to whether such changes are the result of formal policy changes or attitudinal changes among decision makers.

One policy that did change in 2017 was the process for GP registration. BrexitLawNI heard a number of complaints from EU migrants that evidential requirements had in practice changed and it was now much more difficult for them to register with a GP, with patients experiencing extensive delays and increased evidential requirements, when the process had previously been more straightforward. A new Registration Form was introduced for all patients in June 2017. This HSCR1 form, according to the health authorities that issued it 'presented unforeseen issues for patients, GPs and FPS [Family Practitioner Services] staff', it was consequently reviewed and the process only applied to 'new entrants' rather than internal transfers. In addition, the process was further streamlined in February

73 Home Affairs Committee, *Home Office delivery of Brexit: immigration*, February 2018 para 122 <<https://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/inquiries/parliament-2017/home-office-delivery-of-brexit-immigration-inquiry-17-19/>>.

74 In February 2018 CAJ with academic, NGO and trade union partners and the Stronger Together network held a major conference on the implications of BREXIT for migrant workers in NI, a report from which is pending. See, <<https://brexitlawni.org/implications-brexit-migrant-workers-watch/>>.

2018 reducing evidential requirements to 'remove barriers that had resulted in delays to registration'. The process would involve 'extensive post registration checks to validate the patient's entitlement'.⁷⁵

It is not clear what prompted the changes to the process in 2017, what justification there was as to their necessity and proportionality, and as to whether they were Brexit related. It is undisputed that the changes have led to significant 'issues' and delays, and the questioning of entitlements that previously did not occur.

The use of 'in country' controls to police migration in NI after Brexit is alluded to in the UK Northern Ireland and Ireland Position Paper.⁷⁶ The Northern Ireland Affairs Committee in its report on the border, welcoming commitments that free movement across the land border would continue, called for clarity as to the intentions for in-country controls:

We recommend the Government sets out in detail how it proposes to apply existing, or whether there will be new, internal immigration controls for EU nationals. In the Committee's view, the residents of Northern Ireland should not be subject to more onerous documentary checks to determine entitlement to stay and to access public services and the labour market than anywhere else in the UK. It must also establish the resource implications of conducting checks on people away from the border.⁷⁷

Whilst this clarity is awaited, references however to increased 'intensification' of the Hostile Environment measures under the 2014 and 2016 Acts are more explicit in Organised Crime Task Force reports that are detailed in the BrexitLawNI Border Controls Policy Paper.

In May 2018 Tendayi Achiume, the UN Special Rapporteur on Contemporary Forms of Racism on concluding an official visit to the UK that included sessions in Belfast, stated that the "groups with which I consulted reported high levels of anxiety among immigrants regarding their status following the UK's departure from the EU" and specifically:

In Northern Ireland, groups expressed concerns that even a policy that committed to no routine passport checks in the Common Travel Area might result in non-routine checks that in the hostile immigration environment would lead to racial profiling of transiting minorities.⁷⁸

The Rapporteur recommended the adopting of immigration policies pre and post Brexit "that shield EU and non-EU migrants from the threat of racial and ethnic discrimination."⁷⁹

75 Correspondence to CAJ from the Assistant Director, FPS HSC Business Services Organisation, 20 April 2018.

76 HM Government, 'Northern Ireland and Ireland Position Paper', 16 August 2017, para 33.

77 Northern Ireland Affairs Committee, 'The land border between Northern Ireland and Ireland' HC 329 (16 March 2018) para 31.

78 End of Mission Statement of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance at the Conclusion of Her Mission to the United Kingdom of Great Britain and Northern Ireland, para 63 (emphasis in original) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23073&LangID=E>>.

79 *ibid.*

Equality of Treatment for Irish and British Citizens in NI

Another consideration in the Brexit context is the extent to which entitlements will increasingly be tied to British citizenship and potential conflict with the requirements of the B/GFA in relation to equal treatment for British and Irish citizens in NI. The UK has given assurances that the existing legal framework will ensure equal access for Irish citizens as for British citizens in NI to services.⁸⁰ However, as things stand, in numerous areas this is simply not the case, with many entitlements for Irish citizens only provided for by virtue of EEA treaty rights which will cease to have effect after Brexit.⁸¹ For example, take the following examples of three NI resident neighbours all requiring a home help or residential care after Brexit:

- Person A: An Irish citizen who identifies as Irish born in NI;
- Person B: A British citizen who identifies as British born in NI;
- Person C: An Irish citizen who has lived almost all her life in NI but was born just over the border in a Donegal hospital.

As things stand the Health Trusts will be debarred from providing Person C with a home help or residential care after Brexit, which will usually only be available to British citizens.⁸² Person B will continue to be able to receive the service. In order for Person A to receive the service he or she would have to identify as British and prove and rely upon British citizenship. This conflicts with the provisions in the B/GFA.

Whilst the UK government has a clear policy intention to continue to afford Irish citizens equivalent access to services post-Brexit (which entails differential treatment of the EU26) it is notable that this is yet to happen, and is not expressly provided or in the EU Withdrawal Act 2018.

Differentials and Employment: the UK Border Force Recruitment Debacle

The issue would engage public sector employment if more jobs are reserved for British citizens and hence not open to Irish citizens in the Brexit context, which would conflict with the B/GFA and anti-discrimination legislation.

This issue has already come into focus in the context of two recruitment exercises run by the Home Office for new UK Border Force officers. Given the assurances of no new border controls, these recruitment exercises caused considerable controversy. The Home Office launched a recruitment

⁸⁰ HM Government, 'Northern Ireland and Ireland Position Paper' (16 August 2017) para 23.

⁸¹ Traveller Movement, 'Brexit and Irish citizens in the UK: How to safeguard the rights of Irish citizens in an uncertain future', December 2017 <http://travellermovement.org.uk/wp-content/uploads/TTM-Brexit_and_Irish_citizens_in_the_UK_web.pdf>.

⁸² *ibid.* Referencing provisions of the Nationality and Immigration Act 2002, sch 3, paras 1 and 5, which apply to the provisions of Article 15 of the Health and Personal Social Services (Northern Ireland) Order 1972, EU citizens are excluded from non-cash based social welfare schemes, unless the exclusion would breach that person's rights under EU law or the ECHR.

exercise for 300 new 'mobile patrol' UKBF Officers in late 2017 for a range of locations including Belfast.⁸³ CAJ referred this recruitment exercise to the Equality Commission for NI. The recruitment in NI was for British citizens only (which is not a requirement, for example, to join the PSNI) and furthermore, for those candidates without the necessary formal qualifications (2 A levels), the experience criteria was either having 'served in the British Armed Forces', having been a police officer or previously a UKBF officer. In the absence of objective justification for such criterion, these provisions conflicted with fair employment legislation in NI and the provisions of the B/GFA, and would have resulted in recruitment from only one section of the community.⁸⁴

The Equality Commission met with UKBF and:

... stressed the importance of ensuring that employers in Northern Ireland comply with the requirements placed on them by the equality legislation in Northern Ireland. ... [The Commission...] advised Border Force of our concerns in relation to the relevance of the experience criteria, given that it is not essential for applicants to have this experience and that training is provided for all appointees ...[and]...discussed the need for objective justification of all criterion, whether internally or externally advertised. This includes the nationality requirement.⁸⁵

Into 2018 the Home Office launched a fresh recruitment drive for 1,000 new UKBF Officers, with reportedly 21 being Belfast-based (which would increase staffing by around a third). On this occasion different criteria were set for NI than for Great Britain, with the NI posts dropping the experience criteria relating to past service in the UK armed forces or police.⁸⁶ However, the restriction on the posts being open to British citizens only was retained. The Equality Commission again raised concerns regarding compliance with anti-discrimination legislation and the B/GFA.⁸⁷ There was significant media coverage and the Home Office confirmed UKBF would withdraw the recruitment exercise and re-advertise.⁸⁸ However, there was a strong reaction from unionist parties at the differential in criteria between NI and Great Britain, with the matter being raised on numerous of occasions in Westminster.⁸⁹

83 'Concern at recruitment of 300 new Border Force Officers' *Irish News* (19 December 2017).

84 Employers in NI are required to monitor the community background of employees under fair employment legislation. The current staffing composition in relation to UKBF officers in NI is not available under these Monitoring Returns as it falls under the broader Home Civil Service Departments and agencies in NI figures consisting of over 2700 staff. There is currently an imbalance in these figures (62.4% Protestant and 37.6% Catholic) (Fair Employment Monitoring Report No 27, Annual Summary of Monitoring Returns) cited in correspondence to CAJ from the Equality Commission (21 February 2018).

85 Correspondence from the Equality Commission Director of Advice and Compliance to CAJ (19 January 2018).

86 See <https://www5.i-grasp.com/fe/tpl_capita77.asp?newms=info5>.

87 Press Statement: Commission comment on Border Force recruitment advertisement (19 April 2018) <<https://www.equalityni.org/Footer-Links/News/Employers-Service-Providers/Equality-Commission-Comment-on-Border-Force-Recrui>>.

88 See 'More than 1,000 Border Force jobs withdrawn over 'British passports only' policy' *Irish News* (21 April 2018).

89 'Anger over change to Border Force jobs' BBC News Online (31 May 2018) <<https://www.bbc.co.uk/news/uk-northern-ireland-44320419>>.

A Question of Entitlement?

It is not just attitudes to entitlement in the post-Brexit context that therefore could shape the interface with bureaucracy and access to services, but the context that the rules to entitlement to public services, employment and other matters, could change in significant way with numerous differentials.⁹⁰ All of this should be understood in the context of a jurisdiction with a land border that embraces many local cross-border journeys, including those undertaken by cross-border workers. Given present experiences it is no exaggeration to raise concerns about the potential for racial discrimination on a significant scale.

Whilst it is generally accepted that requiring proof of entitlement from any applicant is the safest and only way to mitigate against racial profiling, this also has the detrimental impact of lengthy and bureaucratic processes that include the provision of papers for numerous interactions with public and private actors. A costly and complex system may be built up 'to police' the entitlements of what at present are 2% of the population and with no pressing social need to do so. BrexitLawNI concludes that this is a 'solution' that is best avoided.

D. Ways Forward

Tackling Racist and Sectarian Expression

Official initiatives to disband paramilitary groups should include a specific body of work on tackling involvement in racist expression, intimidation and violence. Monitoring bodies should cease to downplay or overlook this area of paramilitary activity.

The current Department of Justice review should ensure NI incitement to hatred legislation is fit for purpose and the PSNI should review their interpretation of the threshold. There must be a shift from the current policy of widespread tolerance of incitement to hatred to a zero tolerance approach.

The PSNI and Housing Executive should review both information collation and practices in dealing with racist and sectarian housing intimidation.

The PSNI, Councils, Housing Executive, Department of Infrastructure and other relevant public authorities should develop and adopt policies providing for intervention, within their competencies, to remove items that constitute incitement to hatred or hate expression on protected grounds.

Public authorities need to introduce safeguards and take all reasonable steps to ensure funding or facilities they provide or endorse is not used for activities which are likely to be the sites of racist expression.

Public authorities, including those with an education function, should ensure they define and interpret the good relations duty as including positive obligations to tackle racism and sectarianism and take forward concerted and effective action to achieve this goal.

⁹⁰ This includes the potential for different entitlements for: British citizens and Irish citizens in NI; Irish citizens born in NI and those born elsewhere; Irish EU citizens and those of the EU26; EU26 citizens who will retain rights under any Withdrawal Agreement and those who do not; EU26 citizens who can prove they have rights under any Withdrawal Agreement and those who cannot; non-EEA nationals (depending on ordinary residence) and EU26 citizens.

Avoiding Racial Profiling and Broader Discrimination

There is a strong argument that continued EU freedom of movement into NI is the only solution that will avoid the creation of multiple new differentials in entitlements that will make further racial profiling and broader discrimination even more widespread. This should therefore be maintained.

The UK should desist from its planned roll out of 'hostile/compliant environment' measures in NI, and remove those which have already been put in place. Specific safeguards should be introduced, in accordance with international best practice, to prevent racial profiling across the public sector.

Freedom of movement in the CTA should be underpinned by an enforceable treaty and domestic safeguards that incorporate the UK position that there will be no passport checks in and out of NI.

The associated rights in the CTA should be legally codified and the restriction of any NI public services and related entitlements to British citizens should be avoided.

NI needs equality legislation that evolves in step with international standards and best practice in a post-Brexit context and such provision should be underpinned by a Bill of Rights for NI.



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Brexit, Xenophobia and
Racism in Northern Ireland

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