



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**RACIST
HATE
CRIME**

**Human Rights and the
Criminal Justice System
in Northern Ireland**





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Temple Court, 39 North Street, Belfast BT1 1NA
Tel: (028) 9024 3987 ■ Fax: (028) 9024 7844
Email: information@nihrc.org ■ Online: www.nihrc.org ■ twitter.com/nihrc
facebook.com/nihrc ■ youtube.com/nihrc

Foreword

Racism is a scourge that challenges societies worldwide. It causes immense suffering for its victims and it undermines communities. In Northern Ireland (NI) the form of racism that draws most attention, as noted by the United Nations, is sectarianism. However, racism takes many other forms. In particular, racist verbal and physical threats and attacks on immigrants are a cause of concern. The Police Service of Northern Ireland reports that racism comes second only to sectarianism as the most reported form of hate crime: in 2012/13, the official statistics recorded 750 racist incidents and 470 racist hate crimes.

Our society needs to tackle racism as a matter of law, policy and practice. This is not just a matter of decency and the upholding of important values, it is also a legally binding human rights requirement. International treaties, subscribed to by the United Kingdom (UK), lay down a wide range of duties with which States must comply. Important among these is the requirement to put in place and to enforce legal prohibitions on racist hate speech and other forms of hate crime.

The Northern Ireland Human Rights Commission (NIHRC) has undertaken the present investigation in order to assess compliance by the NI Executive and criminal justice agencies with the international human rights obligations regarding the combating of racism. The investigation was framed on the basis of those treaties ratified by the UK that are of most relevance regarding racist hate crimes, taken together with a number of 'soft law' instruments and similar protections developed by the Council of Europe and the European Union.

When undertaking the investigation, the NIHRC carried out a literature review of relevant legislation and policy documents and conducted extensive

fieldwork. We focused upon signal incidents and racist hate crimes that occurred during 2010 to 2012 within the South Belfast and Craigavon areas. The fieldwork involved interviews with frontline and senior personnel from key criminal justice agencies, non-governmental organisations and victims of racist hate crimes. The NIHRC also met with representatives of the Office of the First Minister and deputy First Minister and the Department of Justice. Selected files held by the criminal justice agencies were accessed.

The combination of relevant legislation, policy documents, interview material and agency files enabled us to assess the manner in which signal incidents and racist hate crimes are dealt in NI. The investigation material is presented within this report in relation to the four requirements to be met so as to ensure that the domestic criminal justice system complies with human rights laws and standards: the duties to prevent, prohibit, prosecute and protect. On the basis of its findings, the NIHRC is proposing a number of recommendations. These are to be found in the final chapter.

The NIHRC is extremely grateful to all of those who facilitated and assisted this investigation. It notes with appreciation the constructive engagement of members of the various criminal justice agencies, civil society and of those who are or who work with the victims of racist attacks. We are particularly appreciative of the commitment and fine work of our staff who worked on the investigation and the drafting of the investigation report.

Professor Michael O'Flaherty
Chief Commissioner

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Acronyms

ACPO	Association of Chief Police Officers
CERD	United Nations International Convention on the Elimination of All Forms of Racial Discrimination
CoE	Council of Europe
DDPA	Durban Declaration and Programme of Action
DoJ	Department of Justice for Northern Ireland
DPCSP	District Policing and Community Safety Partnerships
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FCNM	Council of Europe Framework Convention for the Protection of National Minorities
HSCO	Hate and Signal Crime Officer
ICCPR	United Nations International Covenant on Civil and Political Rights
NGO	Non-governmental organisation
NICTS	Northern Ireland Courts and Tribunals Service
NIHRC	Northern Ireland Human Rights Commission
OFMdFM	Office of the First Minister and deputy First Minister
OSCE	Organization for Security and Cooperation in Europe
PBNI	Probation Board for Northern Ireland
PCSP	Policing and Community Safety Partnerships
PPS	Public Prosecution Service for Northern Ireland
PSNI	Police Service of Northern Ireland
UN	United Nations

Terminology

Contest

A court hearing where guilt is not accepted by the accused.

Detections

Cases where a) a crime has been committed and recorded, b) a suspect has been identified and c) where the suspect has either received a formal sanction ('sanction detections') or the outcome is such that no further action was taken against the suspect ('non sanction detections'). These classifications were used up until 2012/13 but have since changed.

Human rights standards

These include binding international treaties, decisions of the European and domestic courts, as well as high jurisprudential authorities such as General Comments or Recommendations, Concluding Observations and the Views of Treaty Bodies. In addition, the NIHRC takes account of non-binding soft law, including Declarations, Resolutions and Official Reports.

Indictable offences

As a general observation, indictable offences relate to more serious criminal behaviour and are tried at the Crown Court before a judge and jury.

Recorded crimes

Crimes recorded for the purposes of data collection are all indictable and triable-either-way offences. Additionally, a few closely associated summary offences are included. These crimes are also termed 'notifiable offences'.

Recorded incidents

An incident is defined as "a single distinct event or occurrence which disturbs an individual's, group's or community's quality of life or causes them concern". In many cases these incidents may be crimes in law, such as disorderly behaviour or many road traffic offences, but they are not of a level of severity that would result in the recording of a notifiable crime.

Special measures

Measures designed to protect victims during criminal investigations and court proceedings that are detailed in EU Directive 2012/29, Article 23.

Summary offences

As a general observation, summary offences relate to less serious criminal behaviour and are tried in the Magistrates' Court before a District Judge.

Temporary special measures

Measures introduced which permit differential treatment of a disadvantaged group. Such measures must be time bound and proportionate to the aim of securing to that group the full and equal enjoyment of human rights and fundamental freedoms. See CERD Committee, General Comment 32.

Undetected cases

Undetected cases refer to cases where a crime has been committed and recorded, all current lines of inquiry have been exhausted but no suspect identified. This does not mean that cases have been closed definitely, as fresh lines of investigation may occur in the future.

Overview

Investigation powers of the Northern Ireland Human Rights Commission

The Northern Ireland Human Rights Commission (NIHRC) was established following the Belfast (Good Friday) Agreement under the Northern Ireland Act 1998. Section 69 of the Act mandates the NIHRC with powers to conduct investigations and to compel evidence.¹

The NIHRC works for the promotion and protection of those human rights to which the United Kingdom (UK) is legally committed at the national, regional and international levels and does so in full conformity with the United Nations (UN) Principles relating to the Status of National Institutions (The Paris Principles).²

The findings and recommendations in this report are presented in discharge of the NIHRC's statutory duties, which include a requirement to review the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI).³

What are 'racist hate crimes'?

'Racist hate crimes' are not explicitly defined in international law or domestic law. To understand the term in a human rights context, it is important to first understand the meaning of 'racial discrimination'. International human rights laws define 'racial discrimination' as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and

fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁴

For the purposes of this report, the NIHRC notes that racial discrimination may give rise to actions by private persons which constitute criminal offences; referred to as 'racist hate crimes'.

The NIHRC also recalls the related terms of 'racism' and 'institutional racism'. It notes, in particular, the definitions accepted by the Stephen Lawrence Inquiry (MacPherson Report) as follows:

'Racism' in general terms consists of conduct or words or practices which advantage or disadvantage people because of their colour, culture or ethnic origin. In its more subtle form it is as damaging as in its overt form.

'Institutional Racism' consists of the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people.⁵

In popular discourse, the term 'hate crime' is often used to incorporate acts of racism that may not amount to a criminal offence, such as name-calling or anti-social behaviour. Such acts can be repetitive which may then engage the criminal law. Alternatively, they can prove indicative of underlying prejudices which may escalate over time if left unaddressed and thereby constitute a criminal offence.

1 Northern Ireland Act 1998, Sections 69(8) and 69A (as amended by the Justice and Security (Northern Ireland) Act 2007). During this investigation, the NIHRC did not however use its formal investigatory powers due to the high levels of co-operation from the DoJ, OFMdfM, and the criminal justice agencies involved.

2 UN General Assembly Resolution 'National institutions for the promotion and protection of human rights', UN Doc. A/RES/48/134 (4 March 1994).

3 Northern Ireland Act 1998, Section 69(1).

4 CERD, Article 1.

5 'The Stephen Lawrence Inquiry' (February 1999), paras 6.4 and 6.34. Available at, <<http://www.archive.official-documents.co.uk/document/cm42/4262/sli-00.htm>>

These acts are often referred to as ‘signal’⁶ incidents and are considered within this report.

The concept of institutional racism is also relevant because it is concerned with the issue of organisational culture. Unwitting prejudices, ignorance and thoughtlessness whilst not deliberate or directed, will nonetheless, if left unaddressed, risk decreasing the levels of trust and confidence amongst the victims of racist hate crimes and the communities to which they belong.⁷ Accordingly, the behaviours and attitudes of staff within the criminal justice agencies in NI are of particular significance.

Human rights law and standards

The principal sources of human rights laws are international treaties. Treaties are written agreements to which the participating States are legally bound.⁸ The two UN treaties that speak most directly to the topic of racist hate crimes are the International Covenant on Civil and Political Rights (ICCPR)⁹ and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).¹⁰ Due to the indivisible nature of human rights, acts of racist hate crimes will also frequently engage the rights protected under the other international human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹¹ the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),¹² the Convention on the Rights of the Child (CRC),¹³ the Convention on the Rights of Persons with Disabilities (CRPD),¹⁴ and the UN Educational, Scientific and Cultural Organisation (UNESCO) Convention on the Protection and

Promotion of the Diversity of Cultural Expressions.¹⁵

Typically, the implementation of a treaty is overseen by a Committee. The ICCPR is monitored by the Human Rights Committee and the CERD is supervised by the Committee on the Elimination of Racial Discrimination (the CERD Committee). The two primary methods by which Committees monitor compliance are the State reporting procedure and the individual complaints procedure. First, the State must submit a periodic report describing its action to implement the treaty provisions. Upon review of this report and after a dialogue with the State, the Committees issue concluding observations that contain both concrete recommendations and a note of general areas of concern or approval. Second, where accepted by the State, a Committee may receive complaints directly from individuals who allege a breach by the State of a treaty obligation. In this way, the Committees issue jurisprudence determining the appropriate application of treaty obligations to the factual scenarios raised.

The concluding observations and the jurisprudence serve as an authoritative statement on how each Committee believes their treaty should be interpreted. The UK has not accepted the right of individuals to petition either the Human Rights Committee or the CERD Committee.

In addition to engaging directly with the State, the Committees also formulate and publish general statements concerning the application of treaty provisions. These statements are called ‘general comments’ or ‘general recommendations’ and in the context of racist hate crimes include the following relevant documents:

⁶ Innes, M., ‘Crime as a Signal, Crime as a Memory’, *Journal for Crime, Conflict and the Media* 1 (2) 15-22, p 15.

⁷ ‘The Stephen Lawrence Inquiry’ (February 1999), Recommendations.

⁸ See Shaw, M., *International Law* (Cambridge, 2003), p 88.

⁹ Ratified by the UK on 20 May 1976

¹⁰ Ratified by the UK on 7 March 1969.

¹¹ Ratified by the UK on 20 May 1976.

¹² Ratified by the UK on 7 April 1986.

¹³ Ratified by the UK on 16 December 1991.

¹⁴ Ratified by the UK on 8 June 2009.

¹⁵ Ratified by the UK on 7 December 2007.

- Human Rights Committee, General Comment 18: Non-discrimination;
- Human Rights Committee, General Comment 31: The nature of the general legal obligation imposed on States Parties to the Covenant;
- Human Rights Committee, General Comment 34: Article 19, freedoms of opinion and expression;
- CERD Committee, General Recommendation 14: on Article 1, paragraph 1 of the Convention;
- CERD Committee, General Recommendation 15: Organised violence based on ethnic origin (Art. 4);
- CERD Committee, General Recommendation 26: Article 6 of the Convention;
- CERD Committee, General Recommendation 31: on the prevention of racial discrimination in the administration and functioning of the criminal justice system;
- CERD Committee, General Recommendation 33: Follow-up to the Durban Review Conference;
- CERD Committee, General Recommendation 35: Combating racist hate speech;
- CRC Committee, General Comment 1: Article 29(1), The aims of education;
- CRC Committee, General Comment 10: Children’s rights in juvenile justice.

Within Europe, both the Council of Europe (CoE) and the European Union (EU) have addressed the subject of racism and hate crimes. The most relevant treaties of the CoE are the Framework Convention for the Protection of National Minorities (FCNM)¹⁶ and the European Convention on Human

Rights (ECHR). Unless otherwise determined by the treaty itself, the official monitoring body for the CoE instruments is the Committee of Ministers (constituting representation from each member state). Under the FCNM, an advisory committee was established to provide assistance to the Committee of Ministers by reviewing State reports and transmitting an advisory opinion.¹⁷ The Committee of Ministers then issues a final determination in the form of a country specific Resolution.

Under the ECHR, the European Court of Human Rights (ECtHR) was established to consider inter-State complaints and complaints made by individuals against a State Party.¹⁸ Individuals must exhaust any ‘effective’ domestic legal remedies for a violation on one of these rights before taking a case to the ECtHR.¹⁹

Through the Human Rights Act 1998 (HRA) a majority of the rights and freedoms contained in the ECHR have been given domestic effect. This is the only human rights instrument incorporated directly into UK law. When interpreting the scope and application of ECHR rights UK Courts must, by virtue of Section 2 of the HRA, take into account judgments and decisions of the ECtHR.

The EU places a high priority on the eradication of racism and xenophobia, outlining its commitment to “endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia” in its constitutional text.²⁰ This work is primarily directed by the EU Agency for Fundamental Rights (FRA).

¹⁶ Ratified by the UK in 1998.

¹⁷ Resolution CM 97 (10) and Resolution CM (2009)3.

¹⁸ ECHR, Article 35.

¹⁹ In the case of *Burden v UK*, the ECtHR stated that a remedy which is dependent upon the discretion of the Executive is not an effective remedy. Therefore at present, if the only possible remedy to be obtained by the domestic courts is a declaration of incompatibility under the Human Rights Act 1998 then an applicant could bring their case directly before the ECtHR. See *Burden v UK*, ECtHR, Application No. 13378/05 (29 April 2008).

²⁰ Treaty on the Functioning of the European Union, Article 67(3).

Directives are legislative acts of the EU that form part of the UK domestic legal order once the transposition date has passed.²¹ Individuals can rely on the terms of Directives in the domestic courts. However, while Directives may require Member States to achieve a certain result, governments are left free to choose the method by which that result is achieved. A Directive of note in the context of racist hate crimes is the:

- Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (25 October 2012)

The EU have also issued 'Framework Decisions' in the area of crime and policing.²² A Framework Decision of particular relevance to racist hate crimes and to which the UK is a party is the:

- Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law (28 November 2008).²³

In addition to the international treaties there exist a number of instruments that are collectively referred to as 'soft law'. These documents are not legally binding but they are of strong persuasive value, especially when issued by the treaty monitoring bodies. They assist with interpreting the treaty obligations, and in this regard they often serve as precursors to more binding legal obligations.

Two UN conferences have produced significant soft law standards relevant to racist hate crimes. In 2001, the General Assembly convened the World Conference against Racism in Durban, South

Africa.²⁴ As a consequence, the Durban Declaration and Programme of Action (DDPA) was adopted.²⁵ Similarly, the Office of the High Commissioner for Human Rights (OHCHR) recently convened four regional expert workshops to discuss the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. A concluding workshop was convened in 2012 in Rabat, Morocco, resulting in the adoption of the Rabat Plan of Action.

In addition, the CoE has established the European Commission Against Racism and Intolerance (ECRI) as a monitoring body tasked to specifically combat racism, racial discrimination, xenophobia, anti-Semitism and intolerance in Europe from the perspective of the protection of human rights.²⁶ The ECRI produces general policy recommendations as guidelines for member States when making public policies. It also examines practice in individual member States and issues recommendations aimed at addressing particular manifestations of racism and intolerance.²⁷

Other 'soft law' instruments relevant to the subject of racist hate crimes, and referred to throughout the following report, include the:

- UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;
- UNODC Handbook on Justice for Victims: on the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;
- UN Human Rights Council Resolution 16/18 on combatting intolerance, negative stereotyping

²¹ Ibid., Articles 288 and 289.

²² The ability to issue new Framework Decisions has been abolished. See Treaty of Lisbon, amending the Treaty Establishing the European Union and the Treaty establishing the European Community (13 December 2007), para 51.

²³ The UK has indicated an intention to opt-out of pre-Lisbon EU crime and policing laws which will include the Framework Decision, and then opt back in to the laws on an individual basis. This is because Lisbon changed the jurisdiction of the ECJ in relation to pre-Lisbon crime and policing laws. However, even if the UK does opt-out of this Framework Decision, it will remain in force until 1 December 2014.

²⁴ Full title is 'World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance'. See UN GA Resolution 52/111 (12 December 1997).

²⁵ In 2009, the UN convened a Durban review conference in Geneva to serve as a catalyst for reinvigorating the commitments outlined in the DDPA and produced an outcome document, hereafter called the 'Durban Review Outcome Document'.

²⁶ Council of Europe, CM Res (2002)8 on the statute of the ECRI, Article 1.
²⁷ These take the form of 'country monitoring reports'. See generally, 'ECRI in Brief', Council of Europe, Strasbourg (April 2009), p 4. Available at, <http://www.coe.int/t/dghl/monitoring/ecri/activities/Ecri_inbrief_en.pdf>

- and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief;
- UN Guidelines on the Role of Prosecutors;
- UNESCO Declaration of Principles on Tolerance;
- CoE Recommendation No. R(97)20 of the Committee of Ministers to Member States on “Hate Speech”;
- CoE Recommendation (2005)9 of the Committee of Ministers to Member States on “the protection of witnesses and collaborators of justice”;
- CoE Recommendation (2006)8 of the Committee of Ministers to Member States on “assistance to crime victims”;
- CoE ECRI General Policy Recommendation 1 on Combatting Racism, Xenophobia, Antisemitism and Intolerance;
- CoE ECRI General Policy Recommendation 2 on Specialised Bodies to Combat Racism, Xenophobia, Antisemitism and Intolerance at the National Level;
- CoE ECRI General Policy Recommendation 4 on National Surveys, on the Experience and Perception of Discrimination and Racism from the Point of View of Potential Victims;
- CoE ECRI General Policy Recommendation 7 on National Legislation to Combat Racism and Racial Discrimination;
- CoE ECRI General Policy Recommendation 11 on Combatting Racism and Racial Discrimination in Policing;
- OSCE Recommendations on Policing in Multi-Ethnic Societies;
- Fribourg Declaration on Cultural Rights.²⁸

²⁸ Text presented by the Observatory of Diversity and Cultural Rights at the University of Fribourg in Switzerland, the Organisation Internationale de la Francophonie and UNESCO in May 2007.

The case for an investigation

The NIHRC conducted this investigation on the basis of its statutory responsibility to review the adequacy and effectiveness in NI of law and practice relating to the protection of human rights and after considering the following matters:

First, the NIHRC recalled that the Criminal Justice (No.2) (Northern Ireland) Order 2004 (the 2004 Order) was introduced to ensure that the perpetrators of offences aggravated by hostility receive, following conviction, a higher sentence. Between April 2007 and January 2012, the NICTS statistics record that five racially aggravated crimes received enhanced sentences in accordance with the 2004 Order.²⁹

Second, the NIHRC recognised that the subject of hate crimes featured high on the agenda of public authorities tasked with monitoring the performance and practices of criminal justice agencies. However, no authoritative human rights analysis had been conducted.³⁰

Third, the NIHRC considered the particular vulnerabilities of victims and, in doing so, observed that racist hate crimes are reported to often have a greater impact when compared to the same offence where a hate element is not present. This is because the perpetrators of racist hate crimes choose their victims or modify the attack on the

²⁹ Information provided by NICTS. The PPS have expressed concern that these statistics do not accurately reflect the number of enhanced sentences under the 2004 Order during this time period.

³⁰ In 2005, the House of Commons, Northern Ireland Affairs Committee produced the report ‘The challenge of diversity: Hate crime in Northern Ireland’, 9th report of session 2004-5, Volume 1. More recently, both the Criminal Justice Inspectorate for Northern Ireland (CJINI) and the Northern Ireland Policing Board (NIPB) had produced reports on the subject. See, CJINI, ‘Hate Crime: A follow-up inspection of the management of hate crime by the criminal justice system in Northern Ireland’ (July 2010) and ‘Hate Crime in Northern Ireland: A thematic inspection of the management of hate crime by the criminal justice system in Northern Ireland’ (January 2007); Northern Ireland Policing Board, ‘Human Rights Annual Report 2012’, p 112-3 and ‘Human Rights Thematic Review: Policing with and for Lesbian, Gay, Bisexual and Transgender Individuals’ (March 2012). At the same time, the criminal justice agencies were conducting comprehensive reviews regarding how hate crimes were addressed. Reports had also been published by non-governmental organisations, such as the joint report by the Institute for Conflict Research (ICR) and the Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO), and that of the Northern Ireland Council for Ethnic Minorities (NICEM).

basis of the victim's apparent identity. The victims are reported to have greater difficulty in their recovery and may fear repeat victimisation which often also results in a greater impact upon their family and the wider community to which they belong.³¹

Fourth, the NIHRC noted that in 2011/12, the official statistics recorded 696 racist incidents and 458 racist hate crimes.³² The sanction detection during this year was 16.8% compared to a rate of 26.3% for all recorded types of hate crimes combined.³³

In 2013, the Minister of Justice committed to developing an action plan to address racist hate crimes and stated that:

*the [NIHRC] is conducting an investigation into how justice agencies manage race hate crime ... Work is on-going to introduce changes to facilitate better monitoring of the legislation and to identify offenders more effectively. Those changes are due to be introduced in the coming months, and they will be reviewed to ensure that the legislation is used effectively.*³⁴

The methodology

In June 2012, the NIHRC issued the Terms of Reference for its investigation identifying the following NI Executive departments and criminal justice agencies to be of particular relevance:

- the Office of the First Minister and the deputy First Minister (OFMdfM);
- the Department of Justice (DoJ);
- the Public Prosecution Service (PPS);
- the Police Service for Northern Ireland (PSNI);
- the Northern Ireland Courts and Tribunals Service (NICTS);
- the Judiciary; and,
- the Probation Board for Northern Ireland (PBNI).

The NIHRC issued notification to these agencies and sought their assistance in the collation of data. It identified the need to examine both the causes and consequences of racist hate crimes. In particular, it decided to focus upon those actions that seek to both prevent crimes and to deal with them after they have occurred. To achieve this aim, the NIHRC considered:

- the relevant international human rights standards;
- the domestic legal and policy framework;³⁵
- the practices of the criminal justice agencies³⁶; and,
- the experiences of the victims and the representatives of Non-Governmental Organisations (NGOs).

³¹ See, Hall 'Hate Crime' Crime and Society Series (2005) p 66-71. It is further the case that in difficult economic times, visible minorities are more vulnerable to verbal and physical attack because of the perception that they are responsible for a lack of job opportunities.

³² After sectarianism, racist hate crime is the second most reported form of hate crime in Northern Ireland. See PSNI, 'Trends in Hate Motivated Incidents and Crimes Recorded by the PSNI 2004/05 to 2011/12' (July 2012), p 13. In 2012/13, PSNI statistics recorded 750 racist incidents and 470 racist crimes. See PSNI, 'Trends in Hate Motivated Incidents and Crimes Recorded by the PSNI 2004/05 to 2012/13' (July 2013), p 10.

³³ See PSNI, 'Trends in Hate Motivated Incidents and Crimes Recorded by the PSNI 2004/05 to 2011/12' (July 2012), p 17. The sanction detection rate refers to the number of offences which are cleared up through a formal sanction to the offender relative to the number of recorded crimes. Not all sanction detections will necessarily result in a subsequent conviction. In cases detected by 'charge/summons', the Public Prosecution Service for Northern Ireland (PPS) may decide not to take forward proceedings or the offender might be found not guilty. See, PSNI 'User Guide to Police Recorded Crime Statistics in Northern Ireland' (August 2012), p 6-8.

³⁴ Available at, <<http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-12-13/04-March-2013/#AQO%203519/11-15>>

³⁵ In considering the domestic legal and policy framework the NIHRC recognised the appropriate role for, and interest of, the NI legislative Assembly. The NIHRC determined that a narrow remit should however be retained when conducting the investigation focusing upon the relevant NI Executive departments as the primary generators of law and policy within the jurisdiction.

³⁶ Criminal justice agencies as perpetrators of racist hate crime and the rehabilitation of offenders were outside scope of the investigation.

For the purpose of case studies the investigation adopted a focused, in-depth methodology, examining two geographical regions. These were selected on the basis of those existing policing areas with the highest recorded numbers of racist hate crimes both within and outside of Belfast, namely:

- South Belfast; and,
- Craigavon.³⁷

The fieldwork was completed between August 2012 and February 2013. It comprised a total of 139 interviews conducted with 145 representatives across each of the relevant criminal justice agencies, NGOs and victims as follows:

- 70 PSNI interviews with 71 PSNI staff. This total comprises 61 interviews with 61 officers from the South Belfast and Craigavon policing areas (comprising of 34 sergeants and constables from neighbourhood policing units and 27 sergeants and constables from the response units) and 9 interviews with 10 senior or other PSNI staff;
- 26 interviews with 26 PPS staff. This total comprises 22 interviews with 22 public prosecutors, and 4 interviews with 4 senior or other PPS staff. Prosecutors were drawn from a list of prosecution officers and senior prosecution officers from the Belfast and Lisburn chambers that either self-identified as having experience of offences aggravated by hostility or were identified following an analysis of relevant case files;
- 12 interviews with 13 NICTS staff. This total comprises 10 interviews with 10 court clerks, and 2 interviews with 3 senior or other NICTS staff. The court clerks were selected by random sampling from a list of criminal court clerks in the Craigavon and Belfast areas;
- 1 member of the Judiciary, selected with the assistance of the Lord Chief Justice. The opinion expressed in this interview is hereafter referred to as the opinion of ‘the Judiciary’;
- 10 interviews with 10 PBNI staff. This total comprises 5 interviews with 5 probation officers and 5 interviews with 5 senior or other PBNI staff. The probation officers self-identified on a service-wide basis as either having written a pre-sentence report for offences aggravated by hostility or as having attended PBNI hate crime training;
- 1 interview with 1 representative from the Unite Against Hate campaign;
- 8 interviews with 11 representatives from 7 NGOs that work on behalf of minority ethnic communities. (The Commission additionally held 3 meetings with 4 representatives from 3 NGOs that work on behalf of minority ethnic communities);³⁸
- 11 interviews with 12 victims. The victims were identified with the assistance of the NGOs.³⁹

In addition to the formal interviews, meetings were also held with senior personnel responsible for policy development within the OFMdFM, the DoJ, the PSNI, the PPS, the NICTS and the PBNI. The NIHRC also reviewed relevant policies and guidance documents from all of those NI Executive departments and criminal justice agencies directly engaged.

³⁷ In 2010/11, the number of recorded incidents with a racist motivation was 156 in South Belfast, and in 43 in Craigavon. See, PSNI, Trends in Hate Motivated Incidents and Crimes Recorded by the Police in Northern Ireland 2004/05 to 2012/13 (5 July 2013), p 22.

³⁸ See Appendix 1.

³⁹ The NIHRC experienced difficulty in obtaining victims for interview. This appeared to be due to fear of exposure and re-victimisation. Victims also questioned the direct benefit of the interview.

Finally, the NIHRC accessed 120 criminal justice agencies files. This total comprises 78 from the PSNI, 35 from the PPS, 5 from the NICTS and 2 pre-sentence reports. All files supplied to the NIHRC were redacted for data protection purposes. The files were selected on the following basis:

- 16 files: Representing the 5 cases identified by the NICTS between April 2007 and January 2012 as having resulted in an enhanced sentence under the 2004 Order. The corresponding 5 PPS and 5 PSNI files were therefore also accessed. One corresponding pre-sentence report was also available;
- 50 files: Representing the 25 detected cases identified by the PSNI in the South Belfast and the Craigavon areas between financial years 2010/11 and 2011/12 with a 'perceived racial motivation'. The corresponding 25 files were also accessed from the PPS;
- 8 files: Representing a random sampling of 4 cases from the 17 cases identified by the PPS as having been aggravated by hostility but not identified by the PSNI as having a perceived racial motivation within the South Belfast and Craigavon areas during financial years 2010/11 and 2011/12. The corresponding 4 files were also accessed from the PSNI;⁴⁰
- 3 files: Representing 1 case identified by a PBNI pre-sentence report. The corresponding 2 files were also accessed from the PPS and PSNI.
- 26 files: Representing 26 undetected cases selected by random sampling those identified by the PSNI in the South Belfast and the Craigavon areas during financial years 2010/11 and 2011/12; and,
- 17 files: Representing 17 incident cases selected by random sampling those identified by the PSNI in the South Belfast and the Craigavon areas during financial years 2010/11 and 2011/12.

Finally, the interviews were conducted according to appropriate ethical standards. All interviewees were informed of the nature of the report and consent was obtained for any recorded interviews. In addition, victims signed a consent form acknowledging their understanding of the purposes of the interview. Within the report, identifying characteristics have been removed or neutralised.

The report

Taking account of international laws and standards, the report is premised upon the four duties of prevention, prohibition, prosecution, and protection (the four 'P's'). These do not represent a hierarchy but should be understood to be overlapping, mutually dependent and reinforcing.

The first requirement, set out in Chapter 2, is the duty to introduce measures which aim to 'prevent' racist hate crimes. This includes an examination of how the criminal justice agencies within NI operate so as to address racism and racist hate crimes and ensure community safety. The chapter further considers how racial equality and good relations are promoted, and the adoption of time-bound special measures in order to eliminate prejudices and achieve equality. The requirements to collect and disaggregate data in order to monitor and evaluate the effectiveness of the measures adopted to prevent racist hate crimes are also assessed.

⁴⁰ Please note that a direct comparison of the PSNI information and the PPS information could not take place as a PSNI file may fall within the time frame requested but would fall outside the time frame requested at the PPS stage and vice versa.

The second requirement, set out in Chapter 3, is the duty to 'prohibit' racial discrimination, race hate speech and racist violence. This duty is closely related, and may to some extent be viewed as a form of prevention. The chapter evaluates the effectiveness of the domestic framework in NI with specific consideration of existing legislation, criminal sanctions as well as the policies and procedures of the criminal justice agencies. It examines acts that have been proscribed and are subject to criminal sanctions. It also examines those acts which do not amount to criminal offences but which may act as signal incidents.

The third requirement, set out in Chapter 4, is the duty to 'prosecute' the perpetrators of racist hate crimes. This duty refers to the standards that should be met in order to make the prosecution of the perpetrator possible and afford the victim an effective remedy. It includes an examination of the accessibility of reporting facilities for the victims and the effectiveness of investigations concerning the racist aspect. The chapter further considers the narrower 'decision' to prosecute and any subsequent proceedings. It also investigates the involvement of the victims of racist hate crimes in the proceedings and the timeliness of judgments.

The fourth requirement, set out in Chapter 5, is the duty to 'protect' the victims. This begins by identifying the need to recognise the impact of racist hate crimes upon the victim and the risk of repeat and secondary victimisation. It further includes the rights of the victims to access information, in particular concerning their case, before examining how the criminal justice agencies ensure that the victims are themselves understood.

Where a victim is identified as having a particular vulnerability, the chapter considers the provision of protection measures. The requirement to provide access to free and confidential support services is also assessed.

As a general approach, Chapters 2-5, consider the relevant human rights standards engaged. This is followed by an examination of the existing domestic laws and policies considered to be of most relevance. Each chapter then considers the practices of criminal justice agency staff, and the experiences of victims and NGOs drawing upon the evidence gathered through the interviews and the review of case files. To conclude, a summation of key findings is provided which take account of the effectiveness of the domestic framework and the level of compliance with human rights standards.

A series of recommendations can be found at pages 104 to 107 of this report.

The duty to prevent

Introduction

International human rights standards require governments to refrain from violating individuals' rights, but they also require positive actions to be taken to prevent private persons from abusing the rights of others.¹ Reducing, and ultimately eradicating, the social conditions within which racism may exist and racist hate crimes are perpetrated should begin with measures to enhance community safety. These include initiatives that promote good relations between communities and which aim to foster tolerance, understanding and mutual respect.² At the same time there should be a promotion of equality and non-discrimination.³ In order to monitor and evaluate the effectiveness of both the measures adopted and the occurrence of criminal offences, it is important that data is collected, and finally, that it is disaggregated to inform decisions regarding future interventions by the criminal justice agencies.⁴

The duty to prevent engages a number of human rights standards, the most relevant of which are the:

- ICCPR, Article 2;
- CERD, Articles 2 (2), 4 and 7;
- CRC, Article 29 (1);
- UNESCO Convention on the Protection and Promotion of the Diversity of Cultural

- Expressions, Articles 10 and 11;
- ECHR, Articles 2, 3 and 8;
- FCNM, Article 6;
- Human Rights Committee, General Comment 31;
- CERD Committee, General Recommendation 15;
- CERD Committee, General Recommendation 24;
- CERD Committee, General Recommendation 31;
- CERD Committee, General Recommendation 35;
- CRC Committee, General Comment 1;
- Durban Declaration and Programme of Action (DDPA);
- UNESCO Declaration on the Principles of Tolerance, Article 1;
- ECRI General Policy Recommendation 4;
- ECRI General Policy Recommendation 7;
- ECRI General Policy Recommendation 11;
- Fribourg Declaration on Cultural Rights, Articles 8 and 11;
- OSCE Recommendations on Policing in Multi-Ethnic Societies; and,
- EU Resolution of the Council on a European Agenda for Culture, Article 3.

This chapter details the constituent elements of the duty to prevent racist hate crimes as required by international human rights laws and standards. It considers the existing domestic laws and policies directed toward addressing racism and preventing racist hate crimes in Northern Ireland (NI). It then considers the practices of the criminal justice agencies staff, and the experiences of the victims and non-governmental organisations. To conclude, an evaluation is provided regarding the effectiveness of the domestic framework and the level of compliance with human rights standards.

¹ ICCPR, Article 2.

² CERD, Article 7; CRC, Article 29; UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Article 10; FCNM, Article 6; Fribourg Declaration on Cultural Rights, Articles 8 and 11.

³ CERD, Article 2(2); ECRI General Policy Recommendation 7: National legislation to combat racism and racial discrimination (13 December 2002); ECRI General Policy Recommendation 11: on combating racism and racial discrimination in policing (29 June 2007); OSCE Recommendations on Policing in Multi-Ethnic Societies.

⁴ CERD Committee, General Recommendation 24: Reporting of persons belonging to different races, national/ethnic groups, or indigenous peoples (27 August 1999); Durban Declaration and Programme of Action (DDPA), Programme for Action, para 92; ECRI General Policy Recommendation 4: On national surveys on the experience and perception of discrimination and racism from the point of view of potential victims (6 March 1998); ECRI General Policy Recommendation 11.

Community safety

Human rights laws and standards

Human rights laws and standards impose a duty on governments to refrain from violating the rights of individuals in the first instance. However, there is also a positive obligation to take measures to prevent private persons or entities from committing acts that impair the enjoyment of the human rights of others.⁵ Such preventive measures are of legislative and operational nature and may collectively be subsumed under the concept of ensuring ‘community safety’.

The ICCPR, Article 2 contains a positive obligation to “adopt legislative, judicial, administrative, educative and other appropriate measures.”⁶ The “failure ... to take appropriate measures or to exercise due diligence to prevent” such harm being caused by third parties, would amount to a violation of the substantive human rights guaranteed by the ICCPR.⁷

The rights enshrined in the ECHR also contain positive obligations. With respect to racist hate crimes, the right to personal integrity as protected by Articles 2, 3 and 8 are particularly relevant. Government and the criminal justice agencies are required to take reasonable measures to ensure individuals are not subject to ill-treatment or offences against the person, inflicted by private individuals.⁸ This includes undertaking preventive operational measures.⁹

The ECtHR has found the positive obligation derived from the ECHR, Article 3, to incorporate a duty to take “all reasonable measures to prevent the recurrence of violent attacks.”¹⁰

Article 8 has also been found to contain positive obligations to protect the physical integrity of the person.¹¹ The ECtHR has confirmed that under Article 2 there is a positive obligation where “the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party.”¹² The failure “to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk,” would amount to a violation of the ECHR, Article 2.¹³ What constitutes a reasonable action will include considering the availability of resources.¹⁴

The CERD Committee has confirmed that there is an obligation to eradicate all forms of incitement to racial discrimination and racist violence established by the CERD, Article 4. This includes a duty to adopt legislation and effectively enforce it through immediate interventions:

[b]ecause threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility.¹⁵

The Durban Review Outcome Document reaffirms the:

responsibility of Governments for safeguarding and protecting the rights of individuals within their jurisdiction against crimes perpetrated by racist ... individuals or groups.¹⁶

⁵ ICCPR, Article 2.

⁶ Human Rights Committee, General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (29 March 2004), para 7.

⁷ *Ibid.*, para 8.

⁸ *Opuz v Turkey*, ECtHR, Application No. 33401/02 (9 September 2009), paras 128 and 159.

⁹ *Ibid.*, para 128.

¹⁰ *Ibid.*, para 162.

¹¹ *E.S. and others v Slovakia*, ECtHR, Application No. 8227/04 (15 December 2009), para 44.

¹² *Opuz v Turkey*, paras 129-130.

¹³ *Ibid.*

¹⁴ *Ibid.*, para 129.

¹⁵ CERD Committee, General Recommendation 15: Organised Violence Based on Ethnic Origin (23 March 1993), para 2.

¹⁶ Durban Review Outcome Document, para 9.

The OSCE Recommendations on Policing in Multi-Ethnic Societies address the specific role that a police service has in preventing crimes. In particular, Recommendation 21 emphasises the importance of the police to “play a proactive role in developing a relationship with minorities” in order to identify and reduce tensions.¹⁷

According to the Explanatory Note:

[it] is often supposed that the responsibility of the police with regard to ethnic conflict is limited to responding to actual incidents of overt conflict ... This view fails to appreciate the importance of the role of police at earlier stages in the potential development of such conflict, and also in the de-escalation of tensions between ethnic groups once public order has been restored.¹⁸

The Explanatory Note recommends monitoring tensions,¹⁹ including the number and seriousness of signal incidents, and the gathering of intelligence from community sources. This requires the police service to build confidence and establish communication channels with ethnic groups.²⁰

Domestic laws and policies

The NI Executive is required to “devise a strategy for enhancing community safety in Northern Ireland.”²¹ An updated Community Safety Strategy was published in July 2012²² with a primary focus on crime prevention and early interventions. It aims to address the “wider issues linked to crime and anti-social behaviour” in order to build safer, shared, and cohesive communities that have confidence in the agencies serving them.²³ The strategy includes hate crimes as a central theme, aiming to promote awareness among communities and the criminal justice agencies, to encourage the reporting of hate crimes and ensure effective enforcement responses.²⁴

The Policing and Community Safety Partnerships (PCSPs), and District Policing and Community Safety Partnerships (DPCSPs), assist in the implementation of the Community Safety Strategy.²⁵ Each District Council in NI must establish a PCSP, which consists of elected members, independent members and representatives of designated organisations. The central tasks of the PCSPs and DPCSPs are to consult and engage with local communities and other relevant stakeholders to identify, early on, which issues are of particular concern and prepare plans for how these can be tackled. The PCSPs and DPCSPs assist in setting priorities for local policing plans and engage with the DoJ and the NI Policing Board.

17 OSCE Recommendations on Policing in Multi-Ethnic Societies, Recommendation 21. The Recommendations are formulated in terms of the policing of ‘national minorities’ in ‘multi-ethnic societies’. In the view of the experts, the term ‘national minorities’ encompasses a wide range of minority groups, including religious, linguistic and cultural as well as ethnic minorities. In principle, the Recommendations are relevant for all of those groups. Similarly, it should be noted that the word ‘minorities’ is used at some points in the Recommendations as a convenient abbreviation for the phrase ‘persons belonging to national minorities’.

18 Ibid., Explanatory Note, Recommendation 21.

19 Ibid.

20 Ibid.

21 The Justice (Northern Ireland) Act 2002, Section 71(1).

22 DoJ, Building Safer, Shared and Confident Communities (July 2012).

23 Ibid., p 3.

24 Ibid., Chapter 6.

25 Established under The Justice Act (Northern Ireland) 2011, part III.

The PCSPs and DPCSPs also have important oversight functions, which include monitoring local policing with the aim of improving service delivery and ensuring effective engagements between the PSNI and local communities. Through early interventions, the PCSPs in particular aim to “deliver a positive difference to communities, contributing to a reduction in crime and enhancing community safety in their district.”²⁶

To promote community safety the PSNI have introduced a range of measures, which includes Neighbourhood Policing and Neighbourhood Watch, which is a joint DoJ, NI Policing Board and PSNI initiative.²⁷

Neighbourhood Policing operates in units and seeks to promote increased levels of involvement by communities. It also seeks to foster the PSNI’s understanding of local issues and to increase confidence in the service through the increased visibility of officers in the neighbourhoods.²⁸

One of three strategic themes of the PSNI ‘Equality, Diversity and Good Relations Strategy 2012-2017’ is to “improve[e] the prevention and detection of Hate Crime and crimes which act as a signal to a community that they are at risk.”²⁹ This commitment is given operational effect through the ‘Service Procedure 16/12, Police Response to Hate Incidents’, which states that officers in the Neighbourhood Policing Units will perform a “Hate and Signal Crime” role.³⁰

In addition to response officers, the Hate and Signal Crime Officers (HSCOs) within the Neighbourhood Policing Units are involved in investigating and monitoring hate incidents and hate crimes, as well as “hate signal incidents and crimes that affect those in minority or vulnerable groupings.”³¹ HSCOs also provide support, advice and information to other investigating officers; undertake internal and external awareness raising of their roles; support to the victims; and, proactively engage with local minority ethnic groups to build confidence in the PSNI’s response to hate crimes.³²

The PSNI Service Procedure 16/12 emphasises the significance of working in partnership, and how this can assist in preventing crimes, raising awareness and supporting the victims. It states that the PSNI:

*must continue to proactively establish new, and build on the existing, partnerships within groups and organisations who engage with minority and vulnerable groups, victims of hate incidents and those who work to support them, and with statutory agencies ... as well as the non-Statutory Organisations.*³³

The practices of the criminal justice agencies and the experiences reported by the victims and NGOs

The PSNI officers interviewed during this investigation understood their duties concerning the prevention of crime and ensuring safe communities. They regarded it as being important to stop situations from escalating. A high level of cooperation between response and neighbourhood officers was highlighted as beneficial. For example, one officer said:

²⁶ Code of Practice for the Exercise of Functions by Policing and Community Safety Partnerships (PCSPs) and District Policing and Community Safety Partnerships (DPCSPs) (November 2012), para 2.6.

²⁷ See <<http://www.psni.police.uk/>>; <<http://www.nidirect.gov.uk/index/information-and-services/crime-justice-and-the-law/crime-prevention/neighbourhood-policing.htm?source=sidepod-nav>>; <<http://www.nidirect.gov.uk/index/information-and-services/crime-justice-and-the-law/crime-prevention/neighbourhood-watch.htm?source=sidepod-nav>>.

²⁸ See <<http://www.nidirect.gov.uk/index/information-and-services/crime-justice-and-the-law/crime-prevention/neighbourhood-policing.htm?source=sidepod-nav>>.

²⁹ PSNI, Equality, Diversity and Good Relations Strategy 2012-2017, approved by the Equality Commission in November 2012, p 11.

³⁰ PSNI, Service Procedure 16/12, Police Response to Hate Incidents (24 June 2013), p 6.

³¹ Ibid. The Hate and Signal Crime Officers (HSCO) take on similar duties that were previously vested with the Hate Incident Minority Liaison Officer (HIMLO) or Minority Liaison Officer (MLO).

³² Ibid., p 13.

³³ Ibid., p 7.

there's communication at the neighbourhood level because they're the ones out there ... feeding into the system, ... what they're hearing when they're out on the street, knowing where the issues are. So it's about recognising the triggers and actually putting in the solutions at the early stages.

A number of different mechanisms were mentioned that supported PSNI officers in fulfilling their community safety duties. The PSNI officers referred to their use of patrols as a means of preventing further incidents from occurring in areas where racist hate crimes have already been committed. They also said briefing logs in the internal PSNI recording system and informing others of the locations of concern in their pre-shift meetings were useful. This helped notify their colleagues working in areas that needed particular attention.

In cases of repeat victimisation the need for heightened attention was stressed and this was recognised by PSNI officers as being necessary to address the broader, underlying issues. A senior officer stated:

where there are issues in a neighbourhood on a wider basis you're going to ... look at putting in place problem solving folders or problem solving initiatives ... especially if it's a repeat or it's a high incident.

Some of the PSNI officers interviewed also noted the importance of challenging "beliefs... perceptions and stereotypes" within communities. One officer stated:

I think most of the police officers out on the beat love talking to the kids because you ... challenge their perceptions and make them think ... a lot of them really do have a very restricted understanding of what goes on outside [their community].

In terms of actions directed towards preventing repeat offences, and thereby improving community

safety, the PBNI staff generally recognised the importance of challenging the racist attitudes of perpetrators. As explained by one probation officer, the aim:

[is to] try to increase their understanding ... of their own identity ... what it is ... triggering them to behave in that way towards other people. To increase a greater understanding of where their actions are coming from.

Although the PBNI staff interviewed recognised their preventive role, they were however critical of the lack of specific materials to guide them when challenging the perpetrators of hate crimes or those with racist attitudes.

Ensuring that the victims had confidence in the criminal justice agencies was perceived to be vital to effectively prevent future racist hate crimes. The PSNI officers typically viewed relations with the victims as an important element of their work to prevent crime and a necessary aspect of policing for community safety. For example, one officer stated:

it is not 'here you are, here are your leaflets, here is your alarm; if you want me, here is the number.' It also means [the officers] have a bit of responsibility, that they go back ... it can stop problems as well, you know, because [the victims] are able to tell us ... It can actually stop things getting out of hand.

Another senior officer similarly pointed out that:

if they have a neighbourhood team or an officer that they know by name, they will report stuff ... and tell us things that are going on ... So basically what we are trying to do is engender that community relationship and a bond between the victim and one of my officers.

The PSNI officers acknowledged the importance of building relationships, engaging with minority ethnic groups and with members of the wider local communities. They viewed this as necessary so as to monitor and address signal incidents and to prevent them escalating. They also pointed to a number of mechanisms that supported this, such as community surgeries, crime prevention days, bicycle security marking and stalls at community events at which information leaflets were distributed as well. Reference was made to multi-agency initiatives, such as the Tension Monitoring Group led by the Belfast City Council. A typical response was reflected in the comments from one senior officer:

I suppose it's understanding the issues and the tensions within communities and that's where the engagement piece comes in, not in a sort of ... meaningless way ... engagement should actually be about ... having the tie into those minority groups, to understand their concerns and their fears ... the Hate and Signal Crime Officers now, who have replaced the HIMLOs, [are] critical as they need to be thinking, way beyond just reacting to the latest hate crime, into what else is happening here that is telling us that tension is increasing or that somebody is more likely, or a group of people are more likely, to become the victims.

In referring to the Tension Monitoring Group, one of the NGOs appeared to value the mechanism. An example was raised in relation to the Roma community when one representative stated:

I would say that that's the most efficient instrument so far. Representatives of different organisations and service providers that are working directly with Roma are coming to those meetings and doing a lot of reporting, what they know that happened in the area from every point of view and that's when an action plan can come ... to intervene early and try to control possible tensions that might arise ... you do get a chance to speak with police officers

who work in the area, you have a relationship and you know you can trust and get feedback, and they are aware that most people don't want to go the official way so they're flexible in that sense of trying to help and coming up with ideas.

The NGO representatives emphasised the importance of accessibility to the PSNI. They generally noted that a lot of good relationships had been built up between the PSNI and minority ethnic communities through focus groups, such as the Policing Board Reference Group and the Hate Crime Thematic Group. However, one NGO criticised the restructuring that had taken place when many of these thematic groups were replaced by the PCSPs. It reported that representation of the communities within the new structures and the contacts developed with the PSNI had diminished significantly.

The NGOs also pointed out that the PCSPs did not have a particular focus on racist hate crimes, and they felt that this could have a negative impact on the good work already completed. One interviewee who was a member of a PCSP expressed for example their reservations as to the effectiveness of the groups and explained the situation as follows:

I notice that people sit around the table and ... say 'ok, we have to deal with hate crime', but ... nobody really says how ... What are the evaluation criteria, what are the aims and objectives? Are we increasing reporting? Are we trying to help victims? Are we trying to challenge attitudes?

Some of the PSNI officers interviewed regarded the links to representatives and workers in the wider community, outside of the minority ethnic groups, as another important means of gaining intelligence and, through their help, preventing further incidents and crimes from occurring. Typical examples included:

[community workers] will all usually get the first phone call as in 'this is happening in the area, we're here, do you know anything about it? Are you aware of it?'

there were calls made to community reps etc. and the community reps were made aware of it ... they put the message out as well not to be annoying those guys.

Some of the PSNI officers, however, voiced concerns regarding communication with community representatives and workers. One officer said:

it's something that was flagged up I think with the community...the community found out very quickly about what had happened ... we were a little worried that paramilitaries might start taking action before we had managed to take action.

The effectiveness of the PSNI's interventions and preventive actions was dictated, in the opinion of the NGOs representatives, by the situations in the respective communities. So, for instance, one interviewee pointed out that:

unfortunately in some areas of [NI] there are places where police can't do much because ... take for example, [you] arrest a member of the local community, that could create problems and potential demonstrations and riots.

Some victims recognised this scenario, and in one instance it was recalled how the police vehicles and officers were attacked when they responded to a call. In this example, the victim also remembered how they had:

I involved the police from the very beginning. Unfortunately that ... actually had an adverse effect on the situation that I found myself in. It made it actually worse.

Findings

The NIHRC found that:

- A framework, necessary to prevent crimes and ensure safer communities, is established in NI and broadly corresponds with the relevant human rights laws and standards.
- The criminal justice agencies staff understood the principles underpinning their work and considered them vital to the successful prevention of crime and ensuring safer communities.
- In areas where relations with the wider community were strained or underdeveloped the preventive actions by the criminal justice agencies appeared to be less effective.

Promotion of good relations between communities

Human rights laws and standards

Human rights laws and standards require governments to promote good relations between communities. This is to be primarily achieved in accordance with the principles of mutual tolerance, respect and cooperation.³⁴ The CERD, Article 7 requires the adoption of,

immediate and effective measures ... with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among ... racial or ethnical groups.

According to the Committee, the promotion of intercultural dialogue and the promotion of equal opportunities are of "equal value" to educational methodologies and should be encouraged in a vigorous manner.³⁵

³⁴ In addition to the standards identified in the text, see generally the DDPA, Programme of Action, para 58.

³⁵ CERD Committee, General Recommendation 35: Combating racist hate speech (9 September 2013), para 37.

Tolerance is defined by the Declaration of Principles on Tolerance to be “respect, acceptance and appreciation of the... diversity of... ways of being human.”³⁶ The CRC, Article 29 identifies the education of children as a significant pathway for addressing intolerance. The Committee on the Rights of the Child has stated that:

[r]acism and related phenomena thrive where there is ignorance, unfounded fears of racial, ethnic, religious, cultural and linguistic or other forms of difference, the exploitation of prejudices, or the teaching or dissemination of distorted values ... Education should thus be accorded one of the highest priorities in all campaigns against the evils of racism and related phenomena ... Racist behaviour is not something engaged in only by “others”. It is therefore important to focus on the child’s own community when teaching human and children’s rights and the principle of non-discrimination. Such teaching can effectively contribute to the prevention and elimination of racism, ethnic discrimination, xenophobia and related intolerance.³⁷

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Article 10, has similarly asked that governments educate the population at large by requiring that they:

encourage and promote understanding of the importance of the protection and promotion of the diversity of cultural expressions, inter alia, through educational and greater public awareness programmes.

To achieve this outcome a government should also encourage the active participation of civil society.³⁸

The ‘OSCE Recommendations on Policing in Multi-Ethnic Societies identifies’ the crucial role that a police service can play in the promotion of inter-ethnic relations.³⁹

Beyond tolerance and the obligation to aim to eradicate prejudice, human rights laws require governments to promote inter-cultural interaction, through cooperation and dialogue. The FCNM, Article 6 in particular requires governments to encourage:

a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons’ ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.

This objective could be achieved, in part, through the encouragement of intercultural organisations and movements which seek to promote mutual respect.⁴⁰

The Fribourg Declaration on Cultural Rights, Articles 8 and 11, recommends that actors in the public sector integrate into their practice the right of everyone to participate in the development of cultural cooperation and it is a strategic objective of the EU’s European Agenda for Culture that the promotion of intercultural dialogue includes the development of the intercultural competences of its citizens.⁴¹ This includes the development of individual understanding of community differences, respect and tolerance for diversity.

The OSCE Recommendations on Policing in Multi-Ethnic Societies suggest that police officers should be trained to have mediation skills and to

³⁶ UNESCO, Declaration on the Principles of Tolerance, Article 1.
³⁷ CRC Committee, General Comment 1: The Aims of Education (17 April 2001), para 11. See also DDPA, Programme of Action, para 74(j).
³⁸ UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Article 11.

³⁹ OSCE Recommendations on Policing in Multi-Ethnic Societies, Recommendation 1.

⁴⁰ FCNM, Explanatory Memorandum, para 49.

⁴¹ EU Resolution of the Council on a European Agenda for Culture, Article 3.

appreciate their potential influence in securing the commitment of potentially conflicting groups to finding non-violent solutions.⁴²

Domestic laws and policies

The NI Act 1998, Section 75, places a statutory duty on designated public authorities to “have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.”⁴³

Public authorities designated under Section 75 include, inter alia, the Northern Ireland Policing Board (NIPB), the Chief Constable of the Police Service of Northern Ireland (PSNI), the Police Ombudsman for Northern Ireland (PONI), the Director of Public Prosecutions Service (PPS) for Northern Ireland, the Northern Ireland Courts and Tribunals Service (NICTS) and the Chief Inspector of Criminal Justice in Northern Ireland (CJINI).⁴⁴ The PPS is exempt from Section 75 duties insofar as this relates to its functions in prosecuting offences.⁴⁵

In May 2013, the NI Executive published its strategy ‘Together: Building a United Community’, which aims to achieve:

a united community, based on equality of opportunity, the desirability of good relations and reconciliation – one which is strengthened by its diversity, where cultural expression is celebrated and embraced and where everyone can live, learn, work and socialise together, free from prejudice, hate and intolerance.⁴⁶

The Strategy recognises the interdependency of equality and good relations, acknowledging in particular, the need to improve equality of opportunity to better address community relations,

as well as to tackle prejudice and hate to remove and reduce the motivation for discrimination.⁴⁷

The DoJ ‘Equality Scheme 2011-2015’⁴⁸ and ‘Section 75 Action Plan 2011-2015’ detail how the Department will fulfil its Section 75 duties. The Action Plan, in particular, sets out the key initiatives to be undertaken by the DoJ to build good relations and combat inequalities.⁴⁹

The PSNI ‘Equality, Diversity and Good Relations Strategy 2012-2017’ and associated Action Plan commits to mainstreaming the promotion of equality, diversity and good relations throughout the Service, in order to increase trust, confidence and satisfaction in the PSNI.⁵⁰

The PPS ‘Equality Scheme’ similarly details the application of Section 75 for its service.⁵¹ In reviewing and proposing new policies, it commits to promoting both good relations and equality of opportunity.⁵²

The practices of the criminal justice agencies and the experiences reported by the victims and NGOs

The criminal justice agencies staff interviewed during this investigation recognised the importance of good relations between communities and its fundamental relationship to addressing causes and consequences of racist hate crimes. Typical examples included:

I think we have to learn to live in a more tolerant and accepting society. I think that has to be acknowledged and recognised by the Court ... I think the more often that is done the more likely we will be able to live in a society where we are all equal and there are no differences ... the less [this]

⁴² OSCE Recommendations on Policing in Multi-Ethnic Societies, General Principles, p 30.

⁴³ The Northern Ireland Act 1998, Section 75(1) and (2)

⁴⁴ *Ibid.*, Section 75(3)(cc), (cd) and (ce).

⁴⁵ *Ibid.*, Section 75(4A).

⁴⁶ OFMdFM, Together: Building a United Community (May 2013), p 3.

⁴⁷ *Ibid.*, para 1.17.

⁴⁸ DoJ, Equality Scheme 2011-2015, approved by the Equality Commission for Northern Ireland on 28 March 2012.

⁴⁹ DoJ, Section 75 Action Plan 2011-2015.

⁵⁰ PSNI, Equality, Diversity and Good Relations Strategy 2012-2017.

⁵¹ PPS, Equality Scheme (2008), Approved by the Equality Commission for Northern Ireland on 28 March 2012.

⁵² *Ibid.*, para 5.3.

happens ... it just serves to keep those distinctions, to keep those differences and intolerances alive.

if a community sees x, y or z as a problem then the window gets smashed or whatever and then they go to the housing executive and... then they get rehoused somewhere else ... It's almost ... self-fulfilling ... Communities where there is intolerance get the feeling that they're winning because that person's gone ... That's where it's really important to get ... support in and to try and get those detections so that the challenge comes in and you start taking away the incentive.

The representatives of NGOs noted the challenges faced in certain communities and recognised that the PSNI could not solve these issues "without the community working at it." Changing people's perceptions, their stereotypical attitudes and the often homogenous nature of communities were identified as the greatest challenges in addressing racism and racist hate crimes. The criminal justice agencies staff said educating the public was vital to tackling prejudices and integrating everyone in a diverse and modern society.

The PSNI officers views were summarised as follows:

it's hard to say whether a community really wants to accept people from [minority ethnic groups] ... they'll tolerate them, but whether they really accept them or not is another story.

[O]ur society is becoming a lot more multi-cultural ... I would say that there are certainly areas or communities ... who will find it very difficult to adjust with different cultures and traditions moving in to 'their areas' ... I think ... the greatest challenge, is ... not so much break people's mindset but letting them open up to other traditions and cultures and embrace them rather than fight them.

One interviewee from a NGO emphasised the need to have a strong response from the criminal justice agencies, as well as a coordinated approach across government departments, including the Departments of Education, of Social Development and the Housing Executive to raise awareness. They suggested the development of an NI Executive Strategy to promote good relations to be crucial to developing a consolidated approach to tackling racist hate crimes.

The PSNI officers recognised the centrality of promoting good relations to address the causes of racist hate crimes as a preventative measure. They also recalled how the response by the criminal justice agencies to signal incidents and reported crimes could become a trigger to improve the inter-ethnic relations in local communities. One interviewee stated:

[B]asically from liaising with the inspector we decided to go door to door and ... say to people 'look, this [leaflet] has been put through your door, who did it come from and how do you feel about it?' A lot of people were actually very open with police and said 'we do not want this, we're happy enough with people from different backgrounds, we just don't care, we just want to get on with our life' ... That was good to see because actually putting people on the spot there was a bit of a risk from our point of view because people could have said 'look, I don't want to speak to you'. Everybody was very much 'no, this is not wanted'.

The PSNI officers referred to different area-specific initiatives undertaken to improve relations between communities. One officer drew attention to "cross-community and cross-cultural events, for example, the kids from the local area... were involved in the dragon boat race this year." Another officer mentioned plans to "get an intergenerational project up and going... and if we can make it cross-community [and] multi-cultural, it is far far better for everybody."

Mention was made of activities with different youth groups or within schools to increase understanding and acceptance of difference. For example, one officer said:

I can target the schools for getting my C.A.S.E. [Citizenship and Safety Education] officer in there to give talks in relation to hate crime and that's shown as high profile, there's an issue there to be dealt with.

It was not obvious however that these practices were commonplace. Some of the PSNI officers indicated that their engagements with schools focused on providing talks to children and young people on subjects like alcohol and drugs, but that they did not address racism and hate crimes. Typical responses were as follows:

I don't even think we have anything with foreign nationals ... you may get some attend the different youth clubs and stuff. But ... if we're not coming across them and they're not coming to us requesting something it wouldn't be happening ... I can't actually think of anything that we are doing.

As regards to community relations ... I think what we're doing is just on our own patches, we're looking at things and doing it. I don't know if you can maybe generalise for the province and say we need to do this, because obviously every district is gonna have its own priorities and difficulties.

The NGOs representatives provided examples of how they had been involved with the PSNI in order to attempt to improve local situations. For instance, one interviewee stated:

my role is also to liaise with [the PSNI] and if there are some tensions ... Some people might not be really sensitive to words, [or] local subtleties ... and that can spark an incident that can be, later on, seen as racist and it might be racist. So in

this kind of framework I work, trying to sometimes settle down things ... There were some cases that I needed to mediate ... and usually these were cultural misunderstandings that could be explained easily by somebody like me.

The NGO representatives referred to initiatives that had been supported by the NI Executive and the criminal justice agencies to challenge negative attitudes and break down barriers between communities. But they also thought more could be done. One interviewee said:

we developed a tool kit for schools which was very, very popular to fit nicely with school programmes and targeting people from different ages. However, we still felt that there isn't enough policy support behind it.

Some NGOs representatives thought that the absence of coordinated approaches impacted on the ability to effectively tackle racist hate crimes and improve relations. Two examples were as follows:

[The tension monitoring group is] good, it's a good mechanism but it's one small piece in a very large puzzle and all of the other pieces have been taken away ... The Unite Against Hate campaign was a very good PR type of campaign ... but I think ... there was nothing else to kind of go with it and so I think that it was less effective than it could have been even though it was really good as a campaign.

I think ... in general, there is no pro-active strategic approach ... it's almost like everybody needs to take a step back and say 'there's so much information now available, so many examples of good practice or things which work, so take a step back, look how can we address it in a coordinated, proper manner?'

Findings

The NIHRC found that:

- The NI Act 1998, Section 75 broadly corresponds with the relevant human rights laws and standards. However, the wording of the legal requirement to “have regard to the desirability” to promote good relations is not fully in accordance with the obligation to take immediate and effective measures.
- The absence of a comprehensive strategy endorsed by the NI Executive significantly impacted on the criminal justice agencies ability to develop a consolidated approach to promoting good relations. Although the NI Executive introduced ‘Together: Building United Community’ in May 2013, the effectiveness of the strategy could not be determined because it had not yet been implemented.
- A number of initiatives had been introduced by the PSNI to promote good relations but these did not form part of a strategic, consolidated approach by the NI Executive and the criminal justice agencies.

Promotion of racial equality and non-discrimination (including, where necessary, the introduction of temporary special measures)

Human rights laws and standards

The CERD recognises the potential of racial discrimination to disturb friendly relations, peace and security and requires governments to undertake “without delay a policy of eliminating racial discrimination in all its forms” alongside the duty to promote understanding among different racial groups.⁵³ The DDPa confirms the importance of devising, promoting and implementing measures, in particular national strategies and policies to eradicate

racism, racial discrimination and xenophobia and to achieve full and effective equality.⁵⁴ The DDPa also recognises that equality of opportunity is paramount in eliminating racial discrimination.⁵⁵ It confirms the significance of the work of civil society.⁵⁶

The ECRI General Policy Recommendation 7 advises that public authorities should be obliged to promote equality and prevent discrimination when carrying out their functions.⁵⁷ A key aspect of this is ensuring that there are positive relationships between public authorities and ethnic minority communities, particularly in the context of policing, in order to promote equal access to public services.

The Explanatory Memorandum states that the promotion of equality could be achieved by placing public authorities,

*under the obligation to create and implement ‘equality programmes’ ... The law should provide for the regular assessment of the equality programmes, the monitoring of their effects, as well as for effective implementation mechanisms and the possibility for legal enforcement of these programmes, notably through the national specialised body.*⁵⁸

The equal enjoyment of human rights does not mean the identical treatment of persons in every instance. For example, the CERD recognises as legitimate, time bound and targeted special measures to be taken by a government or public authority in order to diminish the conditions which cause or help to perpetuate the discrimination of certain racial groups. The CERD, Article 2(2) provides that governments shall,

⁵⁴ DDPa, Declaration, paras 76 and 107.

⁵⁵ Ibid., para 76.

⁵⁶ Ibid., paras 117-118.

⁵⁷ ECRI General Policy Recommendation 7, para 8.

⁵⁸ An example of an equality programme is the nomination of a contact person for dealing with issues of racial discrimination and harassment or the organisation of staff training courses on discrimination. See ECRI General Policy Recommendation 7, Explanatory Memorandum, para 27.

⁵³ CERD, Preamble and Article 2(1).

when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.

The CERD Committee has further elaborated that introducing temporary special measures will be warranted in circumstances where those measures are taken to pursue a legitimate aim in the context of the society within which they are imposed, and are proportional to the achievement of that aim.⁵⁹ To determine the need for temporary special measures accurate data should be compiled, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions of the various groups in the population and their participation in the social and economic development of the country.⁶⁰

The CERD Committee, the FCNM Advisory Committee and the ECRI have all emphasised the importance of promoting the recruitment of under-represented minority groups into police services in an effort to equip them with new competencies, including language skills, which will in turn increase their effectiveness by enhancing communication and building trust with minority groups.⁶¹ The OSCE Recommendations on Policing in Multi-Ethnic Societies recall that:

[i]t is important in a multi-ethnic society that the composition of the police is representative of that society. This is to ensure both that the police are seen to be legitimate by all ethnic groups, and so that the police have the practical skills and experience to work with all sections of society.⁶²

To help achieve this outcome both the FCNM Advisory Committee and the ECRI have suggested that training courses could be offered to the members of ethnic minority communities so as to enable them to compete for available posts.⁶³ The Advisory Committee has further stipulated that knowledge of minority languages should be considered an advantage in the recruitment process.⁶⁴ It has also welcomed the removal of prohibitive language requirements which may serve to exclude minorities.⁶⁵ To encourage the recruitment of members of minority groups, the Committee has recommended that consideration be given to specifically aimed advertisements and other promotional work, or the setting of targets.⁶⁶

The CERD Committee General Recommendation 31 advises that strategies aimed at increasing the engagement of minority ethnic groups with criminal justice agencies may include the development of education programmes to train law enforcement officials in sensitisation to intercultural relations, and the fostering of dialogue between police, the judiciary and vulnerable persons to promote trust.⁶⁷

⁵⁹ CERD Committee, General Recommendation 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination (24 September 2009), paras 8 and 30.

⁶⁰ *Ibid.*, para 17.

⁶¹ CERD Committee, General Recommendation 31: Prevention of racial discrimination in the administration and functioning of the criminal justice system (3 October 2005), para 5(d); ECRI General Policy Recommendation 11, Explanatory Memorandum, para 79. See also DDPA, Declaration, para 108; OSCE Recommendations on Policing in Multi-Ethnic Societies, Recommendations 12-15; OSCE, Ljubljana Guidelines on Integration of Diverse Societies, 'Security and Law Enforcement' (November 2012), p 57-58.

⁶² OSCE Recommendations on Policing in Multi-Ethnic Societies, Explanatory Note, Recommendation 18.

⁶³ FCNM, Advisory Committee, Third Opinion on Albania (23 November 2011), para 93; and, ECRI General Policy Recommendation 11, Explanatory Memorandum, para 80.

⁶⁴ FCNM, Advisory Committee, Third Opinion on Finland (14 October 2010), para 84.

⁶⁵ FCNM, Advisory Committee, Second Opinion on Ireland (6 October 2006), para 77.

⁶⁶ ECRI General Policy Recommendation 11, Explanatory Memorandum, para 80.

⁶⁷ CERD Committee, General Recommendation 31.

In terms of training, the ECRI stipulates that any diversity training for police officers should be as practical as possible and could include interaction with minority groups. It may also include training on cultural and religious pluralism, and the teaching of minority languages.⁶⁸ The FCNM Advisory Committee has similarly focused on the need to train police officers on working in a multi-ethnic environment, as well as on the topics of racism, discrimination and human rights.⁶⁹ The ECRI advises holding regular consultation meetings between the police service and representatives of minority groups and the creation of advisory committees composed of representatives from minority groups.⁷⁰

Finally, the police are to ensure that they communicate with the media and the public at large in a manner that does not perpetuate hostility or prejudice towards members of minority groups.⁷¹ They should not reveal the race, colour, language, religion, nationality or national or ethnic origin or an alleged perpetrator of an offence unless it is deemed to be strictly necessary. The police service should also be sensitive in how it disseminates statistical information so as not to perpetuate harmful myths linking crime and ethnic origin or linking an increase in immigration with an increase in crime.⁷²

Domestic laws and policies

For the purpose of equality and anti-discrimination law, the term racial group in NI is defined by the Race Relations (Northern Ireland) Order 1997⁷³ as:

a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group refer to any racial group into which he falls.⁷⁴

The Irish Traveller community is also included in the meaning of a racial group.⁷⁵

The NI Act 1998, Section 75, places a statutory duty on designated public authorities to “have due regard to the need to promote equality of opportunity.”⁷⁶ Schedule 9 of the Act pertains to Equality Schemes, which must be adopted by public authorities so as to demonstrate how, in exercising their functions, they propose to meet the duties to promote equality of opportunity between different racial groups.⁷⁷

Domestic equality legislation permits affirmative action in narrowly defined circumstances. Measures can be taken “to meet the special needs of persons of [a racial] group in regard to their education, training or welfare, or any ancillary benefits.”⁷⁸ It is also lawful to “afford only persons of a particular racial group access to facilities for training which would help to fit them for that work,”⁷⁹ or to “encourage only persons of a particular racial group to take advantage of opportunities for doing that work.”⁸⁰ Such measures must be justified however by temporal and geographical conditions necessitating the positive action.⁸¹

The OFMdFM retains primary responsibility for matters of racial equality and non-discrimination in NI. In 2005, a ‘Racial Equality Strategy’ was adopted by the then direct rule Minister.⁸² It was endorsed by the NI Assembly in 2007 and was to

⁶⁸ ECRI General Policy Recommendation 11, Explanatory Memorandum, para 78.

⁶⁹ FCNM, Advisory Committee, Third Opinion on Russia, para 94 and Third Opinion on Germany (27 May 2010), para 87.

⁷⁰ ECRI General Policy Recommendation 11, paras 82 and 85.

⁷¹ *Ibid.*, para 20.

⁷² *Ibid.*, Explanatory Memorandum, paras 88 and 89.

⁷³ As amended by The Race Relations Order (Amendment) Regulations (Northern Ireland) 2003, The Race Relations Order (Amendment) Regulations (Northern Ireland) 2009, and The Race Relations Order 1997 (Amendment) Order (Northern Ireland) 2012.

⁷⁴ The Race Relations (Northern Ireland) Order 1997, Article 5(1).

⁷⁵ *Ibid.*, Section 5(3)(a).

⁷⁶ The Northern Ireland Act 1998, Section 75(1).

⁷⁷ *Ibid.*, Schedule 9, Section 4(1).

⁷⁸ The Race Relations (Northern Ireland) Order 1997, Article 35.

⁷⁹ *Ibid.*, Article 37(1)(a).

⁸⁰ *Ibid.*, Article 37(1)(b).

⁸¹ *Ibid.*, Article 37.

⁸² OFMdFM, Racial Equality Strategy 2005-2010.

be implemented alongside a 'Policy and Strategic Framework for Good Relations' (A Shared Future)⁸³ and its subsequent proposed replacement, the 'Programme for Cohesion, Sharing and Integration' (CSI Strategy).⁸⁴

The Racial Equality Strategy was directed towards tackling racial inequalities, eradicating racism and hate crimes. It also committed the NI Executive to initiating actions that would aim to promote good race relations. In 2010 the Strategy's implementation period ended and no replacement was introduced. In the strategy 'Together: Building a United Community' OFMdFM did commit, however, to publishing a new Racial Equality Strategy by the end of 2013.⁸⁵

The 'Minority Ethnic Development Fund' (MEDF), established in 2001 under direct rule, provides financial support for projects that contribute to the "promotion of good relations between people of different ethnic backgrounds, the building of community cohesion, and facilitation of integration."⁸⁶ It is "intended to be aligned with, and support, the Racial Equality Strategy."⁸⁷ Since the Racial Equality Strategy ended in 2010 the NI Executive has continued to extend the MEDF.⁸⁸ During 2011/12 the MEDF was extended twice by phases of 6 months until the introduction of the revised fund in February 2013. The duration of the revised MEDF is two years with a budget of £1.1 million per year.⁸⁹

For its part, the PSNI has in its 'Equality, Diversity and Good Relations Strategy 2012-2017' committed to "identify, address and reduce inequalities in Service Delivery and Employment Practice."⁹⁰ The associated Action Plan specifies an objective to have PSNI engagement programmes target areas, groups and communities that are most disadvantaged and disengaged. This may include racial groups.⁹¹

The objectives of the PSNI Strategy include to "evidenc[e] equality and diversity across the Police Service (Personal Policing – Engagement)."⁹² It also confirms a commitment to meeting legal obligations under the Race Relations Order and states that "where opportune [the PSNI] will exercise affirmative actions to address underrepresentation issues."⁹³ The corresponding Action Plan further indicates that the PSNI will enhance support for marginalised sections of its workforce to use the "unique skill sets of all its employees."⁹⁴

The practices of the criminal justice agencies and the experiences reported by the victims and NGOs

The NGOs representatives interviewed during this investigation emphasised the importance of having a Racial Equality Strategy for NI. They expressed the opinion that the absence of such a Strategy, together with an inconsistent commitment to the MEDF by the NI Executive, was a serious obstacle to furthering efforts to promote equality. This was illustrated by one interviewee who stated:

⁸³ OFMdFM, A Shared Future: Policy and Strategic Framework for Good Relations in Northern Ireland (2005).

⁸⁴ The draft CSI Strategy was never finalised.

⁸⁵ OFMdFM, Together: Building a United Community, para 1.28.

⁸⁶ OFMdFM, Proposals for the Future of the Minority Ethnic Development Fund 2012-15, available at: <http://www.ofmdfmi.gov.uk/medf_proposals.docx>.

⁸⁷ Ibid.

⁸⁸ Hansard Report, Volume 83, No 4 (Monday 8 April 2013) AQO 3701/11-15, p 25-26. In 2011/12 the MEDF was extended by six months twice and in February 2013 a revised MEDF for the next two years was initiated with a budget of £1.1 million per year.

⁸⁹ Information received from OFMdFM.

⁹⁰ PSNI, Equality, Diversity and Good Relations Strategy 2012-2017, p 11.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid., p 5.

⁹⁴ Ibid., Action Plan, p 35.

[the Racial Equality Strategy is]; it's being looked at ... but ... the policies are not up to date and ... [it] means you don't have a proper action plan ... People ... do what they think is best to deliver rather to focus on a plan and actually realise it.

The NGOs representatives did not think enough resources were being earmarked to tackle racism and racist hate crimes. In their view, this was impacting on the preventive aspect of work supported by the NI Executive and undertaken by the criminal justice agencies. For some, mainstreaming racial equality was seen as providing the answer:

because we've got Section 75, we've got the Race Relations Order, we've got an equality duty and we should be mainstreamed into the general work.

The view was expressed that the voluntary sector in this area should be better resourced. One statement reflected this opinion:

[t]he Racial Equality Strategy is not in place, the [MEDF] ... is still being extended on an ad hoc basis ... So there isn't only uncertainty about their existence, [but] they cannot plan ... people don't know, will they have a job? How will they plan the activities of the group? ... We're talking about groups who do amazing jobs ... it's just not acceptable ... Nobody is being held to account.

Regarding the representation of minority ethnic individuals within the criminal justice agencies, the PSNI officers interviewed believed it would be beneficial to "bring in more foreign nationals within the Service." At the same time, the additional pressure that could be brought to bear upon frontline officers from minority ethnic communities was an issue of concern. One officer expressed the issue like this:

you've no idea the terrible names they call us ... I remember ... some of the abuse [my colleague] got was desperate.

Some of the NGOs representatives highlighted the need for an increased representation of members of minority ethnic groups within the PSNI. One interviewee explained that previously, police officers from minority ethnic communities had been designated as Network Support Officers to serve as contact points between the communities and the PSNI. A pilot had been conducted to increase the recruitment of officer from minority ethnic backgrounds, and that including training for persons with English as an additional language had also be provided. The role of the Network Support Officer was, however, transferred to a mainstream service position, at which point only limited time could be directed towards engagement with minority ethnic communities and this was a general source of criticism.

There were 36 officers from a minority ethnic background serving in the PSNI in 2013, representing an annual increase of 2 officers from the previous year. The overall representation rate of ethnic minorities in 2013 amounted to 0.5 per cent.⁹⁵

The PSNI officers regarded the 'community/bilingual advocacy scheme', an initiative partly funded by the PSNI, as supporting them both at an enforcement and community engagement level.⁹⁶ This was viewed as an important commitment, necessary for ensuring equality of access to the service.

⁹⁵ 6967 PSNI officers as of 1 April 2013, statistics provided by the PSNI. 1.8 per cent of the general population in NI is regarded to belong to a minority ethnic group. As this figure does not include Polish, Romanian or other "white" foreign nationals, a higher percentage rate would be expected. Northern Ireland Statistics and Research Agency (NISRA), Census 2011 Statistics Bulletin, Ethnicity, available at: <http://www.nisra.gov.uk/Census/detailedcharacteristics_stats_bulletin_2_2011.pdf>.

⁹⁶ For more information on the 'community/bilingual advocacy scheme' see 'The duty to protect' chapter.

Some police officers thought their colleagues lacked confidence when engaging with members of minority ethnic communities. Interviewees did not regard it a requirement for the PSNI officers to be “expert[s] on everything to do with culture and diversity” but did think it was important to be able to demonstrate sensitivity towards differences as a mark of increasing professionalism. A typical view was captured by the following two quotes:

NI ... until very recently has been almost exclusively a two party game ... I think fear can be a big player in how people deal with, you know ... Sometimes you can tread a bit too carefully ... it just puts other people off because ... they don't understand why you can't engage with them.

my own experience of dealing with people that are different to me is that actually it gains you some respect with them to say 'I'm not really sure I understand this, can you help me with it?' If [officers could] do that ... I think we would be in a far better place... let's just change [the] attitude... embracing and engaging and ask[ing] the questions and [being] sensitive and supportive ... [E]quip them and give them the competence and the confidence to ask the right questions, to engage with people respectfully ... the confidence to ask questions around cultural or minority issues if they don't know.

These views were echoed by the victims of racist hate crimes who typically believed that a heightened awareness of cultural and educational differences would help the PSNI officers to understand “that they need to be patient because of communication problems.”

Findings

The NIHRC found that:

- The Racial Equality Strategy has been under review since 2010, which represents a significant gap in the NI Executive's obligation to design, promote and implement strategies to eliminate racial discrimination. The absence of an updated Racial Equality Strategy has impacted on the criminal justice agencies' efforts to progress racial equality.
- The MEDF was supposed to be linked to the Racial Equality Strategy and was extended on a 6 month basis during 2011/12, affecting the ability of the sector to effectively undertake its work to prevent racist hate crimes.
- The number of minority ethnic PSNI officers in 2013 did not meet the desired level of representation. This was highlighted as a cause for concern and may impact on the effective policing of racist hate crimes.

Collection and disaggregation of data

Human rights laws and policies

In order for a government to identify minority groups and ensure that their rights are fully protected, the CERD Committee has stressed the importance of collecting data on the demographic composition of the general population, to include data on race, colour, descent and national or ethnic origin.⁹⁷ The Committee further recommends that systematic data collection should underpin educational, cultural and informational strategies to combat racist hate speech.⁹⁸

⁹⁷ CERD Committee, General Comment 24. In the Universal Periodic Review of the UK that occurred in 2012, the USA recommended that it ‘Strengthen data collection and maintain disaggregated data to better understand the scale and severity of hate crimes towards women, immigrants, religious minorities, persons with disabilities, and children’, see UN Doc. A/HRC/21/9 (6 July 2012), Recommendation 110.91.

⁹⁸ CERD Committee, General Recommendation 35, para 38.

The DDPA also addresses the need to collect, compile, analyse, disseminate and publish data for the purposes of regularly assessing the situation of victims of racist acts, developing and evaluating legislation, policies and practices aimed at preventing racist acts, and determining if any of these measures may have an unintentional disparate impact upon the victims of racism.⁹⁹ The collection of this data must be undertaken with the explicit consent of the victims, and based on their self-identification.¹⁰⁰ Any resulting policies or programmes should be based upon both quantitative and qualitative research, incorporating a gender perspective. Such policies and programmes should also take into account the priorities identified by the victims.¹⁰¹

The ECRI General Policy Recommendation 4 advises that governments should undertake targeted surveys with actual and potential victims of racism, for example with immigrant groups or minorities, with a view to understanding their experiences of racism. It concludes that such information would not only assist with highlighting problems but would moreover serve to acknowledge the validity of the experiences and the perceptions of potential victims.¹⁰²

With regards the criminal justice system, the CERD Committee requires that any files relating to racist incidents must be retained and incorporated into databases.¹⁰³ The FCNM Advisory Committee has noted the importance of monitoring not only the statistics in terms of reporting the crimes but also the subsequent police investigations and the actions of prosecution services.¹⁰⁴ The ECRI has recommended that any system for monitoring

racist incidents should also record whether or not the incident has been carried through the criminal justice system and prosecuted as a racist offence.¹⁰⁵

Domestic laws and policies

The NI Act 1998, Schedule 9, requires the adoption of equality schemes, which “show how the public authority proposes to fulfil the duties imposed by Section 75 in relation to [their] relevant functions,”¹⁰⁶ albeit there is no explicit requirement to collect and disaggregate data. Schedule 9 does however include a requirement to assess and consult on the equality impact of policies.¹⁰⁷ Public authorities must publish the findings of both their monitoring and assessment processes.¹⁰⁸ They must also ensure that the public has access to information and services.¹⁰⁹

There is no statutory duty specifically requiring the criminal justice agencies in NI to collect, disaggregate, or publish data on their performance regarding racial equality or racist hate crimes. The PSNI does however record the ethnicity, nationality and religion of the victims of racist hate crimes in accordance with its Service Procedure 16/12.¹¹⁰ It also publishes statistics detailing the recorded number of racist incidents, racist hate crimes and the sanction detection rates of such crimes. The statistics are disaggregated by ethnicity or nationality “in at least 86 per cent of records.”¹¹¹

⁹⁹ DDPA, Programme of Action, para 92.

¹⁰⁰ *Ibid.*, para 92.

¹⁰¹ *Ibid.*, para 94.

¹⁰² ECRI General Policy Recommendation 4: On national surveys on the experience and perception of discrimination and racism from the point of view of potential victims (6 March 1998).

¹⁰³ CERD Committee, General Recommendation 31, para 11.

¹⁰⁴ FCNM, Advisory Committee, Third Opinion on Finland, paras 79 and 80.

¹⁰⁵ ECRI General Policy Recommendation 11.

¹⁰⁶ The Northern Ireland Act 1998, Schedule 9, Section 4 (1).

¹⁰⁷ *Ibid.*, Schedule 9, Section 4 (2)(a) and (b).

¹⁰⁸ *Ibid.*, Schedule 9, Section 4 (2)(c) and (d).

¹⁰⁹ *Ibid.*, Schedule 9, Section 4 (2)(f).

¹¹⁰ PSNI Service Procedure 16/12, p 10.

¹¹¹ This represents an increase from 82 per cent of records detailing the ethnicity of victims in the 2011/12 Annual Bulletin. See PSNI, Annual Bulletin: Trends in Hate Motivated Incidents and Crimes Recorded by the Police in Northern Ireland 2004/05 to 2012/13 (5 July 2013), 2.3.1, available at <http://www.psnipolice.uk/hate_motivated_incidents_and_crimes_in_northern_ireland_2004-05_to_2012-13.pdf> and PSNI, Annual Bulletin: Trends in Hate Motivated Incidents and Crimes Recorded by the Police in Northern Ireland 2004/05 to 2011/12 (5 July 2012), 2.3.1, available at <http://www.psnipolice.uk/hate_motivated_incidents_and_crimes_in_northern_ireland_2004-05_to_2011-12.pdf>.

The PPS similarly records and publishes decisions regarding the prosecution of racist hate crimes.¹¹² The NICTS records sentences aggravated by hostility and whether those have been enhanced. At the time of investigation it was, however, unable to disaggregate the data it retained in terms of racist and other forms of hate crimes, such as sectarian or homophobic. This was amended in November 2012.¹¹³ The Annual Judicial Statistics failed to indicate the extent to which the offences were racially aggravated.¹¹⁴

The practices of the criminal justice agencies and the experiences reported by the victims and NGOs

The criminal justice agencies staff interviewed for this investigation discussed the importance of collecting and publishing data on racist hate crimes. They generally considered this to be essential both for identifying areas in need of increased attention by the PSNI, as well as for monitoring and communicating the effectiveness of the criminal justice agencies responses. There was a perceived discrepancy between the number of racist hate crimes recorded in NI, the detection rates and the numbers convicted with an enhanced sentence. In addition, some interviewees acknowledged that underreporting was an issue.

Some of those interviewed identified their personal responsibility to ensure that the racist hate element was recorded. The importance of logging the hate element of a reported crime for future prosecution was generally noted.

For the purpose of generating statistics, however, this information may not have received sufficient attention. Shortcomings were acknowledged at a senior level. For example, one interviewee stated:

it's just not being recorded... we have to put our hands up to not giving sufficient attention to recording aggravation by hostility.

This opinion was supported by the evidence from the case files which demonstrated irregular practices in recording the racial element across all of the criminal justice agencies engaged. Part of the reason was explained as having resulted from a fundamental deficiency in the recording systems:

[y]ou see on our system you drop down what the sentencing is ... it tells you ... six months suspended; but it will not say six months suspended because it's racially motivated ... there's nowhere for that to be recorded.

The PPS suggested that the recording mechanisms of court outcomes had been faulty for a period of time, resulting in inaccurate statistics with regard to the number of enhanced sentences imposed under the 2004 Order between 2007 and 2012.¹¹⁵

Regarding research and surveys some officers from the PSNI referred to the 'community/bilingual advocacy scheme' and how the experiences of the victims of racist hate crimes could improve the Service. They explained that the Scheme was there in part to help the PSNI obtain feedback from the victims and the communities to which they belonged. One officer explained how information impacted upon their work as follows:

¹¹² See <<http://www.ppsni.gov.uk/Annual-Statistics-6720.html>>.

¹¹³ NICTS Document No. A RFC 1346 (30 November 2012).

¹¹⁴ See for example, NICTS, Judicial Statistics 2012, available at <<http://www.courtsni.gov.uk/en-GB/Services/Statistics%20and%20Research/Pages/default.aspx>>.

¹¹⁵ Information submitted by the PPS to the NIHR during the fact check process on 30 August 2013.

[the Community Advocates] are sitting down with [officers] ... talking about what has worked well and what has not worked well ... that's communicated to the people who have operational responsibility ... hate crime is not necessarily on the agenda but it has been when some of those reports have come out ... There is an accountability meeting between the Chief Officer and the District Commander every 6 months, and the performance issues are discussed.

Findings

The NIHRC found that:

- The domestic legislative framework in NI requiring policies to be assessed on their potential impact on equality, including racial group, broadly corresponds with the relevant human rights laws and standards.
- Data concerning racist hate incidents and crimes are gathered by all of the criminal justice agencies in NI. Nevertheless, the collection and disaggregation of data was neither consistent nor sufficiently integrated into the practices of the criminal justice agencies.
- Feedback regarding the experiences of the victims of racist hate crimes was obtained (in part through information received from the Community/Bilingual Advocacy Scheme). This accords with human rights standards.

The duty to prohibit

Introduction

International human rights standards require governments to proscribe certain activities and behaviours. To fulfil the duty to prohibit racist hate crimes, specific and targeted domestic legislation must be introduced that criminalises hate speech and racist violence by private actors. In addition racial discrimination by public authorities must be proscribed to ensure that the victims receive an effective and impartial investigation.¹ The legal framework must then be effectively enforced, to ensure its deterrent effect.² This requires the criminal justice agencies to understand the domestic laws and be competent in determining which is most appropriate to use and in what circumstances.³ Sanctions must be effective, proportionate and dissuasive,⁴ and racist motivation should be reflected in sentencing.⁵ It is also necessary to recognise that the victims of racist hate crimes are often subjected to acts of racism that may not amount to criminal offences. The repetitive nature or cumulative effect of these abuses should, however, be taken account of and the criminal law engaged as appropriate.

The duty to prohibit engages a number of human rights standards, the most relevant of which are the:

- ICCPR, Articles 20 (2), 26;
- CERD, Articles 2 (d), 4 (a);
- ECHR Article 14;
- EU Council Framework Decision 2008/913/JHA, Articles 3 and 4;
- Human Rights Committee, General Comment 18;
- Human Rights Committee, General Comment 34;
- CERD Committee, General Recommendation 14;
- CERD Committee, General Recommendation 15;
- CERD Committee, General Recommendation 33;
- CERD Committee, General Recommendation 35;
- UN Human Rights Council, Resolution 16/18, para 3;
- Durban Declaration and Programme of Action;
- ECRI General Policy Recommendation 1; and
- ECRI General Policy Recommendation 7.

This chapter details the constituent elements of the duty to prohibit racist hate crimes as required by international human rights laws and standards. It examines the existing domestic laws and policies directed toward prohibiting racial discrimination, race hate speech and racist violence in NI. It then considers the practices of the criminal justice agencies staff, and the experiences of the victims and non-governmental organisations. To conclude, an evaluation is provided regarding the effectiveness of the domestic framework and the level of compliance with human rights standards.

1 CERD, Articles 2(d) and 4(a) and the ICCPR, Articles 26 and 20(2).
 2 CERD Committee, General Recommendation 15: Organised violence based on ethnic origin (23 March 1993), para 2.
 3 Effective enforcement also includes procedural duties to bring perpetrators to justice, which will be detailed in the subsequent chapter as part of the 'duty to prosecute'.
 4 EU Council Framework Decision 2008/913/JHA, Article 3; ECRI General Policy Recommendation 7: National legislation to combat racism and racial discrimination (13 December 2002).
 5 EU Council Framework Decision 2008/913/JHA, Article 4; ECRI General Policy Recommendation 7; ECRI General Policy Recommendation 1: on combating racism, xenophobia, anti-Semitism and intolerance (4 October 1996); DDP, Programme of Action, para 84.

Prohibition of racial discrimination

Human rights laws and standards

Non-discrimination, equality before the law and equal protection of the law, is both a fundamental principle and substantive protection.⁶ The ICCPR, Article 26, contains a broad prohibition on discrimination and states that the:

law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The CERD, Article 2(d) requires governments to “prohibit... racial discrimination by any persons, group or organization.”

The ECHR, Article 14, does not contain a freestanding prohibition on racial discrimination, but provides that the rights and freedoms set forth in the ECHR shall be secured:

without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

This means that the prohibition on torture, inhuman or degrading treatment or punishment, the right to a private and family life, the right to property, the right to life and the other protections contained in the ECHR must all be guaranteed without discrimination.⁷ In the context of racist hate crimes Article 14 requires public authorities therefore to conduct Article 2, 3 or 8 investigations and prosecutions without discrimination.

Domestic laws and policies

The NI legislative framework contains two pieces of legislation pertaining to the prohibition of discrimination: the Race Relations Order (Northern Ireland) Order 1997⁸ and the Northern Ireland Act 1998, Section 76.

The Race Relations Order prohibits discrimination and harassment principally in the area of employment, but also includes, inter alia, education and the provision of goods, facilities and services. Articles 3(1) and 3(1A) contain a prohibition of direct and indirect racial discrimination as follows:

3.—(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Order if—

(a) on racial grounds he treats that other less favourably than he treats or would treat other persons; or

(b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but—

(i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and

(ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and

(iii) which is to the detriment of that other because he cannot comply with it.

⁶ Human Rights Committee, General Comment 18: Non-discrimination (10 November 1989), para 1; CERD Committee, General Comment 14: Definition of discrimination (22 March 1993), para 1.

⁷ The substantive right in question need not be itself violated for a violation of Article 14 to be found.

⁸ As amended by The Race Relations Order (Amendment) Regulations (Northern Ireland) 2003, The Race Relations Order (Amendment) Regulations (Northern Ireland) 2009, and The Race Relations Order 1997 (Amendment) Order (Northern Ireland) 2012.

(1A) A person also discriminates against another if, in any circumstances relevant for the purposes of any provision referred to in paragraph (1B), he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but—

(a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons;

(b) which puts or would put that other at that disadvantage; and

(c) which he cannot show to be a proportionate means of achieving a legitimate aim.

Both public and private sector organisations must adhere to Articles 3(1) and 3(1A). By contrast, the NI Act 1998, Section 76 only prohibits discrimination by public authorities and is limited to the grounds of religious belief or political opinion. In certain instances, individuals from minority ethnic communities would however be considered religious minorities and could therefore be captured by this provision. Furthermore, the NI Act 1998, Section 76, is wider in its application than the Race Relations Order, since it is not restricted to certain circumstances such as the provision of goods, facilities and services.

The practices of the criminal justice agencies and the experiences reported by the victims and NGOs

During the interviews for this investigation the criminal justice agencies staff explained how they sought to ensure services were provided without discrimination. For example, one senior prosecutor stated:

I remember the very first day I joined ... [I was told] 'when you come here to work you leave your baggage at the door, meaning ... any prejudices ..., any feelings ... or any views I may have towards those who are not just exactly the same as me... there must be an objectivity about the decision making. Our decisions must not be coloured either by sympathy towards certain sections or a dislike ... that is a culture which has to my knowledge always been a major aspect of the legal work in here.

Criminal justice agencies staff indicated a diversity of views regarding racist hate crimes. Some said it should be treated "like any other crime." Others expressed a view that the victims of racist crimes had to receive the same care and not be treated differently. Finally, some articulated that while their work had to be conducted to the same standard as any other crime, the victims of racist crimes were afforded "special support."

The victims of racist hate crimes often indicated dissatisfaction concerning their treatment. For example, one interviewee felt very strongly that if they had been "from here" they would have been afforded better treatment and the case dealt with more seriously and the PSNI would have "known what to do". This caused the victim to feel that they were not being treated equally and that the "Police [service was] racist."

To illustrate how they would be treated differently the victims referred to slow police response times or how they were dealt with rapidly and informed there was nothing that could be done to help them. This often left the impression that individual cases were not afforded the attention they deserved. Impolite and brusque behaviour by the criminal justice agencies staff evoked similar feelings.

In one example, a victim that had sought advice from a PSNI officer on whether there was somewhere else they could move to feel secure, recounted the experience:

[I] was trying to ask, ... maybe he wasn't the right person to ask but at least, ... if he didn't know about it at least he could lead me to somebody or I'll find out more about it. [He could've said] '... [I]f I'm really honest, I don't know, I just started the post', he could've said that instead of just point blank 'why are you telling me this? ... if you're planning to buy, sell your house, go to a property agent' ... I mean that's not even appropriate.

In contrast to those negative experiences, other victims who understood the constraints of the system and had received support by one or more of the criminal justice agencies recalled a more positive experience. For example, one stated:

I can honestly say that on a human and emotional level the police were extremely helpful towards me because it wasn't just reporting incidents, it wasn't just doing the business, it was very personal conversations about how I felt, how they felt also about what was happening because they were equally frustrated, as I was, that they couldn't get evidence, that they couldn't do anything about it.

Findings

The NIHRC found that:

- The NI Act 1998, Section 76, comprises a broad prohibition of discrimination by public authorities, but does not include race. The CERD Committee recognises the intersectionality of religion and race.⁹ However, the NIHRC is of the view that Section 76 would be insufficient for the purposes of the CERD, Article 2(1)(d).
- The prohibition of direct discrimination was understood by criminal justice agencies. However, their understanding of the required differential treatment so as to address indirect discrimination was less evident.
- Victims who had experienced dissatisfactory service were inclined to believe they were discriminated against. Where victims received additional support or explanation, this significantly increased the perception that their case had been dealt with appropriately.

Criminalisation of hate speech

Human rights laws and standards

A definition of hate speech is contained within the CoE, Recommendation No. R(97) 20, as:

all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.¹⁰

⁹ CERD Committee, General Comment 33: World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance / Durban Review Conference (28 August 2009).

¹⁰ CoE Recommendation No. R(97) 20 of the Committee of Ministers to Member States on "Hate Speech" (30 October 1997), Scope. This Recommendation advocates for a sound legal framework to be implemented around hate speech but does not require a specific prohibition.

While the term ‘hate speech’ is not explicitly used in the CERD, the CERD Committee has identified the relationship between the phenomena and the Convention in General Recommendation 35.

Racist hate speech is not limited to oral words but also includes:

manifestations ... in print, or disseminated through electronic media including the internet and social networking sites, as well as non-verbal forms of expression such as the display of racist symbols, images and behaviour at public gatherings, including sporting events.¹¹

The ICCPR, Article 20(2) requires an express prohibition of incitement to hatred stating that:

any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The CERD, Article 4(a) expands upon the legal prohibition laid down in the ICCPR, Article 20(2). It requires the imposition of criminal sanctions for the dissemination of ideas based upon racial superiority or hatred, incitement to racial hatred or acts of racial violence. The CERD, Article 4(b) also requires the criminalising of participation in any organisation or propaganda which promotes and incites racial discrimination and the prohibition of such organisations.¹² The CERD, Article 4(b) may also be taken to refer to “improvised” forms of organisations or networks as well as “unorganised or spontaneous” promotion of incitement of racial discrimination.¹³

Generally, the CERD Committee recommends that:

The criminalisation of forms of racist expression should be reserved for serious cases to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than the criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups.¹⁴

When considering the forms of conduct that a government should declare punishable by law, the CERD Committee recommends that five contextual factors are taken into account: the content and form of the speech; the economic, social and political climate; the position or status of the speaker; the reach of the speech; and the objectives of the speech.¹⁵

The most pertinent reference principle when calibrating the legitimacy of speech restrictions is the right to freedom of expression.¹⁶ Freedom of expression as protected by ECHR, Article 10 is a qualified right that can be restricted for a variety of public interest reasons, one of which is for the protection of the rights of others so long as it is deemed necessary in a democratic society.¹⁷

The ICCPR, Article 19(2) also protects freedom of expression and it can be utilised both positively to impart information on combating racism¹⁸ and negatively to express derogatory views about ethnic minority groups. Like the ECHR, and in recognition of the potential harms, the ICCPR right to freedom of expression is qualified and may be restricted where provided by law and necessary for respect of the rights or reputations of others.¹⁹

¹¹ CERD Committee, General Recommendation 35: Combating racist hate speech (9 September 2013), para 7. See also, UN Human Rights Council, Resolution 16/18, para 3; EU Framework Decision 2008, Article 1(1)(b); ECRI General Policy Recommendation 7, para 18(f).

¹² See also, CERD Committee, General Recommendation 15.

¹³ CERD Committee, General Recommendation 35, para 21.

¹⁴ Ibid., para 12. See also Human Rights Committee, General Comment 34: Article 19: Freedoms of opinion and expression (12 September 2011), paras 22-25; 33-35.

¹⁵ Ibid., para 15.

¹⁶ Ibid., para 19.

¹⁷ ECHR, Article 10(2).

¹⁸ Durban Review Conference, Outcome Document, para 54.

¹⁹ ICCPR, Article 19 (3).

Any restriction must adhere, however, to the principle of proportionality, meaning that the benefit to the protected interest must outweigh the harm to freedom of expression. The UN Human Rights Committee has determined that while the prohibition on incitement does not conflict with freedom of expression, any legislation enacted by governments must also meet the requirements of legality, necessity and proportionality in the same manner as any other restriction justified under the ICCPR, Article 19(3).²⁰

The Rabat Plan of Action notes that the ICCPR, Article 20 requires a high threshold for the imposition of any limitation because, as a matter of fundamental principle, the limitation of free speech must remain an exception and that incitement to hatred must refer to the most severe and deeply felt form of opprobrium.²¹ In order to assess the severity of the hatred, the Rabat Plan of Action advises a six-part threshold test similar to the CERD Committee's direction on Article 4, requiring a government to look at the: social and political context; position of the speaker within society; intent as opposed to recklessness; content of the speech; reach of the speech in terms of size of its audience; and, likelihood that the incited act would be committed.²²

The CERD Committee recently offered an additional perspective on the relationship between freedom of expression and racist hate speech when it noted that "racist hate speech potentially silences the free speech of its victims."²³

While jurisprudence is limited on the ICCPR Article 20(2), in the case *J.R.T. and the W.G. Party v Canada*, the Human Rights Committee declared inadmissible a communication which claimed that the Canadian government had breached the right to freedom of expression for restricting the telephone activity of T. who was recording and disseminating derogatory statements about the Jewish people. In doing so, the Committee gave support to the actions of the Canadian government and stated that the,

*opinions which Mr T. seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under Article 20(2) of the Covenant to prohibit.*²⁴

In *LK v Netherlands*, the CERD Committee deemed the comments "We've got enough foreigners in this street... They wave knives about and you don't even feel safe in your own street," made concerning a Moroccan man visiting a house allocated to him by the authorities, as racist hate speech within the meaning of Article 4.²⁵

The ECtHR has also been called upon to address the balance between the right to freedom of expression protected by the ECHR, Article 10, and the rights of others.

In *Jersild v Denmark*, for example, the applicant was a journalist responsible for editing and broadcasting an interview within which a number of young men from a right wing group called the 'Greenjackets', made derogatory remarks about immigrants and ethnic groups in Denmark. In this case the applicant was convicted under the Danish penal code for

²⁰ Human Rights Committee, General Comment 34, paras 50-52.

²¹ Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, Rabat, Morocco (5 October 2012), paras 18 and 22.

²² *Ibid.*, para 22.

²³ CERD Committee, General Recommendation 35, para 28.

²⁴ *J.R.T. and the W.G. Party v Canada*, Human Rights Committee, Communication No. 104/1981 (1984), para 8(b).

²⁵ *L.K. v Netherlands*, CERD Committee, Communication No. 4/1991 (16 March 1993), para 6.3.

aiding and abetting the dissemination of racial remarks. The ECtHR was unanimous in concluding that the ‘Greenjackets’ could not enjoy the protection of Article 10, but the judges were split in their views regarding the journalist’s conviction.

In a majority opinion of twelve to seven, the ECtHR found that there had been a violation of the applicant’s right to freedom of expression and that an important factor in the evaluation of the correct balance to be accorded to the competing rights would be whether from an objective point of view, the material had as its purpose the propagation of racist views and ideas.²⁶ In this case, however, the offensive material had been published with a view to analysing and explaining an issue of known social concern.

In the opinion of the minority, the journalist’s right to freedom of expression had not been violated because he had failed to adequately counterbalance the remarks of the youths or note his disapproval.²⁷ According to the minority view, the:

protection of racial minorities cannot have less weight than the right to impart information, and in the concrete circumstances of the present case it is our opinion not for this Court to substitute its own balancing of the conflicting interests for that of the Danish Supreme Court.²⁸

However, it was common to both the majority and minority opinion that the ECHR, Article 10 “must be interpreted, to the extent possible, so as to be reconcilable with its obligations under the UN [CERD].”²⁹

The UK government has made an interpretative declaration to both the ICCPR, Article 20 and the CERD, Article 4 reserving the right not to introduce further legislation. In the 2011 examination of the UK, the CERD Committee was critical of this stance stating that:

[t]he Committee notes the State party’s own recognition that the rights to freedom of expression and opinion are not absolute rights, and recommends that the State party withdraw its interpretative declaration on article 4 in the light of the continuing virulent statements in the media that may adversely affect racial harmony and increase racial discrimination in the State party.³⁰

Domestic laws and policies

The Public Order (Northern Ireland) Order 1987 (Public Order Order), Articles 9-13, prohibits hate speech. Part III criminalises “acts intended or likely to stir up hatred or arouse fear,” and in this regard reference is made to a group of persons defined by their “religious belief, colour, race, nationality (including citizenship) or ethnic or national origins.”³¹

Specific provision is made for five separate offences and the prohibited conduct includes threatening, abusive or insulting behaviour or expressions and the dissemination of those in public. The actions that may constitute an offence include behaviour, words, written materials, recordings, as well as broadcasting and cable programmes.

²⁶ *Jersild v Denmark*, ECtHR, Application No. 15890/89, para 31.

²⁷ *Ibid.*, Joint dissenting opinion of Judges Rysdøl, Bernhardt, Spielmann and Loizou, and Joint dissenting opinion of Judges Gölçüklü, Russo and Valticos.

²⁸ *Ibid.*, Joint dissenting opinion of Judges Rysdøl, Bernhardt, Spielmann and Loizou, para 5.

²⁹ *Ibid.*, para 30. See also, Joint dissenting opinion of Judges Gölçüklü, Russo and Valticos.

³⁰ CERD Committee Concluding Observations on the UK, UN Doc. CERD/C/GBR/CO/18-20 (14 September 2011).

³¹ The Public Order (Northern Ireland) Order 1987, Part III, Articles 9-13. This definition has been expanded to include sexual orientation and disability, see Criminal Justice (No. 2) (Northern Ireland) Order 2004, Article 3.

The practices of the criminal justice agencies and the experiences reported by the victims and NGOs

The criminal justice agencies staff interviewed for this investigation articulated little confidence in their understanding of examples of hate speech and its application in practice, especially with relation to the Public Order Order, Articles 9-13. Some interviewees stated they had never encountered hate speech. Others identified graffiti and verbal abuse as the most common forms of hate speech, remaining unclear as to whether the Public Order Order would apply in such instances. Some PSNI officers identified criminal damage as the base offence that would be applied where they came across graffiti, and then they would “see whether it’s a hate crime or not.”

With regards to verbal abuse, some of the PSNI officers interviewed, classed this as disorderly behaviour or a breach of the peace, whilst others were unsure whether this would meet the threshold of an offence punishable by law. Typically, there was more familiarity with legislation in circumstances where the dissemination of written material was concerned, such as the distribution of leaflets or comments posted on social media. One senior PSNI officer pointed out the challenge:

those are very difficult offences to prove. We have found, particularly with Twitter and Facebook, ... there’s an offence regarding malicious communications, under the Communications Act, which is actually an easier route to go in terms of the proofs required.

Verbal abuse formed a particularly common element of the experiences recounted by the

victims of racist hate crimes. One victim recounted the type of verbal abuse she would regularly be subjected to:

‘foreign bitch, foreign cunt, you whore...’ all of those sort of things... ‘Go back home to your country!’

Findings

The NIHR found that:

- The Public Order Order broadly fulfils the requirement to criminalise hate speech. However, the absence of a sanction for organisations which promote or incite racial discrimination and the participation of individuals in such organisations is problematic.
- The minimal knowledge demonstrated by the criminal justice agencies of the Public Order Order inhibits the combating of hate speech in NI. Specifically, there are problems regarding the limited interpretation and application of Articles 9-13.

Criminalisation of racist violence

Human rights laws and standards

The CERD, Article 4(a) requires the imposition of criminal sanctions for acts of violence against any race or group of persons of another colour or ethnic origin. Similarly, the ECRI General Policy Recommendation’s 1 and 7 make clear that national criminal law should expressly and stringently punish racist and xenophobic acts. This should be done either through defining common offences with a racist or xenophobic nature as specific offences, or by enabling the racist or xenophobic motive of the offender to be specifically taken into account.³²

³² ECRI General Policy Recommendation 7 and General Policy Recommendation 1.

The ECRI has urged that all persons working in the criminal justice system be trained on the criminal law provisions against racially aggravated behaviour.³³

Domestic laws and policies

In NI there is no statutory definition of racist hate crimes.³⁴ The criminal justice agencies apply the following definition:

[a]ny incident, which constitutes a criminal offence, perceived by the victim, or any other person, to be motivated by prejudice or hate towards a person's race ...³⁵

The PPS Hate Crime Policy notes that this definition seeks to build upon the MacPherson definition, which includes "any incident which is perceived to be racist by the victim or any other person."³⁶

There are no specific offences referring to racist hate crimes in NI. A sentence based approach has been adopted.³⁷ The Criminal Justice (No. 2) (Northern Ireland) Order 2004 (2004 Order), Article 2 requires courts to increase the sentence of an offender if the crime committed was 'aggravated by hostility' on grounds of race, as defined in the Race Relations Order, as well as religion, sexual orientation or disability. The court must treat such offences more seriously in accordance with the 2004 Order. The Order also requires the judge to "state in open court that the offence was so aggravated."³⁸

A hate crime is always dependent upon an initial base offence having been committed, to which

an aggravating element, such as racial hatred, is attached. Any offence can serve as the base offence, which may include, inter alia, assault, harassment, murder, criminal damage but also robbery or burglary. The 2004 Order pertains to the aggravating element and can be applied to any offence, ranging from low level criminal behaviour to the most serious crimes.

Where a racist incident occurs it must first be determined whether the act or behaviour could constitute an offence under domestic law.³⁹

Only where this is the case, can the application of the 2004 Order be considered for prosecuting purposes. Moreover, the aggravating element must also be proven beyond reasonable doubt before an enhanced sentence can be given.⁴⁰

The 2004 Order, Article 2(3), states that:

- (3) an offence is aggravated by hostility if -
- (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on
 - (i) the victim's membership (or presumed membership) of a racial group;
 - (b) the offence is motivated (wholly or partly) by hostility towards
 - (i) members of a racial group based on their membership of that group.

³³ ECRI Report on the UK (Fourth Monitoring Cycle), para 50.

³⁴ PPS, Hate Crime Policy (December 2010), para 2.1.1.

³⁵ Ibid.; PSNI, Service Procedure 16/12, Police Response to Hate Incidents (24 June 2013) ('PSNI Service Procedure 16/12'), p 3.

³⁶ The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny (1999), Chapter 47, para 12, available at <<http://www.archive.official-documents.co.uk/document/cm42/4262/sli-00.htm>>.

³⁷ Responses to the consultation on the introduction of race crime legislation in Northern Ireland indicated that people were generally against creating standalone offences, due to the "difficulties arising out of the need to prove racist motivation beyond reasonable doubt", consequently resulting in fewer convictions. NIO, Race Crime and Sectarian Crime Legislation in Northern Ireland: A Consultation Paper (2002) para 8.

³⁸ Criminal Justice (No. 2) (Northern Ireland) Order 2004, Article 2.

³⁹ While every racist crime is also considered a racist incident, not all incidents will meet the threshold of a recordable offence in accordance with the 2004 Order. An incident is defined as "a single distinct event or occurrence which disturbs an individual's, group's or community's quality of life or causes them concern", Home Office, The National Standard for Incident Recording (NSIR) 2011, p 4.

⁴⁰ PPS, Hate Crime Policy, para 5.4.3

The 2004 Order does not define what constitutes hostility. Nonetheless there are two distinct options by which an aggravating factor can be determined.

The first option refers to any demonstration of racial hostility by the offender towards a victim, based on their membership or presumed membership of, or association with a racial group. On such occasions, the offence may not have been motivated by racial hostility; the demonstration of racial hostility being entirely unconnected to the base offence. The domestic law attaches a temporal requirement, which directs the fact-finder to consider what happened immediately prior, during or immediately after an offence was committed.⁴¹

The second option refers to the motivation of the perpetrator. This covers actions that are wholly or partially motivated by hostility towards members of a racial group based on their membership of that group. Such cases may be more difficult to prove, as the racial hostility is the basis upon which the crime was intended. Both the intention to commit a crime and the reason for that crime must be proven beyond reasonable doubt. However, admissible evidence on such occasions may include background materials such as demonstrated racist views in the past, a criminal record for racist hate crimes, membership or an association with a racist group.

Racism is based on prejudices that are often manifested in subtle acts that on their own may not meet the threshold of a crime for the purposes of prosecution. However, when repeated or sustained over a period of time, the cumulative effect may engage the criminal law.

The NI legal framework includes a number of statutes to deal with racist incidents. An incident as defined by policy is “a single distinct event or occurrence which disturbs an individual’s, group’s or community’s quality of life or causes them concern.”⁴²

Of crucial significance is the prohibition of repeat incidents under the Protection from Harassment (Northern Ireland) Order 1997 (Harassment Order). This criminalises a course of conduct, which amounts to harassment and putting people in fear of violence.⁴³ Its purpose is to prohibit actions and behaviours that may seem trivial to some but that harass, alarm or cause distress to a person due to the repetitious nature of the conduct. Article 3 of the Order states:

3(1) A person shall not pursue a course of conduct

(a) which amounts to harassment of another; and

(b) which he knows or ought to know amounts to harassment of the other.

(2) For the purposes of this Article, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.

⁴¹ *R v Rogers (Appellant)* [2007] UKHL 8, para 14.

⁴² Home Office, *The National Standard for Incident Recording (NSIR)* 2011, p 4.

⁴³ *The Protection from Harassment (Northern Ireland) Order 1997*, Articles 3, 4 and 6.

Harassment includes “alarming the person or causing the person distress.”⁴⁴ Alarm and distress have not been defined in domestic law. This allows individual circumstances to be taken into account.

Harassment is understood as a “course of conduct,” compounded by a number of elements, which must involve actions or behaviours (including speech) on at least two occasions.⁴⁵ There is no requirement for each incident within the course of conduct to be identical or harassing; rather, the combination of actions and behaviours constituting a “course of conduct” will determine if the cumulative effect amounts to harassment.

Evidence of intent to harass does not need to be proven. Rather, an objective test is adopted, whereby it is considered whether “a reasonable person” under similar circumstances would regard the questioned course of conduct to amount to harassment.⁴⁶

The criminal offence of harassment requires at least two incidents pertaining to the course of conduct be proven beyond reasonable doubt, in order to successfully prosecute an alleged offender. The tort of harassment created by Articles 3 and 5 of the Order requires the harassment to be proven on the balance of probabilities.⁴⁷

For the purpose of protecting victims, those convicted of harassment may be subject to a restraining order.⁴⁸ A breach of a restraining order is a further criminal offence and carries a sentence of up to five years on indictment.⁴⁹

The second law addressing incidents is the Anti-social Behaviour (Northern Ireland) Order 2004 (ASB Order). Anti-social behaviour does not

constitute a criminal offence. Nonetheless, it may negatively impact on the quality of life of others and can contribute to creating an environment conducive to racist hate crimes, if left unaddressed. More importantly, the anti-social behaviour may have racist overtones.

The ASB Order makes provision for civil protection orders to be granted by a court in order to “protect relevant persons from further anti-social acts” by the defendant.⁵⁰ These can be granted upon application by a relevant authority, if:

- (a) the person has acted, since the commencement date, in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself; and
- (b) such an order is necessary to protect relevant persons from further anti-social acts by him.⁵¹

Where a court finds these conditions fulfilled, it “may make an order which prohibits the defendant from doing anything described in the order.”⁵² Anti-social Behaviour Orders (ASBOs) can be granted in the interim, pending the determination of the main application.⁵³ Moreover, pursuant to Article 6 of the Order, ASBOs can also be granted on conviction in criminal proceedings and in addition to a sentence or to an order discharging the offender conditionally.

⁴⁴ *Ibid.*, Article 2(2).

⁴⁵ *Ibid.*, Article 2(3).

⁴⁶ *Ibid.*, Article 3(2).

⁴⁷ *Mary McCarroll v NIHE* [2012] NIQB 83, para 58.

⁴⁸ The Protection from Harassment (Northern Ireland) Order 1997, Article 7.

⁴⁹ *Ibid.*, Article 7(6)(a).

⁵⁰ The Anti-social Behaviour (Northern Ireland) Order 2004, Article 3(1)(b).

⁵¹ *Ibid.*, Article 3(1).

⁵² *Ibid.*, Article 3(3).

⁵³ *Ibid.*, Article 4.

In the event of a breach of an ASBO, the defendant is guilty of a criminal offence. Such a breach is found where the person, without reasonable excuse, “does anything which he is prohibited from doing by an anti-social behaviour order.”⁵⁴

The practices of the criminal justice agencies and the experiences reported by the victims and NGOs

The criminal justice agencies staff interviewed for this investigation were generally aware of the domestic framework adopting a sentence-based approach in prohibiting racist violence. In that sense, there was a general understanding that NI legislation did not provide for specific offences. Interviewees demonstrated an awareness of the 2004 Order specifically, but some recognised their personal lack of knowledge of the full range of legislation. This led them to conclude that the victims of racist hate crimes and the public in general would be largely unaware of the legislation.

Across all criminal justice agencies, members of staff acknowledged that racist hate crimes should be prohibited in order to indicate that such behaviour is unacceptable and will not be tolerated. However, a few interviewees expressed their disapproval of a further additional criminal sanction for those acts that demonstrated racial hostility.⁵⁵ In these limited instances, the interviewees said that in their opinion the wider public believed the victims of racist hate crimes were receiving special treatment, and questioned furthermore whether people should be punished for having racist views.

One NGOs representative illustrated how these opinions could be demonstrated in practice. In

their view the criminal justice agencies lacked an understanding of why the legislation existed:

I’ve had them go ‘... why do we need special legislation, it’s just treating people special. Hate crime isn’t any different than normal regular everyday crime and you’re just creating a hierarchy of crimes and victims’.

The efforts undertaken at senior levels within the agencies, as well as the introduction of targeted policies and procedures to address hate crime in NI was acknowledged by the NGOs representatives. A general concern, however, was that this had not filtered through to the bottom “to be culturally part of the whole institution.”

The criminal justice agencies staff often questioned the effective enforcement of the legislation by other agencies. They also felt that the 2004 Order had not impacted how they dealt with racist hate crimes, as such crimes would always have been treated seriously or because aggravating factors could be taken into account prior to the introduction of the 2004 Order. Differences were identified at an operational level, where systems now required specific recording of the ‘motivation’ of offenders. But there was also a general perception that racist hate crimes were not a common occurrence that they would have to deal with.

Both the victims and the NGOs representatives agreed that racist hate crimes needed to be dealt with effectively. As stated by one victim:

if you just let somebody who commits [an] offence... go he will keep on doing the same thing.

The investigation examined the understanding and use of relevant legislation addressing racist

⁵⁴ Ibid., Article 7(1).

⁵⁵ This matter is explored further in section ‘effectiveness of sanctions’ on p 55.

violence to assess the effective enforcement of the laws. The analysis of the application of the 2004 Order for the purposes of conviction of an alleged offender revealed a general confusion with respect to the two-limbed nature of the law. Criminal justice agencies staff typically believed that racist hate crimes had to be motivated by hate, viewing the racial element as the sole or main reason for the crime being committed. Only exceptionally, did interviewees articulate the two-limbed nature of the 2004 Order, which covers crimes with an outward demonstration of racial hostility and crimes motivated partially or wholly by hostility. The following statement exemplifies one of the ways in which the general lack of understanding regarding the 2004 Order was apparent:

it's hard to know whether ... [they] are attacking them ... because of their race or are they attacking them anyway but they are attaching a racial label to them because they perceive them as coming from a particular ethnic background? It's hard to know sometimes.

Another interviewee indicated how a racist comment expressed immediately prior to the offence being committed would not engage the 2004 Order, focusing solely on racial 'motivation':

in my view, and I'm maybe wrong here, ... that wouldn't be a racially motivated offence even though the beginning of it was as a result of a comment thrown.

A senior member of staff from the PPS acknowledged that there seemed to be some confusion among prosecutors as regards the two limbs of the 2004 Order, Article 2. For this purpose, a new internal instruction had been sent out and placed on the intranet to make prosecutors aware of the difference.

Criminal justice agencies guidance documents had possibly fostered the misperceptions. The PPS Hate Crime Policy for example repeated the wording of the 2004 Order, Article 2 in order to remind prosecutors. Beyond that, however, the document did not make further reference to the 'demonstrated hostility' aspect of the legislation. Other documents, such as the PSNI Service Procedure 16/12, the PBNi Draft Hate Crime Policy, PSNI statistics or websites either did not mention 'demonstrated' at all or overemphasised the term 'motivation'. Furthermore, the section of the Explanatory Memorandum of the 2004 Order pertaining to offences aggravated by hostility revealed an inaccurate explanation of the legislation, heightening potential for confusion in this respect.⁵⁶

In analysing the case files it became apparent that in the majority of cases the use of racist language represented the principal and often sole indicator for the racial element. However, as often noted by PSNI officers and prosecutors, language on its own would not necessarily amount to a racist motivation. Where the two aspects of the legislation were understood, interviewees confirmed that the use of language would serve to initiate a case based on the demonstration of racial hostility.

The NGOs representatives were generally not aware of the two aspects of the 2004 Order, Article 2, believing it could only apply where a suspect was found to have been motivated by racial hostility. On those occasions when they did understand the two-limbed nature of the 2004 Order, they felt it was not being implemented. In this respect, one NGOs representative noted the negative effect this could have:

⁵⁶ See, The Criminal Justice (No 2) (Northern Ireland) Order 2004, Explanatory Memorandum, Commentary on Provisions. The Explanatory Memorandum refers to the wrong Article number on two occasions. In the section 'Increase in sentence for offences aggravated by hostility': the 1st paragraph, 4th line reference to Article 2(b) should be Article 2(2)(b); and the 3rd paragraph, 1st line reference to Article 2(3)(a) should be Article 2(3)(b). Other inaccuracies were evident in the explanation.

it's a gap for other people to actually commit the same sort of crimes against ethnic minorities because they can feel [they] can escape.

Concerning the standard of proof, it was generally deemed necessary to establish the racial motivation of the alleged offender beyond reasonable doubt in order to meet the standard of proof required for a criminal conviction. The following statement by a prosecutor exemplified this:

the Court might say 'yes, ... that does provide motivation, but they won't necessarily say 'I require that beyond a reasonable doubt' The Court has to be satisfied beyond a reasonable doubt, so in a racially motivated offence they would have to be ... the motivation would have to be established to the same standard otherwise they would just take it as a common assault without motivation.

The Judiciary confirmed that while the hate element formed an integral part of the decision, it should be proven to the same standard as the base offence. In cases where guilty pleas were offered for the base offence but not for the racial element, prosecutors noted that further hearings were required to establish the racial hostility.

Some criminal justice agencies staff remarked that the requirement to prove the racial motivation set a high threshold of proof for them to meet. Evidently, this view was limited to the application of the 'motivated by hostility' limb. One interviewee captured the confusion related to the two-limbed nature and the impact this necessarily had on meeting the standard of proof, precisely the difficulty in proving intent:

I think it's racially motivated ... rather than aggravated ... I'm not sure if it does or not, but does it not set a higher threshold than the aggravated factors ...?

The analysis of how incidents were understood for the purposes of the application of criminal legislation in cases with racist overtones, revealed that, on the whole, PSNI officers were knowledgeable that not all incidents constitute a crime. They were less certain, however, in articulating the difference between incidents and crimes. This was further illustrated by the divergent approaches exemplified by PSNI officers, in particular concerning how low level incidents of similar nature were classed in practice. For instance, the use of racist language and name-calling unaccompanied by physical violence did not meet the threshold of an offence by some; others found it could be regarded as disorderly behaviour.

The analysis of case files pertaining to incidents with racist dimensions demonstrated that certain cases classed as incidents would actually constitute crimes, generally criminal damage. The NIHRC also found, however, that of the random sample of undetected crimes received, some cases corresponded to those recorded as incidents. The NIHRC was therefore unable to determine the common practice in this respect.

Focusing on the application of the Harassment Order, occasionally, criminal justice agencies staff referred to the possibility of using harassment as an offence in cases of racist hate crimes. One example of good practice detailed how racist incidents could constitute harassment:

it could be used to, depending on the situation as a starting point, ... build up a file for harassment or something like that but in and of itself ... no crime as such has been committed.

More generally however, a lack of clarity as to what laws could be applicable in cases of repeated incidents was evident. According to one interviewee:

it was really people running past her house and either shouting abuse or banging on her window or door ... But it was distressing for her. And so in that aspect of things, it is harder for us because there is no actual crime being committed, well apart from obviously the harassment and intimidation ... side of things, but nothing concrete as in criminal damage, assault or anything like that.

Interviews with victims confirmed the repetitive nature of racist hate crimes, often starting off as anti-social behaviour. For example, one victim recounted their experience:

[t]here was a lot of anti-social behaviour in the area and other properties ... pensioners had also their windows broken but nobody experienced that many attacks as I did. ... Stones had been thrown at me, beer cans – full beer cans, potatoes...

The impact of repeat incidents upon the victims was summed up as follows:

the kids running about [shouting abuse], which initially probably wouldn't have much of an impact but if it's sustained ... then it actually becomes a big problem. ... We're talking eight years or something like that and there was so much and I found myself under extreme emotional pressure with all of that.

One victim detailed the type of repeated incidents their family had been subjected to:

[over the] past few years there has been a lot of incidents, like throwing Coke to us ... and even throw[ing] the snow to me, to my daughter and said 'fuck you', 'fuck you'. ... Incidents like this have been happening many, many times for the past years.

Referring to a particular case, one NGOs representative summarised the impact multiple,

low level anti-social behaviour with racist dimensions could have on individuals:

You know it would have started off as an anti-social behaviour case, really it was a racist incident at the end, thinking they would have to flee.

The victims generally considered that criminal justice agencies were not able to do much to address such anti-social behaviour incidents, either because the perpetrators were unknown, children or due to prolonged response times of the PSNI. This caused frustration for some victims. One victim expressed views concerning the perceived challenges:

In terms of practical support I suppose there's just not enough police officers on the ground to deal with any incidents. There was so many times when I phoned and they said 'we'll send somebody around when they can', and by that time the attacks would have stopped, people would have been gone...

Findings

The NIHRC found that:

- The legislative framework in NI allows the racist element of a crime to be taken into account and provides for a broad application, covering circumstances in which racist hatred demonstrated or formed part of the offender's motivation. This broadly corresponds with the relevant human rights laws and standards.
- A lack of knowledge of the 2004 Order was a major obstacle its effective application. It was not usual for the criminal justice agencies staff to demonstrate awareness of the two-limbed nature of racially aggravated offences under the 2004 Order. There was a disproportionate

- emphasis on the ‘motivated’ aspect of the legislation throughout the interviews as well as in the policies, on the computer systems and official websites.
- Some criminal justice agencies staff were unable to articulate the difference between racist incidents and racist hate crimes.
- In the application of the Harassment Order, there was a low awareness of the law and its potential use in instances of racial hatred.

Effectiveness of sanctions

Human rights laws and standards

In considering domestic legal frameworks, the ECtHR has found that the respective laws were insufficient due to the lack of effective deterrence or effective penalties.⁵⁷ For this purpose, the ECtHR looked to the civil or criminal nature of the law,⁵⁸ the dissuasive nature of the law with a view to preventing the prohibited acts,⁵⁹ as well as the efficacy, preventive or deterrent effect of the judicial decisions upon the particular conduct.⁶⁰

The requirement to prohibit racist hate speech and racist violence under the CERD, Article 4(a), entails the obligation to provide criminal sanctions for such acts. The EU Framework Decision and the ECRI General Policy Recommendation 7 require that the sanctions accorded to racist offences be effective, proportionate and dissuasive.⁶¹ The possibility for ancillary or alternative sanctions should also be included.⁶² According to the ECRI General Policy Recommendation 7, effective sanctions in discrimination cases should include compensation.⁶³

Both the EU Framework Decision and the DDPA also advocate for racist motivation to impact upon criminal sentencing.⁶⁴ The ECRI General Policy Recommendation 7 emphasises the overall importance of legislation to act “as a deterrent and, as far as possible, [be] perceived by the victim as satisfactory.”⁶⁵

Domestic laws and policies

In terms of sanctions and damages in racial discrimination cases, the Race Relations Order provides that an action which contravenes the Order may be challenged by any person adversely affected by it; and in the event of the claim being upheld, a court may grant damages.⁶⁶ Where a breach is found on more than one occasion, a court may also grant an injunction to prevent further contraventions.⁶⁷ With regard to public authorities, similar provisions are established concerning breaches of the NI Act 1998, Section 76.⁶⁸

Offences of racist hate speech attract a punishment of up to six months imprisonment on summary conviction and imprisonment not exceeding two years for convictions on indictment.⁶⁹

As regards sanctions for offences of racist violence, domestic criminal laws determine minimum and maximum sentences for the respective base offence. The PPS Hate Crime Policy indicates that, summary offences “relate to less serious criminal behaviour” and are usually tried in the Magistrates’ Court before a District Judge.⁷⁰ Summary offences will generally attract a lower penalty than indictable offences. The majority of racist hate crimes in NI are dealt with in this way. Indictable offences “relate to more serious criminal behaviour” and are

⁵⁷ *Siliadin v. France*, ECtHR, Application No. 73316/01 (26 July 2005), paras 142-143.

⁵⁸ *X and Y v. the Netherlands*, ECtHR, Application No. 8978/80 (26 March 1985), para 27.

⁵⁹ *Okkali v. Turkey*, ECtHR, Application No. 52067/99 (17 October 2006), para 78.

⁶⁰ *Opuz v. Turkey*, ECtHR, Application No. 33401/02 (9 September 2009), para 170.

⁶¹ EU Framework Decision 2008, Article 3; ECRI General Policy Recommendation 7, para 23.

⁶² ECRI General Policy Recommendation 7, para 23.

⁶³ *Ibid.*, para 12.

⁶⁴ EU Framework Decision 2008, Article 4; DDPA, Programme of Action, para 84.

⁶⁵ ECRI General Policy Recommendation 7, Preamble.

⁶⁶ The Race Relations Order (Northern Ireland) Order 1997, Part VIII.

⁶⁷ *Ibid.*

⁶⁸ The Northern Ireland Act 1998, Section 76(2).

⁶⁹ The Public Order (Northern Ireland) Order 1987, Article 16.

⁷⁰ PPS Hate Crime Policy, para 5.5.1.

tried before a judge and jury at the Crown Court.⁷¹ Certain offences may be tried at either the Magistrates' or Crown Courts. In such instances, prosecutors must "consider whether the Magistrates' Court is the appropriate venue in that it has sufficient sentencing powers in relation to the gravity of the offence."⁷²

On this note, the Judiciary's Programme of Action on Sentencing has recognised hate crimes as an area in which further guidance on sentencing is needed.⁷³ In 2010, Sentencing Guidelines for the Magistrates' Court were developed, which contain general advisory principles that should be applied and direct the Judiciary to "take into account the law, guidelines, expert reports and all the circumstances, to decide what will be the correct sentence," including the purpose of satisfying retribution and deterrence.⁷⁴

The Sentencing Guidelines set down sentencing ranges available to Magistrates' Judges.⁷⁵ Within those, judges take into account aggravating and mitigating factors to increase or lessen the sentence given in a particular case. The sentencing ranges correspond to and are restricted by the nature of the offence. For instance, a "small amount of graffiti" or breaking a "small window" would be regarded as minor criminal damage and could, initially, attract a fine and compensation order. The sentencing range available would allow the judge to additionally impose a community order if the crime was deemed aggravated.⁷⁶

Generally, an enhanced sentence will not include a custodial sanction where the starting point of the offence did not provide for this. Exceptions include a breach of an anti-social behaviour order,

disorderly behaviour, breach of the peace and criminal damage causing moderate damage, all providing for an enhanced sentence amounting up to three months custody.⁷⁷ Where an offence against the person was "committed in the context of domestic violence" or where the "victim was engaged in providing a service to the public", the Sentencing Guidelines require the judge to use a higher starting point than prescribed. In this context, the judge may also increase a sentence beyond the sentencing range provided.

The Sentencing Guidelines include reference to racial hostility as an aggravating factor. However, there is no guidance as to what the corresponding tariff might amount to in specific cases or how such an evaluation might be made, as other mitigating and aggravating factors may impact the final sentence.

The practices of the criminal justice agencies and the experiences reported by the victims and NGOs

The criminal justice agencies staff interviewed for this investigation voiced a strong preference for the imposition of enhanced sentences. They acknowledged that targeting people solely because of their race was not acceptable and this should be reflected by the judge in sentencing. Some criminal justice agencies staff deemed enhanced sentences necessary to assure the public, in particular victims, that the criminal justice system was responding robustly to such crimes.

It was unclear whether criminal justice agencies staff would be in favour of enhanced sentencing for crimes in which racial hostility was demonstrated,

⁷¹ Ibid.

⁷² Ibid., para 5.5.2.

⁷³ Lord Chief Justice's Priority Sentencing List, Summary of Responses, Analysis of Consultation and Programme of Action (2 September 2011), p 9.

⁷⁴ Magistrates' Courts Sentencing Guidelines ('Sentencing Guidelines'), available at <<http://www.jsbni.com/Publications/sentencing-guides-magistrates-court/Pages/default.aspx>>.

⁷⁵ Ibid.

⁷⁶ Ibid., Criminal Damage.

⁷⁷ In each case, the Sentencing Guidelines allow the imposition of up to a three month custodial penalty in addition to a community order.

as they were generally unaware of this aspect of the legislation. One interviewee expressed reservations as to why the criminal justice system would distinguish between perpetrators, remarking that all should face the same punishment. Another interviewee who understood the two-limbed nature of the 2004 Order stated their opinion of the law:

[t]here are two aspects to the aggravation by hostility and I would personally support that where a crime is motivated by hostility then I think there should be enhanced penalties. The second limb I don't like ... I think in a free society people should have the right to have views on race, sexual orientation, [that] I may not agree with, ... but I think people should have a right to express themselves and express a dislike. And to sentence somebody to a harsher sentence because they've expressed an opinion to me doesn't seem right.

NGOs representatives favoured enhanced sentencing as it served to reflect the seriousness of the crime and to raise the public's awareness of the crime's unacceptability. In contrast, NGOs representatives noted the limited awareness victims had of the legislation and measures available to them. Some NGOs representatives themselves demonstrated a lack of knowledge of enhanced sentencing for crimes aggravated by racial hostility.

Criminal justice agencies staff understood that sentencing powers lay with the judges, which also represented a disconnect for some, due to the lack of their direct involvement in this final stage. Although they understood their specific duties in addressing racist hate crimes, they did not recognise the relevance or impact they could

have on the sentencing process and outcome for the victim, because finally, sentencing was for the judge. For example, one prosecutor stated:

sentencing is ultimately always a matter for the court so it's not ... something that I particularly push for.

A similar difficulty to understand the broader goal to effectively prohibit was illustrated in respect to the court service. Therein, one court clerk indicated the secondary importance of recording the racial aggravation and enhanced sentence for a court clerk's duties in a Magistrates' Court:

in the Magistrates' Court you are bound by the legislation which only allows you to sentence a certain amount of time So we are ... worrying about the amount of time that somebody is being sentenced to as opposed to ... the reason as to why they are being sentenced But we would be aware of it.

Prosecutors were generally aware of their personal responsibilities to point out the hate element in court. Certain challenges regarding the boundaries of their duties were, however, also apparent:

it's not particularly appropriate for a prosecutor to start suggesting sentences or to say you know, 'the court should sentence in a more harsh fashion due to the nature of this crime...'

some Court Prosecutors might ... feel that a Magistrate would be thinking you're stating the obvious there, you know, and you're telling them something that is really, you know ... they might take offence.

In determining the appropriate forum to try a suspected perpetrator of a racist hate crime, some prosecutors demonstrated a willingness to prosecute racist hate crimes in the Crown Court where sentencing powers are stronger, thus “recognising the seriousness of the racial aspect more.” The Judiciary confirmed that the impact of enhanced sentences in Magistrates’ Courts was more limited in comparison to Crown Courts, due to its sentencing powers. In this vein, the Judiciary questioned whether crimes with a particularly severe impact on a victim should even be heard in the Magistrates’ Courts, when the law permitted prosecution in the Crown Court as well. The PPS Statistics illustrate that the majority of prosecutions in cases of racist hate crimes are for summary offences.⁷⁸

The use of enhanced sentencing in practice demonstrated a stark contrast to how criminal justice agencies staff viewed its purpose. Only in exceptional cases could interviewees point to successful examples. Generally, criminal justice agencies staff had either never heard of the 2004

Order being imposed, had no awareness of its use, or did not see evidence of its implementation in their experience. This led to the wider perception that enhanced sentencing and the 2004 Order were not being used. The statistics depicted a stark contrast between detected racist hate crimes and convictions with an enhanced sentence for racial aggravation.⁷⁹

The NICTS data on convictions with enhanced sentences were available on request. However, due to the absence of specific offences, the 2004 Order being sentence-based, the judicial statistics published did not contain information regarding judicial decisions on racist hate crimes.⁸¹ One interviewee summarised the view held by some concerning the ineffectiveness of enhanced sentencing:

I think [enhanced sentencing] is brilliant, if it is enforced. I think it would help cut out hate crime and make people think twice about doing it. But at this minute in time I can’t see it is making a difference because I don’t see it as being implemented.

Aggravated by racial hostility	2006/07	2007/08	2008/09	2009/10	2010/11	2011/12
PSNI detections	101	86	96	115	71	77
PPS prosecutions ⁸⁰	NA	88	88	104	81	84
NICTS convictions, sentences enhanced	0	2	1*	0	2	1

* in this instance, the sentence was not enhanced due to mitigating factors.

⁷⁸ PPS Annual Statistics, Cases Considered by a PPS Prosecutor to have been Aggravated by Hostility 2007-2012, available at <http://www.ppsni.gov.uk/SiteDocuments/Reports/11_12/7.%20Motivation_Decisions/7.%20Motivation_Decisions.htm>.

⁷⁹ Information received from NICTS, time period 2007-2012. PSNI, Trends in Hate Motivated Incidents and Crimes in Northern Ireland 2004/05 to 2012/13, 5 July 2013, Table 2.9. The same time period illustrated saw 5589 racist hate incidents and 4090 racist hate crimes recorded.

⁸⁰ These figures do not include diversions (cautions, informed warnings and youth conferences) made by the PPS.

⁸¹ NICTS, Judicial Statistics 2012; Magistrates’ Court Bulletins; Crown Court Bulletins, available at <<http://www.courtsni.gov.uk/en-GB/Services/Statistics%20and%20Research/Pages/default.aspx#JudStat>>.

The 2004 Order's requirement upon judges to state in open court if an offence was aggravated by racial hostility, did not seem clear to all criminal justice agencies staff. Especially court prosecutors and court clerks commented that in practice, reasons were not provided as to what factors impacted a decision. They regarded it a possibility that nevertheless, some decisions took the racial element into account. In this sense, one statement captured the perception of the situation:

it would be impossible to tell really what is going on in the Magistrate's mind really unless they specifically say, you know, 'I'm giving you this increased sentence because of these factors', which they wouldn't always do you know.

Prosecutors also pointed to the fact that even where a Magistrates' Court judge stated that an offence was aggravated by hostility, the extent by which the sentence was enhanced would not be evident. The absence of sentencing remarks was viewed as typical in Magistrates' Courts, especially due to time pressures experienced:

only in very serious crimes do you get sentencing remarks; so it's very hard to judge In the Magistrates' Court case the guy will get a sentence and it will be recorded, but there's no actual formal note ... so I never get to know exactly like did he give a £200 fine or a £100 fine because of what he was saying, you know, it's hard to measure that.

NGOs representatives could recall one or two on-going cases that made reference to the racial element. Typically, they could not point to any racist hate crime cases that had been successfully prosecuted or convicted imposing an enhanced

sentence. This view was echoed by the victims interviewed, of which very few had seen their cases progress to the courts. At the time of interview, these victims were unaware of how their cases had concluded.

NGOs representatives felt that the lack of use of the 2004 Order rendered it difficult to comment on the impact of the legislation. One interviewee's remarks on the effectiveness of the 2004 Order captured the views held:

I think that it's hard to talk about the legislation in terms of what's good ... and what's bad about it, because it hasn't really been tested in any way. ... I don't think there's necessarily anything wrong with the legislation as it stands ... I mean it clearly hasn't been a deterrent; but has it not been a deterrent because it's not worded right and so they can't use it, or because it's ineffective, or because they just aren't using it?"

Another NGOs representative believed that one of the difficulties lay in terminology and the absence of standalone race hate offences. This appeared to result in a skewed statistic, not reflecting the actual number of cases that saw a conviction on the base offence only, but more importantly, in the lack of a conciliatory element.

The people feel that at the end of it... that nothing happened about that. They don't feel that there's a resolution to the racist part. Sometimes there's the resolution to the damaged car or the broken window, but no one actually says 'we're sorry that happened because you're Polish'.

Findings

The NIHRC found that:

- Laws in NI related to racist discrimination, racist hate speech and racist violence provide for criminal sanctions to be imposed. Their use was however limited in practice and their impact as effective, proportionate and dissuasive sanctions was not being fulfilled.
- The 2004 Order, Article 2, requires the sentencing judge to state in open court whether the offence was aggravated. There was inconsistent practice in this regard.
- The Magistrates' Courts Sentencing Guidelines do not require a minimum sentence for offences aggravated by hostility to the same degree as domestic violence or where the victim was engaging in providing a service for the public.
- There are no sentencing remarks in the Magistrates' Court. Where an enhanced sentence was applied, it was therefore not clear to what extent the 2004 Order impacted upon the tariff.
- The PSNI and PPS published statistics referring to racist hate crimes but this was not the case for the NICTS. This impacted the perception that the 2004 Order was not being implemented.

The duty to prosecute (including the effective investigation of racist hate crimes)

Introduction

International human rights standards require governments to guarantee an effective remedy to the victims of racist hate crimes. A key component of an effective remedy is the investigation of crimes to enable the prosecution of individuals who have committed a criminal offence. This is necessary to ensure an effective enforcement of the law. In order to enable the prosecution of racist hate crimes there must, first, be accessible reporting facilities for the victims and immediate recording by the relevant criminal justice agencies.¹ Once a report has been made, there should be an effective, independent and expeditious investigation, and this includes a targeted examination of the suspected racist aspect associated with the crime.² There must also be a consistent prioritisation of the prosecution of all racist hate crimes, regardless of the seriousness of the offences.³ Finally, it is important that during the criminal proceedings the victims have an opportunity to be heard and that both the hearing and subsequent judgment are within a reasonable period.⁴

The duty to prosecute engages a number of human rights standards, the most relevant of which are:

- CERD, Articles 2, and 6;
- ECHR, Articles 2, 3 and 14;
- EU Directive 2012/29, Articles 10 and 11;
- EU Council Framework Decision 2008/913/JHA;
- CERD Committee, General Recommendation 15;
- CERD Committee, General Recommendation 31;
- CRC Committee, General Comment 10;
- UN Declaration of Basic Principles of Justice for

Victims of Crime and Abuse of Power;

- UN Guidelines on the Role of Prosecutors;
- Durban Declaration and Programme of Action;
- ECRI General Policy Recommendation 1; and
- ECRI General Policy Recommendation 11.

This chapter details the constituent elements of the duty to prosecute perpetrators of racist hate crimes as required by international human rights laws and standards. It then examines the existing domestic laws and policies directed toward the prosecution of racist hate crimes in NI before considering the practices of the criminal justice agencies staff, and the experiences of the victims and non-governmental organisations. To conclude, an evaluation is provided regarding the effectiveness of the domestic framework and the level of compliance with human rights standards.

The initial report

Human rights laws and standards

The victims of racist hate crimes are often unwilling to report to the police for a number of reasons, including fear of retaliation, suspicion of government officials and alienation from the criminal justice system.⁵ The need for governments to encourage the victims of racist hate crimes to report is of paramount importance. Both the FCNM Advisory Committee and the ECRI have recommended that the UK Government continue to implement measures that facilitate and encourage reporting.⁶ In order to achieve this outcome there must be a consistent endeavour to make persons belonging to the most vulnerable social groups, including persons known to be discriminated

¹ CERD, Article 6 and CERD Committee, General Recommendation 31: Prevention of racial discrimination in the administration and functioning of the criminal justice system (3 October 2005).

² CERD, Articles 2(1)(d) and 6 and ECHR, Articles 2, 3, 8 and 14.

³ CERD, Articles 2(1)(d) and 6; CERD Committee, General Recommendation 31; and ECRI General Policy Recommendation 1: on combating racism, xenophobia, anti-Semitism and intolerance (4 October 1996).

⁴ CERD Committee, General Recommendation 31; EU Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, Article 10; and UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (29 November 1985).

⁵ FCNM Advisory Committee, Third opinion on the UK (30 June 2011), para 118.

⁶ Ibid., para 119; and ECRI Report on the United Kingdom, Fourth Monitoring Cycle (17 December 2009), para 51. See also, CERD Committee, General Recommendation 31 and ECRI General Policy Recommendation 11: on combating racism and racial discrimination in policing (29 June 2007).

against because of their descent, aware of their rights. The measures introduced may include a promotion, within the areas in which the victims live, of institutions such as free legal assistance and advice centres, and centres for conciliation and mediation.⁷

The CERD Committee General Recommendation 31 states that the prompt receipt of reports by the victims of racist hate crimes should be guaranteed. To ensure that this is the case, the police service is encouraged to have an adequate and accessible presence in the neighbourhoods where minority ethnic groups reside. Complaints should be recorded immediately and any refusal by a police officer to accept a complaint involving an act of racism should lead to disciplinary or penal sanctions.⁸

Furthermore, in order to help to send a message to the victims of racist hate crimes that their voice is being heard and to ensure that the racist motivation of ordinary offences are taken into account, the ECRI General Policy Recommendation 11 provides that the police service should adopt a broad definition of what constitutes a racist incident, namely, “any incident which is perceived to be racist by the victim or any other person.”⁹

Domestic laws and policies

The May 2013 ‘Together: Building a United Community’ strategy states that the NI Executive “recognise(s) that there continues to be a need to encourage the reporting of hate crime incidents and this represents a significant challenge to dealing with the issue.”¹⁰

The PSNI have initiated an awareness raising campaign to encourage the reporting of signal incidents and racist hate crimes using the slogans, “Nobody deserves this and nobody deserves to get away with it” and “to stop it... report it.”¹¹ The PSNI Service Procedure comprehensively advises officers of 11 different reasons why signal incidents and racist hate crimes are often unreported.¹² There are also posters often pinned near station inquiry desks with the slogan “Hate crime is wrong... If it happens to you or you see it happen please tell us.” The PSNI require as a condition of the ‘community/bilingual advocacy scheme’, that community advocates encourage the reporting of racist hate crimes and signal incidents. In this regard, the PSNI ‘Policing with the Community’ branch also hosts monthly meetings with advocates to assess reporting figures. The work of the PSNI is reinforced by the PPS Hate Crime Policy which gives recognition to the need to “encourage the reporting of crime.”¹³

It is PSNI policy to “record... all reported hate incidents in a consistent, robust, proactive and effective manner.”¹⁴ The PSNI applies the ‘National Standard for Incident Recording’ 2011 (the NSIR), which contains principles, guidance and definitions to assist the police when responding to reported incidents.¹⁵ The NSIR aims to identify, assess and prioritise risks of any incident at the earliest opportunity. The PSNI facilitates the immediate recording of racist acts via the emergency and non-emergency telephone numbers. PSNI policy requires that “where the caller has difficulties with spoken English then interpreter services should be made available as soon as practicably possible.”¹⁶

⁷ CERD Committee, General Recommendation 31, para 8. See also, OSCE Recommendations on Policing in Multi-Ethnic Societies, Recommendation 20.

⁸ CERD Committee, General Recommendation 31, paras 10-12.

⁹ ECRI General Policy Recommendation 11, para 14. See also, ECRI General Policy Recommendation 11, Explanatory Memorandum, para 74. Definition taken from Stephen Lawrence Inquiry report 1999.

¹⁰ OFMdFM, ‘Together: Building a United Community’ (May 2013), para 4.13.

¹¹ Available at <http://www.psnipolice.uk/hate_crime_leaflet_-_racist1.pdf>.

¹² PSNI Service Procedure 16/12: Police response to hate incidents (24 June 2013), p 5.

¹³ PPS Hate Crime Policy (December 2010), paras 2.4.4 and 3.8.

¹⁴ PSNI, Service Procedure 16/12, p 6.

¹⁵ Home Office, The National Standard for Incident Recording 2011, p 2.

¹⁶ PSNI Service Procedure 16/12, p 9.

It also facilitates reporting online via the PSNI 'non-emergency incident report form', and has committed to responding within 24 hours or the next working day.¹⁷ The online form specifically asks the person reporting "[i]s this incident a Hate Crime/Incident." In addition, the Association of Chief Police Officers (ACPO) 'True Vision' website provides further links to enable the reporting of racist hate crimes in NI.¹⁸

The PSNI records all incidents irrespective of whether they constitute a crime. The NSIR has defined an incident as a:

single distinct event or occurrence which disturbs an individual's, group's or community's quality of life or causes them concern.¹⁹

The PSNI have defined a 'hate incident' as:

[a]ny incident, ... which is perceived by the victim or any other person, as being motivated by prejudice or hate.²⁰

Furthermore, the PSNI have specifically defined 'racially motivated incidents' as:

[a]ny incident, which is perceived to be racist by the victim or any other person.²¹

This is referred to as the 'Perception Test'. The PSNI officers are instructed to "accept without challenge the view of the victim or any other person that the crime was motivated by hate."²² In its policy the PSNI is also clear that the reporting of a hate incident or crime is not linked to evidence and "police officers cannot decide whether or not to record ... a hate incident or crime because there appears to be no evidence to support a perception."²³

Once a call has been received, the PSNI Call Management Centre record the reported incident on Command and Control with the appropriate closing code describing the incident.²⁴ Qualifiers are then added to the closing code to capture key aspects and characteristics of the incident.²⁵ The qualifier used for racist hate incidents is HARC.²⁶ This qualifier is intended to ensure that incidents are tasked to the relevant neighbourhood officer carrying out the hate and signal crime role (the 'HSCO').

Once an incident or crime has been closed, the Command and Control system will automatically populate the 'NICHE' computer system, which is a product specifically designed for police services to record and manage any reported incidents. It will simultaneously record any perceived 'motivation'.

The practices of the criminal justice agencies and the experiences reported by the victims and NGOs

The interviews indicated that it was common for the victims not to report signal incidents and racist hate crimes. This was for a variety of reasons, such as a lack of awareness concerning the technical process, a desire to pass unnoticed, fear of repercussions from the perpetrator, an acceptance of such treatment, a cultural fear of the police and lack of confidence in the criminal justice system's ability to hold perpetrators to account.

One victim, with English as an additional language, described how they had unsuccessfully tried to report an incident. An interpreter stated:

[they] called the police, but [their] English was no good so [they] just said 'police' and [stated their

¹⁷ Available at <<https://report.psnipolice.uk/>>.

¹⁸ Available at <<http://report-it.org.uk/>>.

¹⁹ The National Standard for Incident Recording 2011, p 4.

²⁰ PSNI, Service Procedure 16/12, p 3.

²¹ Ibid., p 4.

²² Ibid., p 3.

²³ Ibid., p 3.

²⁴ "The PSNI's command and control system is used to respond to calls for service from members of the public by prioritising the call and tasking the appropriate police response. Each incident is closed off using codes and definitions set out in the National Standard for Incident Recording (NSIR), designed to provide a common approach to be followed by police forces in England, Wales and Northern Ireland in classifying the broad range of calls for service received." See, PSNI, User Guide to Police Recorded Crime Statistics in Northern Ireland (updated June 2013), p 14.

²⁵ The National Standard for Incident Recording 2011, p 6.

²⁶ PSNI Service Procedure 16/12, p 10.

address] and then the Police just didn't show up... [they were] not sure, maybe because [the police] couldn't understand [them] or they tried to ignore [them].

On another occasion, a NGOs representative described how when following up on a case they had discovered that "the incident was not recorded at all" despite the victim recalling that a police officer had attended the scene.

The interviews with the PSNI officers revealed that they consistently understood the perception test when recording racially motivated incidents. Many officers conveyed that they would also apply this test in practice. In addition, some officers indicated that they proactively questioned victims concerning perception:

I would ask questions that would maybe say 'do you think that this has happened because of...'

Many officers also recalled recording an incident as "racially motivated" based on their own perception, something that was supported during a few of the victims interviews. In situations where it was unclear whether or not the incident was racist, some police officers adopted a cautious approach and recorded the incident as racially motivated anyway. A senior PSNI officer advised:

[w]hat I would ask people to do is if there is any doubt whatsoever to treat it as a hate crime.

One officer went further still, recalling how he would record all incidents involving a person from an ethnic minority community as racially motivated irrespective of perception because "you don't know."

Another officer described how their understanding of the perception test also included instances where racist hostility was demonstrated during the course of the incident:

[g]enerally speaking, an incident is flared where there has been a lot of name calling and then somebody has perceived that incident to be a hate crime because of something somebody said... in a lot of instances it has been a road traffic incident or a road rage incident and then the perception has then come in by something somebody has said thereafter.

On occasion there appeared to be a lack of 'buy-in' concerning the perception test. For example, a small number of officers considered that it could result in recording outcomes that were "illogical", "utter nonsense", "not reasonable" or "wrong". Some of these officers also felt that the lack of any evidential basis for the perception test led to an abuse of the system by the victims because of a belief that the PSNI "would spend more time investigating" or that they would "receive extra housing executive points." A neighbourhood Sergeant suggested that one difficulty for officers in this regard is that because the perception test is not linked to evidence it goes against the "natural reaction" of police, who are trained to always be looking for the evidential potential.

During the case file review, data was received from the PPS identifying the files they had received from the PSNI which were flagged as "racially motivated" as well as the files identified by the PPS. According to this data, 17 files were not recorded by the police as "racially motivated" but were later identified as aggravated by hostility by the PPS. Some of the NGOs representatives also recognised that the "motivation wasn't coming through" from police which then limited their ability to offer support services to the victims.

Findings

The NIHRC found that:

- Under-reporting of signal incidents and racist hate crimes by victims was commonplace. There was a consistent effort, however, on the part of the criminal justice agencies to encourage reporting.
- The PSNI reporting mechanisms are generally accessible. However, problems were identified concerning the accessibility of the telephone and online reporting facilities for victims with limited ability to speak English.
- Some racist incidents had not been recorded on the PSNI system despite a police call-out.
- PSNI officers both understood and applied the perception test. However, some officers questioned its usefulness in practice because it was not premised upon evidence.
- Many crimes recorded by the PPS as aggravated by hostility (i.e. a suspected racist hate crime) were not recorded on the PSNI NICHE system as racially motivated.

The investigation

Human rights laws and standards

The CERD, Articles 2(1)(d) and 6 incorporate a positive duty to properly investigate reported incidents of racist hate crimes. For example, in the case of *LK v Netherlands*, which involved hate speech within the remit of Article 4, the CERD Committee concluded that the existence of legislation making racial discrimination a criminal act was not in and of itself sufficient to represent full compliance with the CERD obligations. Rather, the Committee stated that:

when threats of racial violence are made, and especially when they are made in public and by a

group, it is incumbent upon the State to investigate with due diligence and expedition.²⁷

In this instance, a failure to gather complete evidence was a significant factor that resulted in the Committee finding a violation of Article 6.²⁸

The most developed concept of the duty to investigate within international human rights law is set out under the ECHR, Article 2 (everyone's life shall be protected by law) and Article 3 (no one shall be subjected to torture, or to inhuman or degrading treatment or punishment).²⁹ The ECtHR has ruled that in addition to protecting the substantive rights, Articles 2 and 3 contain a positive procedural duty upon governments to carry out an effective, independent and expeditious official investigation capable of leading to the identification and punishment of perpetrators.³⁰

When determining whether or not an investigation has complied with the procedural duty under the ECHR, Articles 2 and 3, the ECtHR focuses upon the means utilised and not the end result. In the context of an Article 2 investigation, the ECtHR has stipulated that the authorities:

must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which

²⁷ *L.K. v Netherlands*, CERD Committee, Communication No. 4/1991 (16/03/1993), para 6.6.

²⁸ *Ibid.*, para 6.7.

²⁹ See also, Human Rights Committee discourse on the duty to investigate: Human Rights Committee, General Comment 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment); and Human Rights Committee, General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant.

³⁰ *Angelova and Iliev v. Bulgaria*, ECtHR, Application No. 55523/00 (26 July 2007), paras 94 and 98; *Milanovic v Serbia*, ECtHR Application No. 44614/07 (14 December 2010), para 84; *LCB v UK*, ECtHR (9 June 1998), para 36; *Assenov v Bulgaria*, ECtHR, (28 October 1998), para 102; and *Šečić v Croatia*, ECtHR, Application No. 40116/02 (31 May 2007), paras 53 - 54.

undermines its ability to establish the cause of death, or the person or persons responsible will risk falling foul of this standard.³¹

In *Milanovic v Serbia*, the ECtHR found that the police investigation into pervasive low level violence against a member of the Hare Krishna faith was a violation of Article 3 based on a number of investigative failings, including the fact that: the applicant was not kept properly abreast of the course of the investigation or afforded an opportunity to personally see and possibly identify his attackers from among a number of witnesses or suspects questioned by the police; based on no meaningful evidence the police suspected that the applicant's injuries were self-inflicted; the focus of the investigation was restricted to the locality of the attack despite evidence the perpetrators may have been linked with an organisation from an outside region; no video or other surveillance was ever put in place in the vicinity of the flat where the incidents had occurred; no police stakeout appears to have been contemplated; and, no security detail was offered.³²

The ECtHR also considers that the existence of racist motives should be a factor that positively influences the expediency of the investigation due to the wider implications for minority confidence in the rule of law:

where that attack is racially motivated, it is particularly important that the investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.³³

In *Angelova v Bulgaria*, the ECtHR found a violation of Article 2 when the statute of limitations ran out as a consequence of an eleven-year procrastination over the institution of criminal proceedings that involved only sporadic bursts of investigation.³⁴ In *Šečić v Croatia*, failure by the authorities to follow up on a number of leads that may have led to the identification of the perpetrators of an attack on a man of Roma origin, and a prolonged investigation of seven years, was held to be a breach of Article 3.³⁵

The ECHR, Article 8 protects the right to privacy and as with the ECHR, Articles 2 and 3, includes a positive duty that can extend to the sphere of relations between private individuals. It may require the government and relevant criminal justice agencies to act affirmatively to respect a person's physical, psychological and moral integrity.³⁶ It is therefore often the case that where a signal incident fails to meet the requisite threshold for degrading treatment under Article 3, the treatment will nonetheless fall within the much broader ambit of Article 8. For example, in *Orević v Croatia*, the ECtHR found a violation of the right to private and family life of the mother of a disabled Serbian man, for whom she was caring. Although the ill treatment she had suffered was minor and fell outside the scope of Article 3, the relevant authorities failure to put in place adequate protection to prevent the Article 3 ill treatment of her son, coupled with the harassment she herself had suffered, was deemed to have impacted negatively upon her quality of life within the scope of Article 8.³⁷ Further, in *M.C. v Bulgaria*, the ECtHR held that the positive obligation under Article 8 may extend to questions relating to the effectiveness of a criminal investigation.³⁸

31 *Angelova and Iliev v. Bulgaria*, ECtHR, Application No. 55523/00 (26 July 2007), paras 95 and 97. Generally, see also, *Jordan v United Kingdom*, ECtHR, Application No. 24746/94 (4 May 2001), paras 106-109.

32 *Milanovic v Serbia*, ECtHR Application No. 44614/07 (14 December 2010), paras 87-90.

33 *Angelova and Iliev v Bulgaria*, ECtHR, Application No. 55523/00 (26 July 2007), para 98.

34 *Ibid.*, para 105.

35 *Šečić v Croatia*, ECtHR, Application No. 40116/02 (31 May 2007), paras 53-54.

36 *Orević v Croatia*, ECtHR, Application No.41526/10 (24 July 2012), para 152 and *X and Y v Netherlands*, ECtHR, Application No. 8978/80 (26 March 1985), paras 22-23.

37 *Ibid.*, para 153.

38 *M.C. v Bulgaria*, ECtHR, Application No. 39272/98 (4 December 2003), para 152.

In addition to the requirement for an effective investigation, the CERD Committee has found a violation of both Article 2(1)(d) and Article 6 for a failure to investigate the possible racist nature of the attack. In *Dawas and Shava v Denmark*, the authors were Iraqi refugees who had been subjected to a violent assault in their home by 35 perpetrators. A failure by the Danish police to investigate whether there was a racist element to the attack was a breach of the CERD because it had prevented the possible racist motivation of the perpetrators from being adjudicated at the criminal trial.³⁹ The ECRI General Policy Recommendation 11 supports the requirement that the police take full account of any racist motivation when investigating both racist and ordinary offences.⁴⁰

The ECHR, Article 14 prohibits discrimination in the enjoyment of an ECHR right. The ECtHR has thus determined that in the context of an Article 2 investigation, Article 14 imposes an additional duty upon the police, when investigating violent incidents, to “take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events.”⁴¹ The ECtHR has outlined its rationale as follows:

[r]acial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment.

[T]reating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.⁴²

The ECtHR has however, recognised the difficulty of proving racial motivation. It has noted that the obligation to investigate racial overtones to a violent act is one of best endeavours and not absolute.⁴³ Outside of investigative failings, a violation of Article 14 has been found where there was, for example, a failure to charge the perpetrators with the specific racially motivated offence provided for by legislation⁴⁴ and, evidence of prejudices on the part of the police.⁴⁵

The ECtHR has recently taken steps to further outline the duty to investigate where no criminal offence has occurred, but where the criminal justice agencies are aware of serious harassment and violence; for example, in cases where the perpetrators are children below the age of criminal responsibility. In such instances the ECtHR has held that while no procedural duty to conduct an effective investigation under the criminal law may exist, the relevant criminal justice agencies and public authorities - which can include among others, the police, the social welfare centre and the school attended by the perpetrators - are still under a positive obligation “outside” the sphere of the criminal law to take sufficient steps to ascertain the extent of the problem and to prevent further abuse taking place.⁴⁶

³⁹ *Dawas and Shava v Denmark*, CERD Committee, Communication No. 46/2009 (6 March 2012).

⁴⁰ ECRI General Policy Recommendation 11, para 11.

⁴¹ *Nachova and Others v Bulgaria*, ECtHR, Application No. 43577/98 and 43579/98 (6 July 2005), para 160.

⁴² *Ibid.*, paras 145 and 160.

⁴³ *Ibid.*, para 160.

⁴⁴ *Angelova and Iliev v Bulgaria*, ECtHR, Application No. 55523/00 (26 July 2007) para 116.

⁴⁵ *Milanovic v Serbia*, ECtHR Application No. 44614/07 (14 December 2010), para 100.

⁴⁶ *Orečić v Croatia*, ECtHR, Application No.41526/10 (24 July 2012), para 147.

Domestic laws and policies

The Police (NI) Act 2000, Section 32(1) states that it is the general duty of police officers “where an offence has been committed, to take measures to bring the offender to justice.” This must be carried out in accordance with a code of ethics that lays down standards of conduct and practice and which makes police officers “aware of the rights and obligations arising out of the [ECHR] (within the meaning of the Human Rights Act 1998).”⁴⁷

It is the PSNI policy to “respond and investigate all reported hate incidents in a consistent, robust, proactive and effective manner.”⁴⁸ The PSNI Service Procedure references the ACPO ‘Practice Advice on Core Investigative Doctrine’ as a guide for investigations.⁴⁹ The Core Investigative Doctrine notes the importance of the need for “fast track actions” and their relevance to all investigations.⁵⁰ Fast track actions are defined as:

[a]ny investigative actions which, if pursued immediately are likely to establish important facts, preserve evidence or lead to the early resolution of the investigation.⁵¹

The Core Investigative Doctrine advises officers that:

[f]ast track action is particularly appropriate when investigators are responding to incidents which are still ongoing or have only recently ended. Material in the form of witnesses, forensic evidence and articles associated with the crime may be readily available if prompt action is taken to gather them.

Whether the crime has been recently committed or not, the first chance to obtain material may be the last. To delay protecting, preserving or gathering material may result in it being contaminated or lost.

It is important that every chance to gather material is taken as soon as possible.⁵²

The PSNI Service Procedure clarifies that “perception will not be sufficient in order to seek a conviction by virtue of The Criminal Justice (No.2) (NI) Order 2004.”⁵³ Consequently, officers are reminded that:

every hate incident must be investigated with a view to providing the prosecutor with sufficient evidence to prove to a court beyond reasonable doubt that it was motivated or aggravated by hate.⁵⁴

The PSNI are therefore responsible for investigating and gathering evidence for both the base offence to which the hate element may be attached, and the hate element itself. In order to assist in proving aggravated by hate, the PSNI policy states that “evidence in the form of a statement from the victim or witness, interview with the suspect, observation at the scene must be obtained.”⁵⁵

An investigative checklist is also available on the PSNI NICHE system as a prompt to guide officers when responding to an incident. The checklist alerts officers to: “check system to establish if a repeat incident”; “establish motivation”; “seek evidence to prove the motivation for court purposes”; and, to include “evidence of hate” within statements.⁵⁶

The PSNI Service Procedure states that officers “cannot decide whether or not to ... investigate a hate incident or crime because there appears to be no evidence to support a perception.”⁵⁷ In this regard, the PSNI has a number of accountability mechanisms in place to ensure that hate crimes are

⁴⁷ The Police (Northern Ireland) Act 2000, Section 52(1).

⁴⁸ PSNI Service Procedure 16/12, p 6.

⁴⁹ ACPO Core Investigative Doctrine 2005.

⁵⁰ Ibid., p 52.

⁵¹ Ibid., p 51.

⁵² Ibid., p 52.

⁵³ PSNI Service Procedure 16/12, p 17.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ PSNI ‘Investigative Checklist’. Supplied to NIHR by PSNI.

⁵⁷ PSNI Service Procedure 16/12, p 3.

handled correctly, including: Sergeant supervision concerning the standard of the investigation, including where possible, attendance at the scene; the requirement for Area Commander authorisation before a hate crime is 'closed off'; dip-sampling of racist motivated incidents and crimes by the Supervising Sergeant and Supervising Inspector,⁵⁸ the Crime Manager and Area Commander, and the Policing with the Community branch.⁵⁹

Finally, at the time of the investigation, the PPS were also conducting an internal quality assurance exercise.⁶⁰

The practices of the criminal justice agencies and the experiences reported by the victims and NGOs

When asked to describe how they would conduct an investigation into racist hate crimes, the PSNI officers did not generally distinguish between gathering evidence for the base offence and gathering evidence to prove 'aggravated by hostility' under the 2004 Order. This lack of clarity translated at times into a failure to proactively pursue the full evidential potential. For example, one officer recalled an example in which they believed that the perception test was used at court:

[w]hen in the box the defence asked (the victims): 'you are homosexual, how is this a hate crime if the person who attacked you is homosexual?' and his response was 'because I perceive it to be a hate crime' and that was it done... that was the end of all questioning for him, you know, you can't really argue the point... There is nowhere for the defence solicitor to go once you say that.

Many of the PSNI officers were keen to point out that the victims of hate crime did not receive a better standard of investigation than others. Typical examples of this view were as follows:

I think every victim deserves the same level of investigation... I wouldn't be an advocate of going down the line of victims of race crime should get a better level of investigation.

The hate aspect doesn't change the investigation in any sort of shape or form.

It's exactly the same as any other investigation from start to finish and your processes and what you do to try and gather as much evidence as possible.

In the following response a PSNI officer demonstrated a clear understanding that evidence had to be gathered for both the base offence and the aggravated by hostility:

[t]here needs to be proof in the case somewhere that it was aggravated by racism. It's the same as being innocent until proven guilty. [The PPS] have to prove every element in order to get it passed by a magistrate or a judge.

This was not a typical response, although the senior PSNI officers were quick to correct any misconceptions and recognised the problem:

[t]here's a difficulty that some people [i.e. frontline officers] think we are going for a 2 tier system because of hate crime... We're not creating a two tier system, we're actually doing a more bespoke system to meet the needs of that particular person... The perception doesn't always translate into the evidence... I don't think we've got that message across particularly well.

⁵⁸ The "Supervising Sergeant" refers to the HSCO Sergeant, and the "Supervising Inspector" refers to the Neighbourhood Policing Unit Inspector (information provided to the NIHR during the fact check process on 27 August 2013).

⁵⁹ PSNI Service Procedure 16/12, p 12-15

⁶⁰ Information submitted by the PPS to the NIHR during the fact check process on 30 August 2013.

When officers addressed the need to secure evidence proving the racist element of a crime, there was a tendency to use language that suggested they focused on proving the 'motive' of the perpetrator to the exclusion of the 'demonstrated' limb of the 2004 Order. It was apparent that proving a 'motive' was regarded as difficult in practice:

you are effectively talking about someone's thoughts... unless you can prove someone's thoughts or they're going to admit to the reasoning behind why they've done something, part of that motivation or element you will never prove.

When asked what evidence they would seek to gather to prove a racist hate crime, the PSNI officers generally thought that the "most straightforward" kind of evidence to collate was verbal abuse directed towards the victims. This was supported by the PPS staff interviewed.

Upon reviewing the case files, it appeared that in the majority of cases, evidence to prove the hate element was indeed predominantly comprised of offensive language as recorded in the witness statements. Moreover, this appeared to be the only evidential basis upon which prosecutions were secured under the 2004 Order.

Beyond a recording of the words spoken, the case files contained very little open analysis regarding the hate element of the crimes. Concerning the character of the defendant, one file notably referenced the suspect's "numerous marking on arms... 'self confessed' Nazi" although this information was not included in the subsequent outline of the case. A few case files contained the defendant's criminal record.

Senior PSNI officers were however able to confidently articulate the other types of evidence that could be gathered, such as: the demeanour or gestures made by the suspect, ideally as shown on CCTV; any previous convictions of the suspect; repeat incidents concerning the address or victim that can be linked; looking for previous similar offences that can be matched; as well as taking account of the nature of the crime itself, for example, "excrement on the broken window." Senior PSNI officers also noted that requests should be made for intelligence; upon receipt of which, they should follow up on all lines of inquiry which have evidential potential. They also made clear that the interviewing skills of officers were important to obtain 'quality' information from both the victim and the suspect. This would include comprehensive victim statements that clearly specify the exact language used.

In the absence of racist words, it was considered important that police officers stated the reasons 'why' the incident was perceived to be racist. A few front-line officers mentioned that they would try to draw out any motivation when questioning perpetrators:

If you don't ask the questions in the interview you don't have, on most cases, the evidence.

It's a skill to get information from people and if, through that skill, that information confirms that it is a race incident or a hate incident then that's great.

One of the case files reviewed also contained a transcript of the suspect interview. Therein, it was apparent that the PSNI officers specifically questioned the suspect concerning the racist element of the crime. The following questions were asked:

Why did you specifically turn and describe people in that way?

Do you think that is appropriate?

Why did you shout?

Do you think it is appropriate to refer to people of that race by that terminology?

During the investigation, a senior prosecutor gave a presentation to police officers concerning the types of evidence that may prove aggravated by hostility.⁶¹

The most immediate challenge identified by the PSNI officers was identifying and locating a perpetrator. Officers noted that this was inhibited by the realities of poor street lighting, lack of CCTV, lack of witnesses, and lack of time. The victims interviewed also identified that at times, response officers came under attack from hostile communities, and concluded that these behaviours undermined an effective investigation.

The victims interviewed perceived there to be an inconsistent level of commitment from the PSNI concerning the investigation of racist hate crimes. While a number of the victims noted that forensic evidence had been gathered, CCTV sourced and house-to-house enquiries undertaken, other victims described the investigation as almost non-existent. A typical example was provided by one victim who described how the PSNI officer:

just took a short note and said there's nothing we can do because they are just young people.

On a further occasion, where the victim perceived a limited investigation, the police were described as justifying a lack of engagement on the basis that the perpetrator had mistaken the victim. An interpreter explained that:

[the] PSNI came twice and asked him what happened. The PSNI said that the perpetrators chose the wrong house as they had come for another victim... He does not know how they knew this because they did not catch the perpetrators.

Although not typical, on one occasion a serious allegation was made by one victim concerning explicitly discriminatory attitudes on the part of a police officer. The victim described how the PSNI officer actively dissuaded them from progressing their case on the basis of their nationality. An interpreter explained:

[t]he policeman left the house to go to the neighbour's house and he came back with a completely different attitude saying that he spoke to them and you don't need to take the matter any further and, if you take any further then you count yourself responsible for whatever is gonna happen because you are not from this country. He said this will create a lot of trouble for you ... So the incident wasn't reported ... [they] were scared and really intimidated.

Some of the victims expressed their disappointment in the time it took for officers to respond. At times, the lack of expedition was felt to impact upon ability of the PSNI to gather evidence. As suggested by one victim:

[t]here was so many times when I phoned and they said 'we'll send somebody around when they can' and by that time the attacks would have stopped, people would have been gone and then you're sitting.

Another victim stated their frustration at the refusal of the police to follow the perpetrator on the night of the attack, only to be asked to identify the perpetrator two months later:

61 1 February 2013, Cookstown event.

they ask[ed] me to come to [identify the perpetrator] ... [from] the [photographic] line-up, which is difficult two months after the incident. That very night I told police ... to follow me to the house, then maybe [I could] pick the particular person, definitely there will be a sign of blood on his shirt. But two months later I'm asked to pick someone from the line-up!"

In relation to evidence gathering, a senior PSNI officer acknowledged that there was room for improvement:

[t]he quality of the investigations has not been of the standard that I want and if quality of investigation means that the evidence isn't being captured, or if it is captured it's not being captured with the right integrity ... I mean the integrity of the actual of ... evidence I don't mean the integrity of the officer.

Concerning the supervision and accountability of the PSNI, many senior officers indicated that while they would try to attend the scene of racist hate crimes this was often not possible, due to other more pressing demands. In this regard, response officers noted:

[if] it was something very serious then yes [a senior officer] would come down but a lot of the time it's enough to give them facts over the phone.

Findings

The NIHRC found that:

- Some victims of racist hate crimes perceived that they had been discouraged by PSNI officers from persisting with their complaint.
- The domestic law and policy framework did not direct the criminal justice agencies to afford a particular expediency to the investigation of racist hate crimes. Nor was there any evidence of a particular expediency in practice where a racist hate crime was suspected.
- The evidential burden required to prosecute racist hate crimes was not understood by all of the PSNI officers interviewed. A focus on the base offence and the belief that the perception test was sufficient to prove the 'aggravated by hostility' component at court often resulted in inadequate attention being paid to the investigation of the racist element.
- The majority of incidents investigated by the PSNI involved verbal abuse that met the 'demonstration of hostility' limb of the 2004 Order. However, PSNI officers rarely mentioned this aspect of the 2004 Order. Instead there was a greater emphasis on the 'motivated by hostility' limb, which was considered difficult to prove.
- The PSNI have introduced extensive accountability mechanisms in an effort to hold officers to account for any failure to follow PSNI hate crime policy. However, there was no evidence of a review mechanism to determine if the racial hostility element of a crime had been appropriately recorded at the initial stages, for example, by the controller or the responding officer.

The decision to prosecute

Human rights laws and standards

The UN Guidelines on the Role of Prosecutors states that:

[p]rosecutors shall...perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.⁶²

In *L.K. v Netherlands*, the CERD Committee gave recognition to the fact that national criminal justice systems should apply the expediency principle which means that the prosecution service is allowed discretion concerning their decision to pursue a prosecution on the basis of public interest considerations. It stated that:

[t]he Committee observes that the freedom to prosecute criminal offences—commonly known as the expediency principle—is governed by considerations of public policy and notes that the Convention cannot be interpreted as challenging the *raison d'être* of that principle.⁶³

The Committee additionally emphasised the importance of ensuring that the rights of the victims of racist hate crimes under the CERD are considered within this decision-making process, stating that:

[n]otwithstanding, [the expediency principle] should be applied in each case of alleged racial discrimination in the light of the guarantees laid down in the Convention.⁶⁴

Furthermore, the CERD Committee General Recommendation 31 emphasises the importance of prosecuting even 'minor' offences where these are committed with racist intent in order that the social cohesion of society might be protected.⁶⁵ The ECRI has also recognised the need for a consistent prioritisation of the prosecution of racist offences.⁶⁶

When deciding whether to recommend or pursue a prosecution, particularly in the context of children who have committed racist acts, the UN Guidelines on the Role of Prosecutors urge that special consideration is given to the "nature and gravity of the offence, protection of society and the personality and background of the juvenile."⁶⁷ The UN Committee on the Rights of the Child has also recommended:

Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law... The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with the child offenders. This can be done in concert with attention to effective public safety.⁶⁸

⁶² UN Guidelines on the Role of Prosecutors adopted at the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (27 August to 7 September 1990), para 12.

⁶³ *L.K. v Netherlands*, CERD Committee, Communication No.4/1991 (16 March 1993), para 6.5.

⁶⁴ *Ibid.*

⁶⁵ CERD Committee, General Recommendation 31, para 15. For example, in *LK v Netherlands*, the Committee found a violation of Article 6 because coupled with an incomplete investigation, the prosecution service have failed to institute criminal proceedings.

⁶⁶ ECRI General Policy Recommendation 1, p 5.

⁶⁷ UN Guidelines on the Role of Prosecutors, para 19. The UN Guidelines on the Role of Prosecutors do not define a 'juvenile'. However, the UN Standard Minimum Rules for the Administration of Juvenile Justice, (29 November 1985), Annex, para 2.2(a), states: "A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult." In addition, the UN CRC Committee, General Comment 10: Children's rights in juvenile justice (25 April 2007), para 38 states that "The Committee ... recommends that those States parties which limit the applicability of their juvenile justice rules to children under the age of 16 (or lower) years, or which allow by way of exception that 16 or 17-year-old children are treated as adult criminals, change their laws with a view to achieving a non-discriminatory full application of their juvenile justice rules to all persons under the age of 18 years. The Committee notes with appreciation that some States parties allow for the application of the rules and regulations of juvenile justice to persons aged 18 and older, usually till the age of 21, either as a general rule or by way of exception."

⁶⁸ CRC Committee, General Comment 10, para 10.

While the UN Guidelines on the Role of Prosecutors and the UN Declaration of Basic Principles emphasise that the prosecution should consider the views and concerns of the victims where their personal interests are affected,⁶⁹ the EU Council Framework Decision, the ECRI and the DDPA all express the need for the criminal justice authorities to prosecute offences with an element of racism *ex officio*.⁷⁰ An *ex officio* prosecution means that the prosecution of such acts will be automatic and not be dependent upon a report or accusation made by the victim.

The EU Directive, Article 11 accords victims the right to a review of a decision not to prosecute for at least the most serious crimes. Any review of a decision not to prosecute should be carried out by a different person or authority to that which made the original decision.⁷¹

The FCNM's Advisory Committee has strongly welcomed the establishment of a specialised post of "Public Prosecutor for Hate Crime and Discrimination" in a number of Spanish regions. The Committee has noted the success of this post at the regional or devolved level, and its translation into the institution of the post of "Public Prosecutor for Equal Treatment and Against Discrimination" in the Spanish Supreme Court.⁷²

69 UN Guidelines on the Role of Prosecutors, para 13(d) and UN Declaration of Basic Principles of Justice, para 6(b). See also CoE Recommendation (2006)8, para 4.4, which states that victims should have the opportunity to provide relevant information to the criminal justice personnel responsible for making decisions regarding their case.

70 EU Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law (28 November 2008), Article 8; Durban Declaration and Programme of Action, Programme of Action, Durban, South Africa, (31 August to 8 September 2001), para 89; and, ECRI General Policy Recommendation 1, p 4.

71 EU Directive 2012/29, Preamble, para 43. See also the recent comments of the Court of Appeal for England & Wales which queried whether the review process there could be made subject to clearer procedure and guidance with time limits, *R v Christopher Killick*, [2011] EWCA Crim 1608, para 57.

72 FCNM Advisory Committee, Third Opinion on Spain (22 March 2012), para 92.

Domestic laws and policies

Once enough evidence has been secured concerning a racist hate crime, the PSNI forward the case to the PPS for consideration. In order to inform the PPS of the hate element, the PSNI Service Procedure directs that officers must "clearly and fully" include instances of aggravation by hostility in the 'outline of case' included in the case papers.⁷³ The PPS will also be able to see the 'motivation' as marked by the PSNI on the electronic recording system.

The PPS is responsible for deciding if a prosecution is to be pursued and for what offences. The 'Code for Prosecutors' details the applicable code of ethics setting out the standards of conduct and practices expected from prosecutors in instituting and leading criminal proceedings.⁷⁴ The Justice (NI) Act 2002 provides the statutory rules of procedure, and includes a requirement that the Code for Prosecutors:

*must be guided by the general principles of the Guidelines on the Role of Prosecutors adopted at the Eighth [UN] Congress on the Prevention of Crime and the Treatment of Offenders.*⁷⁵

The Justice (NI) Act 2004, further requires that the criminal justice agencies (including the PPS, the NICTS and the PBNI) exercise "their functions in a manner consistent with international human rights standards relevant to the criminal justice system."⁷⁶

The PPS will initiate or continue prosecutions only where the investigation results in a case that meets the Test for Prosecution: which is comprised of an 'evidential test' and a 'public interest test'.

73 PSNI Service Procedure 16/12, p 11.

74 The Justice (Northern Ireland) Act 2002, Section 37.

75 *Ibid.*

76 The Justice (Northern Ireland) Act 2004, Section 8(1).

The evidential test requires that the evidence, which can be adduced in court, is sufficient to provide a reasonable prospect of conviction. To complete this process a prosecutor must examine the evidence in relation to an identifiable individual and assess whether this would serve to prove, beyond reasonable doubt, that the individual had committed the criminal offence. In addition to the evidence gathered and submitted by the PSNI, the PPS can electronically access and take account of the defendant's record, should one exist.⁷⁷

With regard to offences aggravated by racial hostility under the 2004 Order, the PPS Hate Crime Policy explains that, “[f]or an offence aggravated by hostility to be committed, there must be sufficient objective evidence of hostility which is offender-motivated, rather than perception-based.”⁷⁸ Therefore, in addition to proving beyond reasonable doubt the defendant's guilt of the base crime, a prosecutor must also consider whether the evidence could prove “beyond reasonable doubt that the offence was aggravated by hostility.”⁷⁹ The Policy notes that “the term motivated by hostility is not defined,” which may render it difficult to prove this element in practice thereby heightening the importance of background evidence to establish a motive.⁸⁰

The public interest test is context dependent and will be influenced by the circumstances of the particular case.⁸¹ In making this determination prosecutors are directed by a list of public interest considerations. According to the PPS Hate Crime Policy, “[o]ne factor in favour of prosecution is motivation of hatred on grounds of race” and “the PPS recognises the impact of non-prosecution on a victim and also the wider community.”⁸² The Policy acknowledges that while the public interest will

normally require prosecution rather than diversion, “each case must be considered on its own particular circumstances.”⁸³

If the PPS determines that a prosecution will be progressed on the basis that the offence was aggravated by hostility, this element will be recorded on the case file and the electronic Content Management System.⁸⁴ The PPS will not be able to progress electronically with the case file however unless the ‘motivation’ of the offender has been recorded. Subsequently an ‘aggravated by hostility’ page is generated on the system allowing the prosecutor to specify the type of hostility, for example, racial hostility.

Similar to the PSNI Service Procedure, the PPS Hate Crime Policy and Case Management System emphasises the ‘motivation’ limb of the 2004 Order. But the prosecution may equally prove that the perpetrator ‘demonstrated’ hostility at the time of committing the offence since this could be an easier standard to satisfy.

The PPS Hate Crime Policy commits the Service to “ensuring that the proper interests of the victim are considered at every stage of the criminal process including when the decision to prosecute is taken.”⁸⁵ The Policy also recognises however, that a prosecution may proceed after a victim has withdrawn a complaint and contrary to the victim's wishes. In this latter circumstance, the victim may be ‘compelled’ to give evidence and “this must be considered by the public prosecutor.”⁸⁶

The PPS Hate Crime Policy comprehensively details how the victim may request the giving of reasons for an original decision.⁸⁷

⁷⁷ Information submitted by the PPS to the NIHRG during the fact check process on 30 August 2013.

⁷⁸ PPS Hate Crime Policy, para 2.2.1.

⁷⁹ *Ibid.*, paras 5.4.3 and 9.3.1.

⁸⁰ *Ibid.*, para 9.3.10.

⁸¹ PPS Code for Prosecutors (2008), para 4.3.1.

⁸² PPS Hate Crime Policy, paras 5.3.3 and 6.3.

⁸³ *Ibid.*, para 5.7.7.

⁸⁴ *Ibid.*, para 4.5.

⁸⁵ *Ibid.*, para 5.8.1.

⁸⁶ *Ibid.*, para 5.6.2.

⁸⁷ *Ibid.*, paras 7.2.22 - 7.2.25. For further discussion, see ‘The duty to protect’ chapter, ‘Access to Information’ section.

The PPS Hate Crime Policy further notes that the PPS “will write to the victim explaining the decision and drawing the attention of the victim to the availability of the review mechanism.”⁸⁸ The ‘no prosecution’ letter states:

You also have the right to request a review of the decision not to prosecute. This means that the decision will be reconsidered.⁸⁹

The PPS Victims and Witnesses Policy notes the non-statutory nature of the review process and states that the review will be undertaken by a “prosecutor other than the prosecutor who initially took the decision now under review.”⁹⁰ The reviewing prosecutor will base his or her review on whether “the decision was within the range of decisions that a reasonable prosecutor could take in the circumstances.”⁹¹ If so, then the original decision will stand.

The practices of the criminal justice agencies and the experiences reported by the victims and NGOs

During interviews for this investigation the PSNI officers described how they would notify the PPS regarding the hate element of an offence via the ‘outline of case’. Some interviewees acknowledged however, that there was room for officers to improve their articulation of the racist hate element when passing case files to the PPS. Two typical examples were as follows:

officers do forget to state the most obvious because they just think it’ll be obvious when somebody else reads the interview notes and the statements.

You usually get some sort of RFI [request for further information from PPS] back to say please can you confirm why you believe this is a hate crime or submit your notebook entry from the time to say that you noted comments from somebody saying ‘Oh, I did it because he’s black’ or ‘I did it because he’s Polish’ whatever.

There were mixed opinions among prosecutors concerning the quality with which a racist hate element to a crime was ‘flagged up’ by the PSNI. Some prosecutors spoke positively:

I think the police are pretty good at flagging these types of cases up.

By contrast, other prosecutors expressed a need for police officers to highlight the hate element better:

[t]he police wouldn’t necessarily say ‘please note, this is a hate crime’ ... You tend to realise any hate cases like that you would sort of pick it up yourself just through going through the evidence. It doesn’t seem to be particularly setting off any alarm bells for the Police. ... I think there is more of a potential for it to be missed at the directing stage unless it’s actually highlighted more.

At times, prosecutors contrasted racist hate crimes case files with domestic violence case files, noting that the police flagged up the latter more clearly, through the inclusion of a noticeable ‘yellow form’.

Upon review, the case files examined depicted the racist nature of the incident in the ‘outline of case’. The manner and quality with which this was done however, varied substantially. Some outlines simply noted that the file contained the possibility of racist elements:

⁸⁸ Ibid., para 7.2.25.

⁸⁹ PPS Form V60e and V60i. See PPS Departmental Instruction No 3/2012, Annex 1 and Annex 2 (April 2012).

⁹⁰ PPS Victims and Witnesses Policy (March 2007), p 30.

⁹¹ Ibid.

[t]he defendant had entered the store and was extremely drunk and was racially abusive toward a member of staff.

[h]e perceived this as a racist attack.

Others case files adopted a more factual approach stating only the offensive language used:

[d]efendant grabbed him by the throat and said 'fucking monkey'.

When defendant was confronted by occupant he said 'Fuck off you black bastard'.

Another approach observed, and one which appeared to offer the most clarity for prosecutors, was a combination of the above strategies:

[a]ccording to the IP (injured party) racial abuse was shouted at him, for example 'Paki bastard'.

[r]acially abused him by calling him a 'yellow fucker'.

[v]ictim alleged he had been racially abused by the defendant who called him a 'chinky' and a 'gouk'.

Inconsistencies were evident in the case files between the information contained in the 'outline of case' and the PSNI perceived motivation 'tick box'. The PSNI had often detailed racist elements to the offence in the outline of case, but had not similarly recorded the 'perceived motivation' on the NICHE system.

Finally, senior PPS staff stated that at the time of the investigation, they were undertaking a Quality Assurance exercise, part of which included an examination of the sufficiency of the PSNI outline of case in terms of identifying the hate component.

During the interviews, most of the criminal justice agencies staff expressed good inter-agency working

relationships. A few police officers however, identified specific problems in regard to their engagement with the PPS. First, that it was difficult for officers to identify the relevant PPS decision-maker:

they don't always let us know who is sending us emails and who is in charge of this case and, as I said, I think it changes.

I think there could be more contact but you'll never know who the prosecuting officer is.

Prosecutors identified that the "system" should inform police officers of the identity of the PPS decision-maker.⁹²

Secondly, the PSNI officers identified that they did not always receive a response from the PPS to their enquiries:

I have stopped doing it because ... I have submitted stuff as far ago as three or four years and I still haven't had a reply. ... I have never had a reply in response to a request from our end.

Some prosecutors identified that they experienced difficulty in obtaining responses from PSNI officers to 'requests for further information' or 'decision information requests'.

Concerning the first aspect of the 'test for prosecution', many prosecutors confirmed the need for 'objective' evidence to prosecute a crime as 'aggravated by hostility' under the 2004 Order:

[y]ou're not trying the case but you just need evidence, admissible evidence that isn't contradicted by other admissible evidence. It's not rocket science but it's a judgment.

[p]eople would get very annoyed if it was outlined and maybe there wasn't evidence to back it up. So you do need your evidence for it I think.

⁹² Information submitted by the PPS to the NIHRC during the fact check process on 30 August 2013.

In this regard, the NGOs representatives perceived that there was a lack of inter-agency understanding between the PSNI and the PPS concerning the different definitions used to classify the hatred element of a crime. This perception was confirmed in a small number of interviews with prosecutors who did not appear to be aware that the PSNI classify the 'perceived motivation' of the crime on the NICHE system on the basis of the perception test:

[t]he police might tick it ... that it's one of these but maybe we wouldn't agree that there is evidence of that.

I'm not quite sure what they're told to enter.

During the case file review there was a failure to identify offences as 'aggravated by hostility' under the 2004 Order for the purpose of prosecution. For example, a case file recorded that the perpetrator had admitted referring to the victims as 'Paki bastards' shortly after the offence had been carried out, however, the decision-maker did not appear to pursue prosecution in conjunction with the 2004 Order. Yet on another occasion, the case file noted the use of the term 'Paki bastards' shortly before the offence was carried out, and records within the Prosecutors Form that the offence should progress as aggravated by hostility. In these comparable cases the files contained no rationale to explain why the similar evidence was being treated differently; namely, why one case was pursued as aggravated by hostility and the other was not.

Concerning the second aspect of the 'test for prosecution', many prosecutors recalled that it would be in the public interest to prosecute cases with a racial element. Typical comments included:

that's a no brainer, it always will be.

Say there was racist elements, then that would strongly motivate me, I think probably everyone would say 'well there is actually a public interest in us proceeding this case by the fact that there was racist elements here'.

The case file review also supported this attitude, for example, prosecutors were seen to inform investigating officers that:

[h]aving looked at the evidence the defendant was fortunate prosecution was not initially directed, as I consider this was a hate crime.

The allegation is a racially motivated road rage incident and in the circumstances it is considered that this matter should go before a court to let them decide.

In one case file a letter from the PPS to the defendant's solicitor similarly noted that "the circumstances were further aggravated by (the defendant) verbally abusing (the victim) in a racist manner ... in all the circumstances, it is considered that diversion is not an appropriate course of action."

During interviews some prosecutors noted that due to the public interest in prosecuting racist hate crimes, they would seek to introduce evidence by way of hearsay or a bad character application where they were unable to otherwise establish the racist element. This was also supported by the case files review.

Concerning children who engaged in racist acts, it was apparent that the prosecutors remained sensitive to the specific challenge that such cases present. It was reported by the criminal justice agencies staff that few racist hate crimes perpetrated by children would be progressed to court because the emphasis was on diversion actions. This was supported by the case files.

During the interviews there was a tendency among prosecutors to refer to the term 'racially motivated' rather than the language of the 2004 Order which is 'aggravated by hostility' and also incorporates a 'demonstration' of hostility. For example, prosecutors recalled:

[w]hat I would be thinking about, is this, is there evidence that this is motivated in that way? Is there a reasonable prospect of conviction on the evidence that that's motivated in that way.

Because as you know there is enhanced sentencing powers when it's racially motivated. Now, typically ... I would say there's cases where people might be assaulted and it's hard to know if it's racially motivated.

Finally, during the interviews, a prosecutor raised the important point that it was open to the PPS to go ahead with a case even where the victim has chosen to withdraw their support. In this regard, the prosecutor identified that it would require a balancing act concerning the competing interests and that they would look for any intimidation of the victim when considering how to best progress the case. The point was made as follows:

[y]ou're then deciding whether it's in the public interest to continue with the prosecution and ... the fact the person has stated they don't want to go ahead ... there could be an element of

intimidation ... have they good valid reasons and is it better looking at all the factors together? A lot would depend on the seriousness of the offence ... it's always a balancing act ... the biggest thing is to get as much information as you can before you decide one way or the other whether you are going to go ahead or not.

Findings

The NIHRC found that:

- There was no consistent presentation of evidence in the PSNI officers' 'outline of case' to show how the reported offences were aggravated by racial hostility.
- Prosecutors did not always understand that the PSNI use the 'perception test' to classify a racist hate crime.
- Prosecutors attributed a high degree of public interest to the prosecution of racist hate crimes.
- The files demonstrated inconsistent practice concerning prosecutor analysis of the evidence when determining whether the evidential test was met to prosecute the offence as aggravated by racial hostility.
- There was a notable tendency among prosecutors to defer to the language of 'motivate' rather than the language of the 2004 Order which is broader.
- Prosecutors were willing to consider pursuing prosecution in cases where the victims had withdrawn their support.
- PPS policy affords the victim an opportunity to have a decision not to prosecute reviewed. The review is to be conducted by a prosecutor other than the prosecutor who made the original decision.

The judicial process

Human rights laws and standards

The EU Directive, Article 10 requires governments to ensure that victims may be heard during criminal proceedings and may give evidence. This obligation is satisfied where the victims are permitted to make oral or written statements within the judicial process.⁹³ More specifically, the CERD Committee General Recommendation 31 urges governments to ensure that the victims of racist acts can be heard by the judge during the proceedings, and that they have the opportunity to confront hostile witnesses and challenge evidence.⁹⁴ The UN 'Declaration of Basic Principles' state that when allowing the views of the victims to be presented at the appropriate stage of the proceedings, this should be done without prejudice to the rights of the accused.⁹⁵ Finally, the ECtHR case law has similarly stated in the context of the ECHR, Article 2 that:

*[i]n all cases ... the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.*⁹⁶

Furthermore, in keeping with the need for an expeditious process, the ECtHR case law and the CERD Committee General Recommendation 31 also requires governments to ensure that the victim receives a court judgment within a reasonable period.⁹⁷

Domestic laws and policies

PPS internal guidance instructs prosecutor's to mark prominently the front of the file and counsel's brief that the offence is considered aggravated by hostility.⁹⁸ The PPS Hate Crime Policy notes that the court prosecutor shall bring the aggravated by hostility component of the offence to the attention of the court.⁹⁹

Serious crimes that qualify as indictable offences will be tried at the Crown Court before a judge and jury. Less serious crimes will be tried as a summary offence in the Magistrates' Court before a District Judge alone.¹⁰⁰

Following conviction, and where a judge so requests, the PBNI may be required to provide a Pre-Sentence Report assessing the risk of re-offending and the possibility of managing the risk in the community. This report is intended to assist the court making a decision on the most suitable type of sentence following a conviction. Pre-sentence reports are not requested in the majority of cases before the Magistrates' Court.¹⁰¹

During the investigation, the PBNI was in the process of revising its Hate Crime Policy. The policy that was in place did not reflect both limbs of the 2004 Order because it was limited to referencing 'motivated by hostility'.¹⁰² The PBNI draft policy stated that when preparing a Pre-Sentence Report, the PBNI must identify any violence assessed as having been motivated by hate or prejudice, even if the hate element may not be included in the charge.¹⁰³

⁹³ EU Directive 2012/29, Preamble, para 41.

⁹⁴ CERD Committee General Recommendation 31, para 19. See also EU Directive 2012/29, Article 10.

⁹⁵ UN Declaration of Basic Principles, para 6(b).

⁹⁶ *Jordan v United Kingdom*, ECtHR, Application No. 24746/94 (4 May 2001), para 109.

⁹⁷ CERD Committee General Recommendation 31, para 19.

⁹⁸ Information submitted by the PPS to the NIHR during the fact check process on 30 August 2013.

⁹⁹ PPS Hate Crime Policy, paras 4.5 and 4.8.

¹⁰⁰ *Ibid.*, para 5.5.1.

¹⁰¹ Pre-sentence Reports are particularly important to assist the court in making a proportional restriction on the liberty of the defendant. However, they are also crucial in protecting the victim from future harm.

¹⁰² PBNI, Policy on Hate Crime, (4 November 2005), para 2.1.

¹⁰³ PBNI Draft Hate Crime Policy (November 2012), p 7.

When sentencing, a judge will determine the base offence before considering any aggravating factors. The Magistrates' Courts Sentencing Guidelines refer to those crimes committed in a context of hostility as aggravated and replicate the relevant text of the 2004 Order.

Domestic policies acknowledge some provision for the victim to submit a 'victim impact statement' to the judge after a conviction and before sentencing. For example, the Sentencing Guidelines note that the "impact of the offence on the victim, and on society as a whole, will always be a relevant factor in the sentencing process" and that this information is in part obtained through a "personal statement from the victim."¹⁰⁴ The DoJ 'Code of Practice for Victims of Crime' provides that if a victim has prepared a victim impact statement, the PPS "will make sure it is provided to the Court."¹⁰⁵ Such a statement can describe the emotional, medical, physical, social and financial impact of the crime upon the victim.¹⁰⁶

The PSNI Policy Directive 05/06 outlines the use of victim impact statements in more limited terms by directing their use in indictable cases only, with a particular emphasis on those cases involving sexual and serious physical assault. In such circumstances, the policy states that the investigating officer "should consider the need to record data concerning the effect of the crime on the victim" and "would include... information from the victim."¹⁰⁷ The PPS Hate Crime Policy states that the victim can pass their statement to the prosecutor "who will hand it to the court."¹⁰⁸

Victim impact statements are not routinely used in the Magistrates' Court.

Further, in recognition of the lack of clear structure concerning their use, the DoJ document on 'Improving Access to Justice for Victims and Witnesses of Crime: A Five-Year Strategy' notes the recommendation by the NI Assembly Justice Committee that a:

formal system for the completion and use of Victim Impact Statements should be introduced by January 2013.¹⁰⁹

The DoJ identified that this action would be delivered during 2013/14 or 2014-15.¹¹⁰ The DoJ also commit within the Strategy to "promote the use of victim personal statements."¹¹¹

'Victim impact reports' can also be submitted by the PPS to the court. These are prepared by experts and provide specialist opinion on the impact of the crime on the victim. Victims do not however, input directly into a victim impact report.¹¹²

In May 2013, enhancements were made to the NICTS line of business system (ICOS), the PPS case management system and to the Causeway messaging system (which is used for the sharing of information between agencies electronically) in relation to 'aggravated by hostility' offences. The NICTS ICOS system is now alerted to any offences which the PPS prosecutor has marked as 'aggravated by hostility' and the system now requires the court clerk to record on ICOS if the prosecutor opened the case as 'aggravated by hostility'. This information is then shared back to PPS via Causeway.¹¹³

¹⁰⁴ Magistrates' Courts Sentencing Guidelines, referring to *R v Turley* [2008] NICC 18.

¹⁰⁵ DoJ Code of Practice for Victims of Crime (21 March 2011), p 17.

¹⁰⁶ DoJ 'A Guide to NI's Criminal Justice System for Victims and Witnesses of Crime' (26 May 2010), p 35.

¹⁰⁷ PSNI Policy Directive 05/06: Dealing with victims and witnesses (19 May 2009), p 17.

¹⁰⁸ PPS Hate Crime Policy, para 5.10.4. The PPS Hate Crime Policy also refers to 'victim impact statements' as 'victim personal statements'.

¹⁰⁹ DoJ 'Improving Access to Justice for Victims and Witnesses of Crime: A Five-Year Strategy' (June 2013), p 62.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, p 31.

¹¹² For the difference between 'victim impact statements' and 'victim impact reports' in NI, see, DoJ Consultation document 'Provision of victim impact statements and victim impact reports: A Department of Justice consultation' (December 2011), p 5-6. See also, PPS Hate Crime Policy, paras 5.10.3 and 5.10.4.

¹¹³ The detail of this information was submitted by the NICTS to the NIHR during the fact check process on 6 September 2013.

The practices of the criminal justice agencies and the experiences reported by the victims and NGOs

Prosecutors noted a general improvement in recent years regarding the manner in which the aggravated by racial hostility component of the offence is flagged up within the PPS. Many PPS staff described how they could mark that the offence was aggravated by racial hostility and add further instructions to the court prosecutor. Some of the PPS interviewees called into question, however, whether the instructions were read. Typical responses were as follows:

I don't know if the court prosecutors always check the instructions ... maybe they do, I just don't know ... I suspect that it is not always convenient for them to find the instructions.

I usually print my comments off ... stick them on the files ... highlight them in yellow, so that people actually will read them.

During the interviews, prosecutors stressed that the wording of the PSNI 'outline of case' was highly significant in circumstances where the defendant entered a guilty plea. In this context, prosecutors noted that this might be the only information provided to the court:

[t]he outline of case would be read out to the Magistrate and that's what the summing up effectively would be ... they would decide what happens ... to a great degree based on the 'outline of case'.

In the circumstance of a contest, senior PPS staff noted their expectation that the court prosecutor would indicate to the judge at the outset of the

trial that he or she was seeking to prove that the offence was aggravated by hostility. Court prosecutors however, did not always meet this expectation:

[w]hen I've ran a contest I tend to not preface the case by saying 'your worship this is a case that we consider is aggravated by hostility'. I tend to ... assume it will come out in the evidence.

Similarly, a court clerk noted that one of the challenges faced by the criminal justice system was ensuring that prosecutors highlight racist hate crimes to the court:

I think it has to be looked at from the prosecutor's end ... Well, what I mean is it has to be highlighted from the prosecution to the court.

In an interview with the Judiciary, it was emphasised that although prosecutors were expected to highlight that the offence was aggravated by hostility, in the absence of such an opening, judges would still make that ruling, where appropriate.

Senior PPS staff also noted that the Judiciary would not always welcome comment from prosecutors concerning their sentencing remit. This opinion was articulated as follows:

"[w]hat we can do is draw the judge's attention to the fact that he [or she] has certain powers. ... Now they won't always do it because sometimes the judges get a bit cheesed off if we're, you know, treating them like children. But we can say, 'your worship, we invite you to find ... and I would refer you to your sentencing powers'.

During the interviews some probation staff expressed the view that cases presented to them as “motivated by hate ... [were] more to do with drunken irresponsible behaviour.” In one case file where the prosecution successfully argued aggravated by racial hostility on the basis of comments such as “fuck Polish” and “I’m going to kill you”, the PBNi pre-sentence report was largely silent on the hate element except to record the perpetrator’s statement that it “was just ‘drunken ramblings’.”

There was limited experience of the use of victim impact statements by criminal justice agencies staff interviewed. Moreover, none of the victims interviewed had made a victim impact statement. From the perspective of some prosecutors, the onus lay with the PSNI to prepare the statement, and bring it to the attention of the PPS. Unsurprisingly, therefore, and in line with the PSNI policy, officers stated that they would not be used in Magistrates’ Courts but only in the Crown Courts and for more serious crimes. The prosecutors interviewed were generally of the opinion that the use of victims impact statements was not supported by the Judiciary. One prosecutor explained the situation like this:

[o]ne of the High Court judges was speaking and he took a rather dim view of ... these impact statements ... because there was a tendency to say things in their statement which there wasn’t evidence for in the court ... he said that could maybe influence the judge unduly.

It was suggested by the Judiciary that given that victim impact statements may lengthen court proceedings, prosecutors may instead “cleverly” draw out much of this information from their evidence and where the impact on the victim was particularly severe, the case may be better tried in the Crown Court. While the Judiciary noted that the PPS will “often advise the court orally of the impact of the offence on the victim,”¹¹⁴ prosecutors noted that they would not always be aware of the impact of the crime upon the victim when making a decision regarding the court venue.¹¹⁵

During the interviews prosecutors recognised that adjournments were common within the judicial process:

Almost every case in court has an adjournment or two, or three or four or five or six.

It was not clear from the interviews what the reasons for the adjournments were or who they were instigated by.

Of the two victims interviewed whose case went to court, one recalled that they went to court on three separate occasions, only to be told without further explanation on the final occasion that the case was not proceeding.

During interviews, court clerks saw their recording role as primarily focused on outcome. Generally, they were not aware of whether or not a case was opened as aggravated by racial hostility and explained that different staff could sit on different days.

¹¹⁴ Information submitted by the Judiciary to the NIHRC during the fact check process on 4 September 2013.

¹¹⁵ Information submitted by the PPS to the NIHRC during the fact check process on 30 August 2013.

Significantly, upon review of the case files it was noted that the legal papers received by a defendant and which note the offence with which they are charged do not explicitly state that the prosecution is seeking to prove the offence was aggravated by racial hostility. According to senior PPS staff, the defendant should, however, “pick it up from the papers.” The first official occasion therefore, where the defendant will be made aware of this element of the case is at court.

- When not required to give evidence, the victim’s engagement in the judicial process was limited. Since the majority of racist hate crimes were tried in the Magistrates Court, the use of victim impact statements was minimal.
- The defendant is not formally notified that the prosecution will be seeking to prove the offence is aggravated by racial hostility before the first court appearance.

Findings

The NIHRC found that:

- There was uncertainty as to whether or not court prosecutors would read PPS decision-maker instructions.
- Court prosecutors did not always alert the judge to the fact that they were seeking to prove that the offence was aggravated by hostility.
- Prosecutors were reluctant to alert judges to their specific sentencing powers under the 2004 Order.
- It was not obvious whether or not frontline probation staff understood that verbal racist abuse by intoxicated perpetrators would constitute aggravating behaviour within the terms of the 2004 Order.

The duty to protect

Introduction

International human rights standards require governments to implement certain measures to ensure that the victims of racist hate crimes¹ are safeguarded against repeat and secondary victimisation. In order to do this, victims must be able to access information concerning their rights and their case, and understand and be understood from the first point of contact with the criminal justice agencies.² Where a victim is assessed as having a particular vulnerability, special protection measures must be available to: ensure, where necessary, the physical integrity of the victim and their family; ensure the dignity of victims during questioning and when testifying; and, enable avoidance of contact between victims and offenders at court.³ In accordance with their needs, victims should have access to free and confidential support services.⁴ Finally, when implementing the above, governments are encouraged to develop ‘sole points of access’ or ‘one-stop shops’ in order to address the multiple needs of victims of racist hate crimes, including the need to receive information, assistance, support, protection and compensation.⁵

The duty to protect engages a number of human rights standards, the most relevant of which are the:

- ECHR, Articles 2 and 3;
- FCNM, Article 6 (2);
- EU Directive 2012/29, Articles 1, 3, 4, 6, 7, 8, 9, 18, 19, 20, 22 and 23;
- CERD Committee, General Recommendation 26;
- CERD Committee, General Recommendation 31;
- UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;
- Durban Declaration and Programme of Action;
- UNODC Handbook on Justice for Victims;
- CoE Recommendation (2005) 9;
- CoE Recommendation (2006) 8;
- ECRI General Policy Recommendation 1; and
- ECRI General Policy Recommendation 11.

This chapter details the constituent elements of the duty to protect victims of racist hate crimes as required by international human rights laws and standards. It then examines the existing domestic laws and policies directed toward protecting the victims of racist hate crimes in NI before considering the practices of criminal justice agency staff, and the experiences of victims and NGOs. To conclude, an evaluation is provided regarding the effectiveness of the domestic framework and the level of compliance with human rights standards.

- 1 NB. Victims who have suffered abuses that do not constitute a crime; i.e. signal incidents, are also protected by international human rights law. In such circumstances human rights standards urge governments to consider providing remedies such as any necessary material, medical, psychological and social assistance and support. See, for example, UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (29 November 1985), paras 18–19.
- 2 EU Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, Articles 3, 4, 6 and 7; CERD Committee, General Recommendation 31: Prevention of racial discrimination in the administration and functioning of the criminal justice system (3 October 2005); ECHR, Articles 2 and 3; and CoE Recommendation (2006)8 on assistance to crime victims (14 June 2006).
- 3 EU Directive 2012/29, Articles 18, 19, 20 and 22; CERD Committee, General Recommendation 31; and CoE Recommendation (2005)9 on the protection of witnesses and collaborators of justice (20 April 2005).
- 4 EU Directive 2012/29, Articles 8 and 9; and UN Declaration of Basic Principles.
- 5 EU Directive 2012/29, Preamble, para 62.

The impact upon the victim, (including the issue of repeat and secondary victimisation)

Human rights laws and standards

When adopting the UN Declaration of Basic Principles, the UN General Assembly identified that the victims of crime and victims of abuse of power, and also frequently their families, are “unjustly subjected to loss, damage, injury and that they may, in addition, suffer hardship when assisting in the prosecution of offenders.”⁶ In relation to the impact of racist hate crimes, the ECtHR has emphasised that racist violence is a particular affront to human dignity,⁷ while the CERD Committee, General Recommendation 26 notes that the degree to which it damages the victim’s perception of their worth and reputation is often underestimated.⁸

In this regard, the DDPa acknowledges the individual vulnerability of persons from African and Asian descent, migrants, refugees, asylum seekers and Roma/Gypsies/Sinti/Travellers to racial discrimination.⁹

The human rights standards call upon governments to give recognition to the impact of crimes on the victims as well as on society as a whole.¹⁰ Concerning minority racial groups, the DDPa urges governments:

to recognize the effect that discrimination ... ha(s) had and continue(s) to have on many racial groups living in a numerically based minority situation within a State.¹¹

According to the EU Directive, Article 1, governments should give such recognition in part by ensuring that victims of crime are treated in a

“respectful, sensitive, tailored, professional and non-discriminatory manner” by the criminal justice agencies and victim support services. The UN Declaration of Basic Principles similarly calls upon governments to treat victims with “compassion and respect for their dignity.”¹² The UNODC Handbook notes that victims of racist hate crimes, as some of the most vulnerable members of the population, may require additional attention and victims services should be structured accordingly in order to meet this need.¹³

It is a general principle of human rights law that the victims of crime should be protected from repeat and secondary victimisation.¹⁴ The UNODC Handbook outlines the importance of addressing the issue of repeat victimisation in order to ensure the well-being of the victim:

A major psychological consequence of criminal victimization in many cases is that the victim no longer feels safe. Preventing repeat victimization can be a powerful way not only to reduce overall victimization but also to speed the victim’s psychological recovery.¹⁵

Secondary victimisation includes not only the direct result of the criminal act but also the impact of the response of institutions and individuals to the victim. According to the UNODC Handbook secondary victimisation is “most apparent within the criminal justice system.”¹⁶ It most commonly occurs because “those responsible for ordering criminal justice processes and procedures do so without taking into account the perspective of the victim.”¹⁷

The EU Directive identifies that the victims of hate crimes tend to experience a high rate of

⁶ UN Doc. A/RES/40/34, (29 November 1985).

⁷ *Nachova and Others v Bulgaria*, ECtHR, Application No. 43577/98 and 43579/98 (6 July 2005), para 145.

⁸ CERD Committee, General Recommendation 26: on Article 6 of the Convention (20 March 2000), para 1.

⁹ See in particular, the DDPa, Declaration, paras 34, 36, 48, 50, 53 and 68.

¹⁰ EU Directive 2012/29, Article 1 and Preamble, para 9; and CoE Recommendation (2006)8, Appendix, para 2.1.

¹¹ DDPa, Programme of Action, para 48.

¹² UN Declaration of Basic Principles, para 4.

¹³ See UNODC, Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, p iv and 50.

¹⁴ EU Directive 2012/29, Preamble, para 9; CoE Recommendation (2006)8, Preamble; and CERD Committee, General Recommendation 31, para 17(d).

¹⁵ UNODC, Handbook on Justice for Victims, p 51.

¹⁶ *Ibid.*, p 9.

¹⁷ *Ibid.*, p 9.

secondary and repeat victimisation, of intimidation and retaliation.¹⁸ In order to reduce this, the EU Directive states that criminal proceedings should be carried out in a:

*coordinated and respectful manner, enabling victims to establish trust in authorities.*¹⁹

Domestic laws and policies

The policies of the criminal justice agencies recognise that the impact of racist hate crimes upon victims can be especially traumatic. This is partly evidenced by the existence of the individual PSNI, PPS and PBNI policies on the topic. Both the PSNI Service Procedure 16/12 and the PPS Hate Crime Policy give recognition to the potential ripple effect upon the victim's community. For example, the PSNI Service Procedure states:

*the impact of prejudice/hate incidents can be long lasting and far reaching, going beyond the victim's own experience to change the behaviour and increase fear in the victim's wider family/group/community.*²⁰

The PPS Hate Crime Policy similarly notes:

*[t]hese consequences can resonate within the racial ... group in the wider community, and that community can feel victimised and under attack.*²¹

The PPS Hate Crime Policy further seeks to identify why hate crime has such traumatic effect upon the victim:

*[h]ate crime is particularly hurtful to victims as they are targeted solely because of their personal identity, their actual or perceived racial or ethnic origin.*²²

The PSNI Service Procedure, unlike the PPS Hate Crime Policy, does not explicitly identify why this greater impact can occur.

In terms of addressing the impact upon victims of signal incidents and racist hate crimes, the DoJ Code of Practice for Victims of Crime (DoJ Code of Practice) as the overarching strategic document which describes the roles of the criminal justice agencies with regard to the victims of crime, emphasises that "dignity, respect and sensitivity" should form the core of how victims are treated.²³ The DoJ has also indicated its intent to introduce a statutory victim charter and a statutory witness charter.²⁴ It is envisaged by the DoJ that the statutory victim charter will be introduced through the Faster, Fairer Justice Bill and within time period 2013-2015.²⁵ The statutory witness charter is planned for introduction in the "next available Justice Bill" in 2015-2018.²⁶

The Police (NI) Act 2000 stipulates that police officers will on appointment attest to:

*faithfully discharge the duties of the office of constable with fairness, integrity, diligence and impartiality, upholding fundamental human rights and according equal respect to all individuals and their traditions and beliefs.*²⁷

The PSNI Service Procedure which addresses hate incidents similarly requires officers to protect human dignity and uphold the human rights of all persons when carrying out their duties, and that officers should show sensitivity concerning the cultural background of the victim.²⁸ The PSNI Code of Ethics further requires officers to "consider any particular needs, vulnerabilities and concerns" of victims.²⁹ Similarly, the PPS Hate Crime Policy states that:

the PPS recognises that there are individual issues for particular victims or witnesses and these will be

¹⁸ EU Directive 2012/29, Preamble, para 57.

¹⁹ Ibid., Preamble, para 53.

²⁰ PSNI Service Procedure 16/12: Police response to hate incidents (24 June 2013), p 4.

²¹ PPS Hate Crime Policy, (December 2010), para 3.6.

²² Ibid., para 3.3.

²³ DoJ Code of Practice for Victims of Crime (21 March 2011), p 3.

²⁴ See, DoJ 'Making a difference to victims and witnesses of crime: Improving access to justice, services and support: A five year strategy' (June 2013), p 20-21.

²⁵ Ibid., Appendix E, p 50.

²⁶ Ibid., Appendix E, p 51.

²⁷ Police (Northern Ireland) Act 2000, Section 38.

²⁸ PSNI Service Procedure 16/12, p 11.

²⁹ PSNI Code of Ethics (2008), para 2.3.

considered in each case in which they arise.³⁰

Both the PPS and PSNI also acknowledge that the victims of hate crimes can often be repeat victims and assert that this is an important factor to be taken into account when carrying out their duties.³¹ The PSNI embraces a proactive approach to identifying the victims of repeat crimes stating that it is an objective to:

take responsibility/appropriate steps to identify and protect repeat victims ... [and that] ... where a repeat victim has been identified, investigating police officers must ensure that effective action is taken to reduce the risk of further incidents taking place.³²

According to the PSNI Service Procedure, when responding to hate crime incidents, officers must check records in order to establish whether or not the incident involves a repeat victim and to determine the appropriate response.³³

In June 2013, the PSNI Service Procedure was amended to stipulate that once a repeat victim has been identified, a full report must be submitted to the Area Commander, who must then consider if it is in a linked series. If the matter is linked, a lead 'Investigating Officer' must be appointed and an investigative strategy agreed with the Crime Manager.³⁴ The PPS consider the likelihood of the perpetrator "repeating" the offence to be a public interest factor in favour of prosecution.³⁵ Finally, the PSNI's Neighbourhood Policing Units designate officers with a Hate and Signal Crime Role, whose duty it is to provide advice and support to all victims of hate incidents.³⁶

The practices of the criminal justice agencies and the experiences reported by the victims and NGOs

During interviews carried out for this investigation, it was apparent that racist hate crimes have significant repercussions upon the victim's quality of life. Some victims expressed the desire to move house or sell their business but were largely unable to undertake this action due to financial constraints. There was no hierarchy expressed regarding the victimhood; regardless of whether individuals had suffered physical assault or other harm. Indeed, most of the victims interviewed had been the subject of a physical attack, but the impact of repeated criminal damage and verbal abuse was equally traumatic. For example, one interviewee who was subjected to sustained verbal abuse stated:

I developed mental health [issues] as a result of what happened and was, at some points, suicidal ... I could not just leave the property because I part owned the property which made it very very difficult.

A perceived failure of the criminal justice agencies staff to recognise and acknowledge the impact of racist hate crimes, at times, reduced the victims' confidence in the services being provided. However, the criminal justice agencies staff did in fact often express the opinion that racist hate crimes were "more serious", "worse", on a "whole different level" to offences where the hate element was not present.

It was common for the NGOs representatives to express an opinion that the criminal justice agencies staff did not understand the reasons why an enhanced level of service is required:

³⁰ PPS Hate Crime Policy, para 3.2.

³¹ Ibid., and PSNI Service Procedure 16/12, p 4.

³² PSNI Service Procedure 16/12, p 6 and 16. The PSNI Service Procedure 16/12 defines repeat victimisation as, "where a person or immediate family member suffers more than one hate incident/crime in a 12 month period following the date the first incident/crime was reported", p 16.

³³ Ibid., p 11.

³⁴ Ibid., p 14.

³⁵ PPS Hate Crime Policy, para 5.3.4.

³⁶ PSNI Service Procedure 16/12, p 13.

I think for me ... one of my biggest frustrations is ... about the understanding of hate crime and why ... it needs to be recognised as a particular type of crime.

The criminal justice agencies staff rarely articulated the reasons why racist hate crimes should be treated differently. On a few occasions staff did however suggest reasons as to why racist hate crimes were considered more serious. For example, a prosecutor stated:

[i]t smacks of singling people out, and taking away their individuality ... just picking on them because of ... the colour of their skin and I think that is something.

Similarly, a PSNI officer said:

the crime is based on their personal identity ... what or who they represent.

A small number of criminal justice agencies staff, primarily from the PSNI, expressed the view that the addition of a hate element did not distinguish the crime:

hate crime criminal damage is no different to a criminal damage in my mind.

exactly the same suffering has been inflicted on that human being ... everybody is a human being.

A few PSNI officers also expressed dissatisfaction with their perception that victims of hate crime were being favoured:

[s]ometimes I think it is unfair to have assault highlighted as a hate crime and another assault not highlighted as a hate crime just because of colour of skin or somebody's race ... Sometimes people are getting better treatment in a way.

I don't think one person should be given favouritism over another because it's been deemed a hate crime.

More than half of the victims interviewed were the subjects of repeat attacks. Some of these victims expressed feelings of confusion as to why they were targeted. In fact, on one occasion a victim even questioned if they could have been to blame:

[t]he whole issue is that you're actually feeling guilty yourself, you feel like it's all your own fault that this is happening and combined with the sustained attacks that are happening, they really, really impact on your mental health and well-being.

Fear of repeat attack was not limited to victims of repeat crimes but was also evident in victims of one-off crimes.

The PSNI officers identified that the neighbourhood policing teams would take primary responsibility for assisting repeat victims, with a member of neighbourhood often becoming the investigating officer. However, a small number of interviews indicated that response policing teams could and did on occasion take proactive measures to protect the repeat victim from further attack. For example, a response officer identified that he would actively inquire of victims how many times they had suffered a racist incident. This practice however, was not typical.

Findings

The NIHRC found that:

- The PSNI and PPS policies commit to treating all the victims of racist hate crimes in a respectful manner and recognise the need to give "consideration" to their unique concerns.
- Criminal justice agencies staff generally recognised that a racist hate crime was more serious than the same offence without the hate element. However, a few PSNI officers felt that the hate element did not distinguish the crime. These officers believed that the victims of racist hate crimes were being "favoured" by the PSNI.

- Frontline criminal justice agencies staff could not generally articulate why a racist hate crime was more serious than the same offence without the hate element.
- The criminal justice agencies staff acknowledged that the victims of racist hate crimes are more likely to suffer repeat victimisation. However, only a few PSNI officers stated that they would proactively question a victim on how many times they had suffered a racist attack.

Access to information

Human rights laws and standards

The EU Directive, Article 4 requires that victims should be offered certain types of information without unnecessary delay. While the extent and detail of the information to be provided may vary depending upon the specific needs and personal circumstances of the victim and the type or nature of the crime, the Directive also highlights the need to protect victims of “hate crime” from further victimisation.³⁷ The information to be accorded under Article 4 includes:

- (a) the type of support they can obtain and from whom, including, where relevant, basic information about access to medical support, any specialist support, including psychological support, and alternative accommodation;
- (b) the procedures for making complaints with regard to a criminal offence and their role in connection with such procedures;
- (c) how and under what conditions they can obtain protection, including protection measures;
- (d) how and under what conditions they can access legal advice, legal aid and any other sort of advice;³⁸

(e) how and under what conditions they can access compensation;³⁹

(f) how and under what conditions they are entitled to interpretation and translation;

(g) if they are resident in a Member State other than that where the criminal offence was committed, any special measures, procedures or arrangements, which are available to protect their interests in the Member State where the first contact with the competent authority is made;

(h) the available procedures for making complaints where their rights are not respected by the competent authority operating within the context of criminal proceedings;

(i) the contact details for communications about their case;

(j) the available restorative justice services;

(k) how and under what conditions expenses incurred as a result of their participation in the criminal proceedings can be reimbursed.

The CERD Committee General Recommendation 31 also stresses the need to ensure that victims have access to information throughout the proceedings and that they are kept informed as to the progress of any proceedings.⁴⁰ The EU Directive addresses the issue with greater specificity. For example, the preamble to the EU Directive notes that victims should receive evidence that the crime has been reported in the form of a written acknowledgement which includes the file number and time and place of reporting the crime.⁴¹ The EU Directive, Article 6 further stipulates that victims should be notified of their right to receive, without unnecessary delay, the following information: any decision not to

³⁷ EU Directive 2012/29, Article 4(2) and Preamble, paras 9, 55, 56 and 57.

³⁸ See also, ECRI General Policy Recommendation 1: on combating racism, xenophobia, anti-Semitism and intolerance (4 October 1996), which advises on the need to ensure that victims are made fully aware of the legal remedies available to them, either through the criminal law or in administrative or civil law.

³⁹ See also, EU Directive 2012/29, Article 9(1)(a).

⁴⁰ CERD Committee, General Recommendation 31, paras 17(c) and 19(a).

⁴¹ EU Directive 2012/29, Preamble, para 24.

proceed with an investigation or a decision not to prosecute the offender; the time and place of the trial and the nature of the charges brought against the offender; and, any final judgment in a trial or information enabling them to know the state of the criminal proceedings, except in the exceptional circumstance where this would adversely affect the case.⁴²

The CoE Recommendation (2006)8 encourages generally that the criminal justice agencies provide explanations of any decisions made regarding the victim's case.⁴³ The EU Directive, Article 6 requires that a brief summary of reasons should be given for: any decision not to proceed with an investigation; any decision not to prosecute; and any final judgment in a trial. It also states that the provision of information in sufficient detail allowing the victim to know about the current status of proceedings is particularly important in order to enable victims to make informed decisions about their participation in the proceedings, for example, whether or not to request a review of a decision not to prosecute.⁴⁴ These requirements are also reinforced by the ECtHR case law concerning the procedural duty to investigate under ECHR, Articles 2 and 3. In *Jordan v UK*, the ECtHR found a violation of ECHR, Article 2, partly as a consequence of a failure on the part of the prosecution service to provide reasons for the decision not to prosecute.⁴⁵

The ECtHR has also sought to emphasise the importance of involving the next of kin of a deceased in the inquest procedures and in particular, through the provision of information.⁴⁶ In *Jordan*, the ECtHR stated:

[i]n all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Güleç v. Turkey*, cited above, p. 1733, § 82, where the father of the victim was not informed of the decisions not to prosecute; *Öğür v. Turkey*, cited above, § 92, where the family of the victim had no access to the investigation and court documents; *Gül v. Turkey* judgment, cited above, § 93).

[T]he Court considers that disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under Article 2. The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures ...

Further, the Court notes that the practice of non-disclosure has changed in the United Kingdom in the light of the Stephen Lawrence Inquiry and that it is now recommended that the police disclose witness statements 28 days in advance ... This development must be regarded as a positive contribution to the openness and fairness of the inquest procedures.⁴⁷

The EU Directive, Article 6 further provides that victims should also be "offered the opportunity to be notified", without unnecessary delay, when the perpetrator of the crime against them is released from detention unless this would result in an identifiable risk of harm to the offender. At the very least, victims should be notified in the above instance, when the offender poses an identified risk of harm to them.⁴⁸

⁴² *Ibid.*, Article 6(2) and Preamble, para 20.

⁴³ CoE Recommendation (2006)8, para 4.4.

⁴⁴ EU Directive 2012/29, Preamble, para 26.

⁴⁵ *Jordan v United Kingdom*, ECtHR, Application No. 24746/94 (4 May 2001), para 142.

⁴⁶ *Ibid.*, paras 133-134.

⁴⁷ *Ibid.*, paras 109, 121 and 134.

⁴⁸ EU Directive 2012/29, Articles 6 (5) and 6 (6).

To implement the victim’s right of access to information, the EU Directive, Article 3 also places a duty upon governments to take appropriate measures to assist victims to understand and to be understood from the first point of contact and in any further necessary interaction. Communications with victims must use simple and accessible language, orally or in writing taking into account the personal characteristics of the victim which may also affect their ability to understand or to be understood.⁴⁹

Concerning interpretation services, the EU Directive, Article 7(1) also requires that, where requested, victims who do not understand or speak English should be provided with free interpretation during police questioning and when giving testimony at court. For other aspects of criminal proceedings, the EU Directive urges that interpretation be provided to the extent necessary for victims to exercise their rights.⁵⁰ The ECRI General Policy Recommendation 11 notes that the interpreting service provided by police should be carried out, to the extent possible, by professionals.⁵¹

The EU Directive, Article 7(3) provides that where requested, victims who do not understand or speak English should be provided with translations of information essential to the exercise of their rights in criminal proceedings in a language that they understand, free of charge. Such information includes any decision which ends the criminal proceedings. When requested by the victim, such a decision should also be accompanied with brief reasons. Finally, it is the responsibility of the relevant criminal justice agency to assess whether or not a victim requires interpretation and translation services.⁵²

Domestic laws and policies

The DoJ Code of Practice commits to giving victims, “relevant information, at the appropriate time, throughout the criminal justice process.”⁵³ This includes information regarding a victim’s role, the progress of a victim’s case at certain stages, as well as information regarding delays, what to expect at court, the outcome of criminal proceedings, and where further help can be obtained.⁵⁴ The DoJ has developed ‘A Guide to Northern Ireland’s Criminal Justice System for Victims and Witnesses of Crime’, which is available online and explains the criminal procedures for victims, including: reporting the crime, police procedures, the decision to prosecute, the trial, victim information schemes as well as compensation.⁵⁵ The DoJ intends that the proposed Victim Charter will:

*set out ... the key milestones at which information will be provided, the timescales for providing this information, how it will be provided and who has responsibility for it.*⁵⁶

In regard to the victim’s access to information concerning the progress of their case, PSNI policy states that all victims of crime will receive an initial letter from the PSNI with the name of the investigating officer and the crime reference number unless they have specifically indicated that they do not want to be contacted.⁵⁷ PSNI officers now also carry business cards which can be left with the victim. As the investigation progresses the PSNI NICHE computer system reminds officers to give periodic updates to victims after 10, 30 and 70 days. Outside of these set time frames, the PSNI policy commits to informing the victim

⁴⁹ Ibid., Article 3(2).

⁵⁰ Ibid., Preamble, para 34.

⁵¹ ECRI General Policy Recommendation 11: on combating racism and racial discrimination in policing (29 June 2007), para 19.

⁵² EU Directive 2012/29, Article 7(7).

⁵³ DoJ Code of Practice for Victims of Crime, p 3.

⁵⁴ Ibid., p 3.

⁵⁵ DoJ, ‘A Guide to NI’s Criminal Justice System for Victims and Witnesses of Crime’ (26 May 2010), p 35.

⁵⁶ DoJ ‘Making a difference to victims and witnesses of crime: Improving access to justice, services and support: A five year strategy’, Annex E, p 50.

⁵⁷ PSNI Policy Directive 05/06: Dealing with victims and witnesses (19 May 2009), p 11.

after certain occurrences: when a person has been apprehended; if no one has been made amenable, within three months of the incident;⁵⁸ when a suspect has been charged, released with no further action or on bail; as well as details of the first court appearance.⁵⁹ However, PSNI policy also identifies that the PPS will have responsibility for updating the victim on the progress of the file once the file has been forwarded to the PPS.⁶⁰

The PPS also recognises the importance of information provision.⁶¹ At the Magistrates and Youth Courts, the PPS Community Liaison Teams (CLT) serve as the point of contact for victims regarding the provision of information. PPS policy states that “victims are notified in all cases when a decision has been made as to prosecution or no prosecution” and that “victims are notified... of the outcome of the prosecution.”⁶² If a decision is taken not to prosecute, it is PPS policy that the letter sets out an explanation of the reasons for that decision.⁶³ The PPS Hate Crime Policy further commits that “in more serious cases, including hate crime, where a decision is taken not to prosecute, detailed reasons for the decision will, where possible, be given to the victim without request.”⁶⁴ Where a suspect has pleaded not guilty, a victim may have to testify as a witness in court. In this instance, the PPS will provide the relevant information indicating when the victim is required to attend court.⁶⁵ Finally, the PPS have developed a leaflet for Victims and Witnesses at the Magistrates, County and Youth courts detailing their role in the court process.⁶⁶

During the course of the investigation, a pilot Victim and Witness Care Unit was established for the Belfast Magistrates’ Courts. This is a joint project between the PSNI and PPS and seeks to serve as a single point of reference for victims, from the point at which the PPS receive the police investigation file through to the conclusion of the appeal and release of the prisoner from custody.⁶⁷ The DoJ ‘Making a difference to victims and witnesses of crime’ strategy indicates that a Victim and Witness Care Unit will be established as a single point of contact for as much of the criminal justice process as possible.⁶⁸

Concerning information provision to victims regarding offenders, there is a statutory duty on the PBNI to establish an information scheme for victims concerning offenders subject to supervision at the post-sentencing stage.⁶⁹ In accordance with this duty, the PBNI operate a ‘Victims Information Scheme’ for victims who wish to receive such information. There is a further statutory duty to provide information where offenders serving prison sentences are discharged or temporarily released.⁷⁰ In fulfilment of this duty, the NI Prison Service runs the ‘Prisoner Release Victim Information Scheme’ which is co-located with the PBNI Victim Information Scheme.

In relation to the provision of information to victims regarding support services, the DoJ Code of Practice identifies external support organisations that can be of assistance to victims of hate crime.⁷¹ Further, the initial letter sent out by the PSNI will also advise victims of the support services offered by Victim Support NI as well as including an information leaflet for victims.⁷²

⁵⁸ PSNI Service Procedure 16/12, p 11.

⁵⁹ PSNI Policy Directive 05/06, p 11-12.

⁶⁰ *Ibid.*, p 12.

⁶¹ PPS Hate Crime Policy, para 7.2.1.

⁶² PPS Victims and Witnesses Policy (March 2007), p 16.

⁶³ PPS Hate Crime Policy, para 7.2.1.

⁶⁴ *Ibid.*, para 7.2.25

⁶⁵ *Ibid.*, para 7.2.1.

⁶⁶ Available at, <<http://www.ppsni.gov.uk/SiteDocuments/PPS%20VICWIT.pdf>>.

⁶⁷ Hansard, NI Assembly, Committee for Justice: ‘Witness Care Unit project’ (27 September 2012).

⁶⁸ DoJ ‘Making a difference to victims and witnesses of crime’ strategy, p 23.

⁶⁹ The Criminal Justice (Northern Ireland) Order 2005, Article 25.

⁷⁰ The Justice (Northern Ireland) Act 2002, Section 68.

⁷¹ DoJ Code of Practice for Victims of Crime, p 57-58.

⁷² PSNI Policy Directive 05/06, p 11.

DoJ guidance states that a victim “should always be interviewed in a language of their choice, unless exceptional circumstances prevail.”⁷³ The PSNI Policy Directive 05/06 states that police officers should request an interpreter “at the outset of any investigation where the victim cannot clearly understand English.”⁷⁴ The PSNI Service Procedure notes more generally that “where the victim may have difficulties with either written or spoken English... alternative formats will be made available as necessary.”⁷⁵ In this regard, all officers now carry blackberries on which they can access interpreting services.

The PPS Victims and Witnesses Policy states that when a case proceeds to court:

the PPS and police will work jointly to ensure an interpreter is available for the first court appearance, thereafter the NICTS will arrange for the interpreter to be present at court.⁷⁶

The PPS have also committed to “consider carefully” whether or not it is necessary to hold a consultation with a victim or witness where English is not the first language and where the victim or witnesses’ evidence is central to the prosecution case.⁷⁷ Finally, the PPS have a victim information leaflet available in six minority languages.⁷⁸

The practices of the criminal justice agencies and the experiences reported by the victims and NGOs

PSNI staff interviewed for the investigation demonstrated high levels of commitment to the updating of victims concerning the progress of their case, especially at the investigation stage. Officers were positive in their remarks about the NICHE update flags, finding them to be a helpful reminder. Communication with victims appeared to take on a variety of modes with door-to-door, phone, email and text message communication all being referenced during interviews. Commonly, however, response officers identified that time pressures often served as a barrier to effective communication.

Victims expressed mixed levels of satisfaction concerning communication with agency staff regarding their case at the investigation stage. In one instance, a repeat victim had the local Sergeant’s mobile number and email address, expressing the feeling that there was “various chance of communication which was great.” However, on more than one occasion, communication was lacking and in particular in the circumstance where no suspect could be made amenable. In this instance, victims emphasised the importance of closure:

so if they want to close the file [they should] clarify and say sorry we cannot do anything about your case ... it has to have an end, I don’t think that an open end[ed] thing [is] an option.

they never come back to say if it’s possible to tell me who, you know, the offender is.

⁷³ DoJ, ‘Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, the use of special measures, and the provision of pre-trial therapy’ (January 2012), p 188.

⁷⁴ PSNI Policy Directive 05/06, p 14.

⁷⁵ PSNI Service Procedure 16/12, p 5.

⁷⁶ PPS Victims and Witnesses Policy, p 25. See also, PPS Hate Crime Policy, para 7.2.1.

⁷⁷ PPS Hate Crime Policy, para 7.5.3.

⁷⁸ Available in Cantonese, Latvian, Lithuanian, Polish, Portuguese and Slovakian. Available at, <<http://www.ppsni.gov.uk/Victims-and-Witnesses-5086.html>>

It was common for victims to express a reluctance to initiate contact with the agencies due to their unfamiliarity with the process and a feeling that their communication may lead to a hindrance. For example, two victims recalled:

[y]ou [are] just sort of waiting there and sometimes you have the feeling that you don't want to phone them ... because you are sort of distracting them, you're disturbing them ... You want to chase it up but at the same time you [feel] like a lunatic torturing them.

[w]e are not familiar with the law really, the process, so we kind of just wait ... we were quite passive ... [and didn't] like to be a nuisance. We thought if they got something they might just inform us. So we wait.

During interviews, it was not immediately apparent which organisation had responsibility for updating the victim at the court stage. A senior PSNI officer noted that:

responsibility for ... victims moves once the file is received at the PPS from the police service.

Nevertheless, many officers demonstrated a commitment to updating the victim right through to the court outcome. However, this was overwhelmingly linked to whether or not the officer was required as a witness in court. Outside of this context, some officers noted a lack of information provided to victims at the court stage and were at times critical of other agencies. For example, one PSNI officer stated:

the court is very poor in telling us what is happening and [as] a consequence [of] that we are certainly very bad at telling our victims what has happened.

Concerning the PPS, another officer noted:

I think the PPS get away with a lot in relation to passing work back to the police and not taking on as much of a responsibility as they should ... it should be them updating victims in relation to what's happening at court. I think that's one of the things that is still lacking.

Although PPS staff identified the importance of keeping victims informed and that contact with victims was a topical issue within the organisation, this activity was perceived as being the primary responsibility of the PSNI. Direct contact was only envisaged by the PPS decision-makers where the victims requested a consultation following a decision not to prosecute and by court prosecutors on the day of trial if the victim is called to provide testimony. While senior staff did express an expectation that court prosecutors should be "making time for the victim" in sensitive contexts, this did not always appear in practice to outweigh other pressures:

I'm trying to be more accessible ... but its hard.

I would go over my lunch break and speak to them.

Although not a typical complaint, one prosecutor expressed the view that the judiciary were at times "putting pressure" on prosecutors to progress contests before having the opportunity to speak to the victims:

really it's unreasonable ... some judges would say, 'right start your first contest' and you haven't spoken to your victims or witnesses at all.

Where the victim is not required as a witness at court, senior PPS staff stated that the victim would not be notified of the trial date. Moreover, unless the victim had specifically requested to be kept informed, the PPS would not notify them of court adjournments. Senior PPS staff regarded this as too burdensome in light of available resources.

The victims and NGOs representatives identified communication problems as the case continued through the judicial process. For example, a victim attended court only to have their case dropped on the day without explanation:

I [told] police that I would like to see the prosecutor ... to tell me why my case did not carry on ... [the prosecutor did] not bother to come and see me.

Another victim, who was not required as a witness, was particularly distressed at hearing reports from third parties that the perpetrator had walked free from court:

honestly I still don't know the result ... nobody [came] here to tell me ... what happened in the court ... as if these things have nothing to do with me ... we didn't get any suggestion as to whether or not we should be in the court or whether or not it would be helpful.

The NGOs representatives thought the victims did not know that the offence could be 'aggravated by hostility'. This was viewed as being important to validate the victim's perception that the crime was racist. The PPS was encouraged to explain to victims this aspect of the prosecution's case:

I think greater engagement with the victim [is needed] if they're dropping an aggravated by hate motive ... sometimes they're not even aware it was on to begin with.

The availability of mobile interpreting services was referenced by police officers as marking an improvement to interpreting facilities within the service. However, a significant number of officers also noted a preference for using members of the victim's family or community to interpret at the scene or first meeting. Although not typical, an officer noted that he would phone around former victims of the same community to source an interpreter rather than using the mobile service. There was also evidence in a few interviews of the use of the victim's children for the provision of interpreting services. However, this was also rejected by officers if the subject matter was sensitive. Only a few officers mentioned experiencing difficulties trying to obtain an interpreter. When this problem was mentioned, it was highlighted as an issue concerning both the more "exotic" languages as well as for the major minority languages in NI:

[i]t's just a bit of a nightmare to try and get hold of someone, you're always trying to get a Polish or Lithuanian interpreter and they're always going 'do they speak Russian?'

Further difficulties noted by PSNI officers included a distrust of interpreters among victims, especially evident within the Roma community. The difficulty of small communities was also apparent when a victim of another minority group knew the interpreter used by the PSNI and specifically requested a different person.

One prosecutor noted the important role an individual interpreter can play during the victim's testimony:

the interpreter for the weaker case was very charming, the jury liked her ... she gave feeling to what the person was saying and so she made a pretty ropey case better ... it turned completely full circle ... the jury [can be] impressed by what an interpreter adds ... sometimes its lost in translation.

Evidence suggests that there is good availability of interpreters during the court process. However, the NGOs representatives, PSNI officers and victims regretted the absence of interpreters in a support context, such as during the witness service at court, preventing victims from adequately communicating their needs. For example, one officer noted:

[i]t is all very well having an interpreter there, but the interpreter is only telling you ... what is being said to you, he is not telling you what everybody else is saying. It is a shambles to be honest.

Most of the victims interviewed that required interpreting services obtained these without difficulty. However, some problems were reported. For example, one victim was not offered the professional interpreting service until an intervention by an NGO. On another occasion, the PSNI officers were unable to access the telephone interpretation service via blackberry.

Findings

The NIHRC found that:

- The victims of racist hate crimes did not receive sufficient information on their case once the file had passed to the PPS and during the judicial process.
- The victims did not appear to be informed by the PPS that the offence would be prosecuted as 'aggravated by hostility'.
- The victims who were not required as witnesses on the day of trial received little information regarding their cases, which contributed to secondary victimisation in some instances.
- Prosecutors wanted to speak to the victims at court and senior PPS staff provided direction to do so in sensitive cases. This did not always occur, however, the primary reason being time constraints.
- PSNI interpreting facilities had improved in recent years through the introduction of the mobile service. On a small number of occasions however, officers were unable to readily access an interpreter with the relevant language skills. Furthermore, instead of deferring to the professional service, officers identified a preference for using community or family members as interpreters.
- The absence of interpreting facilities when accessing support services caused difficulties.

Protection measures

Human rights laws and standards

The preamble to the EU Directive states that there should be a strong presumption that victims of hate crime will benefit from protection measures because there is a tendency for repeat and secondary victimisation.⁷⁹

The EU Directive, Articles 18 and 19 also identify that governments should ensure that measures are available to guarantee: where necessary, the physical protection of the victim and their family; without prejudice to the rights of the accused, the dignity of the victim during questioning and when testifying; and, unless required, that the necessary conditions are established to enable avoidance of contact between the victim and offender at court. Concerning the latter issue, the Directive makes clear that all new court premises should have separate waiting areas for victims.⁸⁰

In order to determine whether special measures should be put in place to protect victims during questioning and when testifying at court, the EU Directive, Article 22 provides that a timely and individual assessment must be carried out for all victims.⁸¹ The assessment is to take into account the personal characteristics of the victim, the type or nature of the crime and the circumstances of the crime, again, with particular attention being accorded to victims who have suffered crime related to bias or discrimination based on their personal characteristics and to hate crime. The assessment should also take into account the wishes of the victim in terms of their desire for special measures.⁸² The CoE Recommendation (2005)9 advises that government should look at the

proportionality between the nature of the protection measure and the seriousness of the intimidation of the witness.⁸³

Upon completion of the assessment and where the need for protection has been identified, special measures, which may be implemented during the investigation process, shall include: interviews being carried out in premises designed or adapted to suit the specific needs of the victim; interviews being carried out by or through specially trained professionals; and, interviews being carried out by the same persons, unless this is contrary to the good administration of justice.⁸⁴

In addition, the EU Directive, Article 20 states that interviews with victims must be conducted without unjustified delay, that the number should be kept to a minimum, and carried out only where strictly necessary to the investigation. In terms of any questioning or confrontation of the victim, CERD Committee General Recommendation 31 specifies that it is to be conducted with the necessary sensitivity as far as the racist element is concerned.⁸⁵

Similarly, upon completion of the assessment and where a protection need has been identified, the special measures which may be implemented during the court process shall include: measures to avoid unnecessary questioning about a victims private life not related to the criminal offence; measures allowing the hearing to take place without the presence of the public;⁸⁶ and, the use of communication technology to avoid visual contact between victims and defendants, including during the giving of evidence, or to allow the victim not to be present in the courtroom.⁸⁷

⁷⁹ EU Directive 2012/29, Preamble, para 57.

⁸⁰ *Ibid.*, Article 19(2).

⁸¹ See also EU Directive 2012/29, Preamble, para 55.

⁸² *Ibid.*, Article 22; CoE Recommendation (2005)9, para 15.

⁸³ *Ibid.*, para 14.

⁸⁴ EU Directive 2012/29, Article 23(2).

⁸⁵ CERD Committee, General Recommendation 31, para 19(b). See also ECRI General Policy Recommendation 11, para 66.

⁸⁶ See also CoE Recommendation (2005)9, para 17.

⁸⁷ EU Directive 2012/29, Article 23(3).

The CoE Recommendation (2005)9 provides specific examples of the techniques that could be used to prevent the identification of witnesses where considered necessary. These include the: use of screens, curtains, voice distortion technology, covering of the face, and videoconferencing; audiovisual recording of statements made by victims during the preliminary phase of proceedings; the ability to use statements in court made by victims at the preliminary stage, where it is not possible for the victim to attend; validity of evidence given at the preliminary stages in court, if a cross-examination took place at the preliminary stages; and, disclosing information identifying the victim or witness at the latest possible stage and/or releasing only selected details.⁸⁸

The preamble to the EU Directive provides that any persons involved in the individual assessment to identify victims' specific protection needs in the context of special protection measures should receive specific training on how to carry out such an assessment.⁸⁹

Domestic laws and policies

The PSNI Service Procedure details that response officers should consider whether contact with other police branches such as crime prevention and the 'Hate incident practical action' (HIPA) scheme would be appropriate.⁹⁰ The HIPA scheme is a joint scheme operated by DoJ, PSNI and the NI Housing Executive that provides personal and home protection measures for eligible victims. When an incident is confirmed by the PSNI, minimum repairs can be undertaken to secure the property. This is available to owner-occupiers, private rentals, as well as social housing.⁹¹ Further, neighbourhood

police officers can provide victims with a personal attack alarm.

Special protection measures, such as the Protected Person Programmes, are available within the PSNI Organised Crime Branch. The two tiered scheme admits victims according to a threat and risk analysis. This is, however, generally reserved for particularly serious and high risk cases.⁹²

The Criminal Evidence (NI) Order 1999, as amended by the Justice Act (NI) 2011, governs the use of special measures that can be afforded to vulnerable and intimidated witnesses so as to enable them to provide the best evidence in court. The adequate identification and appropriate treatment of vulnerable and intimidated witnesses is essential both for the successful administration of justice in the public interest, access to justice of the victim and the protection of witnesses.

Under the Order, vulnerable witnesses include children under 18 years and persons, who may be considered vulnerable due to incapacity, such as physical disability, mental disorder or any significant impairment of intelligence and social functioning.⁹³ Intimidated witnesses are defined as witnesses whose evidence is likely to be affected due to fear or distress about testifying.⁹⁴ These categories are not mutually exclusive. The DoJ and PPS acknowledge that the victims of racist hate crimes may fall into the category of intimidated witnesses.⁹⁵ The PSNI Code of Ethics provides that police officers should pay particular attention to the needs of witnesses where there is a risk of intimidation and provide protection and support accordingly.⁹⁶ PSNI Policy Directive 05/06 sets out

⁸⁸ CoE Recommendation (2005)9, para 17.

⁸⁹ EU Directive 2012/29, Preamble, para 61.

⁹⁰ PSNI Service Procedure 16/12, p 11.

⁹¹ The leaflet states, "All hate incidents must be reported to the police to be eligible for support. When an incident is confirmed by the police, minimum repairs may be carried out to secure the property, and if requested there will be a follow up visit by your local Police Hate Incident and Minority Liaison Officer who can provide a personal attack alarm to the occupants if required. The Scheme is available 24 hours each day to provide support and reassurance to victims of Hate Crime." See, <<http://www.nidirect.gov.uk/hipaleaflet.pdf>>.

⁹² See also, Criminal Justice Inspection Northern Ireland, The use of special measures in the criminal justice system in Northern Ireland (April 2012) [CJINI special measures report], paras 3.44 and 3.45.

⁹³ The Criminal Evidence (Northern Ireland) Order 1999, Article 4 as amended by The Justice Act (Northern Ireland) 2011.

⁹⁴ The Criminal Evidence (Northern Ireland) Order 1999, Article 5.

⁹⁵ DoJ 'Making a difference to victims and witnesses of crime' strategy, Appendix D, p 49; PPS Hate Crime Policy, para 8.1.5; and The Criminal Evidence (Northern Ireland) Order 1999, Article 5(2)(c)(i). See also, CJINI, special measures report, para 3.42, and DoJ, 'Achieving Best Evidence in Criminal Proceedings' guidance.

⁹⁶ PSNI Code of Ethics, paras 2.3 and 2.4.

the definition of a vulnerable victim but does not lay down the definition of an intimidated victim.⁹⁷

The PSNI commits the service to deal with victims in accordance with the DoJ 'Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, the use of special measures, and the provision of pre-trial therapy.'⁹⁸ The DoJ guidance applies the definition of vulnerable and intimidated witness as laid down by the 1999 Order and comprehensively details the interviewing techniques to be used in the context of intimidated witnesses, including due considerations which must be given by the interviewing team to the witness' "race, gender, culture and ethnic background."⁹⁹ In particular the guidance outlines that police interviewers "have a responsibility to be informed about, and take into account, the needs and expectations of witnesses from the specific minority groups in their local area."¹⁰⁰

The PSNI, PPS and NICTS can identify the need for special measures, however, the PPS will apply for these to be granted by the court. The special measures include the use of screens, live link, video recorded evidence, communication aids, giving evidence in private and the removal of wigs and gowns.¹⁰¹ In some instances, a supporter may accompany the witness. At the same time, the requirement for special measures may change within the course of a particular case, depending on the relevant circumstances. The needs of a witness must therefore be continually assessed.¹⁰²

Finally, the NICTS Victim and Witness Policy identifies that dedicated witness rooms are available in all main courthouses.¹⁰³

The practices of the criminal justice agencies and the experiences reported by the victims and NGOs

The HIPA scheme was commonly referenced during the interviews carried out for this investigation. In this context, PSNI officers recalled that victims were provided a selection of door bolts/chains, a door viewer and personal alarms. A few officers mentioned that they would contact the Housing Executive for repairs or re-housing if the victim lived in an Executive property which had been damaged. Reference was also made to the fact that a note could be placed in the briefing book by any officer to ensure that passing attention is paid to the location of the victim by patrolling units.

Most of the repeat victims interviewed received some assistance from the criminal justice agencies to enhance protection of their physical person. The receipt of alarms, locks and lights did not appear to contribute much comfort. CCTV was installed for one victim and attacks on the victim's property decreased. CCTV was promised for another but not received. One victim was provided with outside sensor lights but had to install them, they could not do this because they were afraid of being attacked. On the few occasions when increased police patrols were mentioned, they were welcomed and encouraged by victims. Finally, a victim who had suffered repeat attacks told of an officer's response after enquiring about the possibility of police help to move house:

he was like 'why are you asking me this? Are you planning to sell your house? Then go to the sales or property agent'. That [is] the response I got and I was nearly in tears because we were so scared but we don't feel safe or secure at all.

⁹⁷ PSNI Policy Directive 05/06, p 3-4.

⁹⁸ Ibid., p 3.

⁹⁹ DoJ, 'Achieving Best Evidence in Criminal Proceedings' guidance, p 177.

¹⁰⁰ Ibid.

¹⁰¹ DoJ Code of Practice for Victims of Crime; NICTS, Victim and Witness Policy (March 2012).

¹⁰² CJINI Special Measures Report, para 3.28.

¹⁰³ NICTS Victim and Witness Policy, p 8.

A few PSNI officers mentioned the use of special measures during investigative questioning. On the limited occasions in which this was referenced, it occurred in the context of an ‘achieving best evidence’ interview for child victims. However, due to the lack of overall reference, this did not appear to be a common practice for victims of racist hate crimes.

Victim interviews also highlighted the importance of sensitive questioning by police. For example, a repeat victim described how the more general motive question asked by police officers had made them feel particularly low:

[i]t was the question, ‘do you have any idea why they are doing this?’ ... sometimes the way it was worded made me feel really, really awful ... I suppose [it is] a normal [question] but in the particular scenario that I found myself in, I started wondering ‘why are [the perpetrators] doing this?’

Concerning the use of special measures at court, it was clear from the PPS and NICTS interviews that the onus was on the prosecution to make the application. However, prosecutors noted that the direction of the investigating officer and whether or not an ‘achieving best evidence’ interview had taken place would be influential in their application. In general, prosecutors and senior PPS staff expressed what appeared to be an established view that cases are more successful when evidence is given without the use of special measures. One senior PPS staff member stated:

it is the almost universal view of prosecutors that a witness who’s in the witness box in the open court is more convincing to judge and jury on its own than somebody who’s behind a screen or someone who’s in a tv room ... we need to be careful not to see special measures as something which is great in every case, which it isn’t.

While senior PPS staff noted that the organisation would give priority to intimidated witnesses,

prosecutors did not adopt a position whereby they assumed victims of racist hate crimes were intimidated. In order to introduce special measures, it was apparent that further evidence would have to be established. For example, two prosecutors noted:

unless there was something that prompted me to think that, in this particular case these people are particularly vulnerable or intimidated, I wouldn’t make a distinction between that and any other case.

I don’t particularly see why the fact that it was a hate crime would necessitate having special measures any more or less than any other offence in which the witness is intimidated or vulnerable.

Prosecutors identified that such additional evidence could include an exhibition of “fear” by the victim so that they “didn’t want to come to court”, or felt they were “more readily identifiable” because of their ethnic origin. Importantly, a few prosecutors identified that a repeat victim scenario was more likely to give rise to an application for special measures.

it might be different where you’ve got neighbours or something and they’re being racially abused all the time ... its really affecting their everyday lives and ... they feel incapable of giving evidence in the same room as [the person] they’re seeing every day [who] is torturing the life out of them.

In making an application for special measures, the prosecutor would have to demonstrate the above by supplying an additional statement from the witness or providing medical evidence:

if you are youth, you will get special measures but if its fear of distress you have to go through hoops to get those measures granted so you would usually have to gather extra evidence, just medical evidence to say that, ‘they have been a nervous wreck since’.

None of the victims interviewed had served as a witness during the judicial process. However, some NGOs representatives expressed the opinion that police were not comfortable with the concept of ‘intimidation’ for special measures. For example, it was stated:

[i]t’s easier for police to categorise vulnerable, intimidated has sort of a different sort of interpretation of it. I think there’s a crime of intimidation whereas someone can feel intimidated ... victims of racially motivated may be more intimidated but that may not be recognised by the police early enough in terms to apply for special measures.

Findings

The NIHRC found that:

- Elements of the hate incident and practical action scheme were widely offered to repeat victims of racist hate crimes. However, at times, the assistance was ineffective. Increased police patrols were strongly welcomed by victims.
- There was no evidence of individual assessments to identify whether or not special measures for the victims would be appropriate during the criminal process.
- The PSNI Policy Directive 05/06 defined a vulnerable witness but not an intimidated witness for the purpose of engaging special protection measures. The PPS Hate Crime Policy noted that victims of racist hate crimes may be intimidated. Prosecutors regarded the direction of the investigating PSNI officer as persuasive in any decision to instigate an application for special measures. However, PSNI officers did not appear to be aware of this expectation.

Access to free and confidential support services

Human rights laws and standards

The EU Directive draws a distinction between non-specialist and specialist support services. Article 8, provides that in accordance with their need, victims of crime should have access to free and confidential victim support services. In addition, governments should take measures to establish free and confidential specialist support services.¹⁰⁴ The reliability of support services is regarded as essential in order to encourage and facilitate the reporting of crimes.¹⁰⁵ Importantly, access to any support service is not dependent upon a victim making a formal complaint about a criminal offence.¹⁰⁶

Victim support services should act in the interests of victims and operate before, during and for an appropriate time after the criminal proceedings.¹⁰⁷ Support services are encouraged to pay particular attention to the specific needs of victims who have special needs as a consequence of their race, colour, language, nationality, cultural beliefs or practices, and ethnic or social origin.¹⁰⁸

The EU Directive, Article 9(1) requires that non-specialist victim support services should at a minimum include: emotional support; advice relating to financial and practical issues arising from the crime; information about or referral to relevant specialist support services; and where available, psychological support. Advice should also be provided to the victim relating to the risk and prevention of secondary and repeat victimisation, of intimidation and of retaliation, where this is not provided elsewhere.

¹⁰⁴ EU Directive 2012/29, Article 8(3).

¹⁰⁵ *Ibid.*, Preamble, para 63.

¹⁰⁶ *Ibid.*, Article 8(5).

¹⁰⁷ *Ibid.*, Article 8(1).

¹⁰⁸ UN Declaration of Basic Principles, para 17.

The EU Directive, Article 9(3) provides that specialist support services should be developed to include, as a minimum, appropriate interim accommodation for victims in need of a safe place due to an imminent risk of secondary victimisation, intimidation or retaliation, unless such services are otherwise provided by other public or private sector bodies. Further possible specialist services could include: short and long-term psychological counselling, trauma care, legal advice¹⁰⁹ and immediate medical support.¹¹⁰

The UN Declaration of Basic Principles do not distinguish between specialist and non-specialist services but require governments to ensure that victims have ready access to appropriate health and social services.¹¹¹

Finally, the UN Declaration of Basic Principles provides that police, justice, health, social service and other personnel concerned should receive training to sensitise them to the needs of victims, and be given guidelines to ensure proper and prompt aid.¹¹²

Domestic laws and policies

In order to access further support services, the PSNI, PPS and NICTS refer to voluntary organisations such as Victims Support NI and other partner organisations.¹¹³ Victim Support NI is a voluntary service which receives its core funding from the DoJ. It is the main contact point for victims and will provide emotional and practical advice confidentially and free of charge, regardless of whether an incident was reported or not. The services offered include assistance in making criminal injury compensation claims,¹¹⁴ advice on

other possible sources of help, and the provision of a witness service at court.¹¹⁵ The witness service provides support before, during and after the trial to help keep victims informed and to familiarise them with the court process.¹¹⁶ In order to tailor their services, Victim Support NI rely upon the criminal justice agencies to notify them that the case involves a racist hate crime. Hate crimes are treated as ‘priority one’ cases by Victim Support, ensuring that there is an immediate response and referral to relevant external organisations.

The PSNI HSCO is also tasked to offer ‘support’ to the victims of racist hate crimes. This would often take the form of referral to appropriate external organisations, although the HSCO is also intended to provide emotional support. Follow-up by the HSCO is offered to victims of signal incidents and not just victims of racist hate crimes.

The PSNI Service Procedure encourages officers to refer victims to the community advocates (now known as ‘bilingual support workers’),¹¹⁷ part of the ‘community/bilingual advocacy scheme’ funded and managed by the PSNI, Policing with the Community branch. The role of the advocate is to assist neighbourhood officers in providing advice to victims of hate crime as well as encouraging reporting and ascertaining the victim’s satisfaction with the police. At present, the advocacy service for victims of racist hate crimes is provided by two people on a part-time basis in the Belfast and Derry/Londonderry offices of the NI Council for Ethnic Minorities.¹¹⁸ Previously, and at the time of the investigation, the advocacy service for victims of racist hate crimes was provided by two people and jointly run by the Chinese Welfare Association and the Polish Welfare Association.

¹⁰⁹ See also, CoE Recommendation (2006)8, para 4.5.

¹¹⁰ EU Directive 2012/29, Preamble, para 38.

¹¹¹ UN Declaration of Basic Principles, para 15.

¹¹² *Ibid.*, para 16.

¹¹³ PSNI Policy Directive 05/06, p 16-17 and PSNI Service Procedure 16/12, p 12.

¹¹⁴ Victims who have suffered disease, physical or mental injury due to a crime are entitled to apply for compensation from the Compensation Agency through the Criminal Injuries Compensation Service. However, compensation for disease or mental injury will not be payable without physical injury, unless the victim “was put in reasonable fear of immediate physical harm to his or her own person”. See The Northern Ireland Criminal Injuries Compensation Scheme (2009), Section 10.

¹¹⁵ See, <<http://www.victimsupportni.co.uk/what-we-do/community-service>>.

¹¹⁶ PPS Hate Crime Policy, para 7.3.16.

¹¹⁷ PSNI Service Procedure 16/12, p 12.

¹¹⁸ The Community Advocates/Bilingual Support Workers operate on a 20-hour contract.

Where the victim or witness wishes, the PPS will forward their contact details to the Witness Service provided by Victim Support NI to enable them to access support at court.¹¹⁹

Finally, the Housing (Northern Ireland) Order 1988, as amended, places the Housing Executive under a legal duty to provide temporary housing should it not be reasonable for that person to stay in their home when they have suffered violence and may be at risk of further violence.¹²⁰

The practices of the criminal justice agencies and the experiences reported by the victims and NGOs

During the interviews carried out for this investigation, officers described the role of the neighbourhood policing team's HSCO as one of "reassurance" and "assistance" to the victim, as well as providing a degree of "oversight" for the investigation. Two neighbourhood officers conveyed the victim-focused nature of the role as follows:

[w]henver I'm speaking to the victim I know everything that happened, I don't need to ask any questions. I'm asking them do they have questions for us.

[c]ertainly we try [to] at least help them be comfortable again, living and existing within South Belfast and get[ting] back to a normal way of life and get past the actual incident itself [in] order [to] move on.

The victims interviewed generally described inconsistent levels of support during the investigation stage. The support received appeared to be largely dependent upon the individual police

officer that responded to the reported crime. For instance, a repeat victim recalled how one particular neighbourhood officer offered sustained emotional support:

[the officer] would have initiated contact and phoned me on a regular basis and, to be honest, sometimes I [was] stood in the shopping centre when [the officer] phoned but we ended up talking for an hour and it was really really ... what I absolutely needed ... focusing on the emotional support.

Concerning the specific referral by officers to Victim Support NI, a Sergeant recognised that this was similarly dependent on the individual police officer "depending on how good they are." During interviews, many officers did however, identify that they would refer victims to Victim Support NI. Understanding of the specific services offered by Victim Support NI, on the other hand, was more limited. An officer commented:

I vaguely know what Victim Support do, only through them coming in to district training and telling us... what they can do for people but we [don't] know what Victim Support has done for anybody.

PPS staff identified reliance upon Victim Support NI to look after victims during the court process.

On the whole, victims affirmed the receipt of a leaflet informing them about Victim Support NI. When discussed, the assistance identified as offered by Victim Support included compensation advice and a "listening ear." For many victims, however, this assistance lacked practical relevance to their situation, for example, a victim stated:

¹¹⁹ PPS Hate Crime Policy, para 7.2.1.

¹²⁰ Housing (Northern Ireland) Order 1988, Articles 5 and 8.

I explain[ed] everything, [then] he sa[id] we [can] give you emotional support, [and] I said what [do you mean] when you say emotional support? [Do you] just want to hear? If I cry you will help more?

During interviews with the NGOs representatives, it became apparent that very few of the victims referred to Victim Support NI in the past two years were referred with the specific identification that they were victims of a racist hate crime. They did not believe that the number of victims presented as a victim of a racist hate crime was a true reflection of the actual number. Accordingly not all victims of racist hate crimes were treated as ‘priority 1’ victims.

Neighbourhood officers identified that referrals to external organisations were commonplace. For example, officers noted that they would refer the victim, where relevant, to the Housing Executive, the “benefits office” and social services. However, very few victims recalled being referred to support agencies other than Victim Support NI. Where victims had interacted with external support organisations, they had for the most part self-identified. One victim called for an increase in support provision for victims, and in particular those who could not speak English:

[t]o be honest most of the support, I found, I initiated it all myself because I was really at the end of my tether. I didn’t really know what to do ... But I [can] imagine what it would be like for somebody who maybe doesn’t speak the language very well and who maybe hasn’t been here very long ... I think it’s a whole different ball game for those people to get that support and I think yes, a lot more can be done to support those people.

Finally, PSNI officers reported having engagement with the ‘community/bilingual advocacy scheme’. The advocates were described as being particularly helpful for victims who distrusted police, new arrivals to NI, and those with limited English. Since advocates also came from a minority background there was the feeling from officers that they could assist them “gain... information and also engender a bit of trust.”

From the perspective of both NGOs representatives and victims, there was a general lack of awareness among criminal justice agencies staff of the ‘community/bilingual advocacy scheme’. A further problem identified by the NGOs representatives was the limited number of community advocates.

Findings

The NIHRC found that:

- Neighbourhood policing officers exhibited a commitment to the provision of both emotional and practical support to victims of racist hate crimes.
- There was a lack of awareness among criminal justice agencies staff of the specific services that Victim Support NI provides. There was also a noted absence of referrals from the PSNI to Victim Support NI specifying that the individuals concerned were considered to be victims of racist hate crimes.
- Criminal justice agencies staff demonstrated limited knowledge of, and referral to, external support organisations.

Conclusions and recommendations

To address racist hate crimes it is necessary for the NI Executive and criminal justice agencies to understand that the human rights engaged are overlapping, mutually dependent and reinforcing. The duties to prevent, prohibit, prosecute and protect, only when taken together, provide a comprehensive framework.

The NIHRC found that the domestic laws and policies relevant to addressing racist hate crimes are in general compliance with international standards. Notwithstanding the achievements, the NIHRC found that there is considerable room for improvement in terms of practice. On occasion, individual practices did not meet the standards required. In other instances, the practices of the criminal justice agencies had the cumulative effect of undermining the effectiveness of the human rights framework as a whole. In this regard, it is the outcome for the rights holder that is of paramount consideration.

Fundamentally, although the NIHRC has been able to identify the necessary elements of a domestic framework to address racist hate crimes, it is clear that these elements had not been drawn together by the NI Executive nor were they so understood by the criminal justice agencies.

The NIHRC found that, taken collectively, the approach of the criminal justice agencies did not demonstrate the necessary partnership needed to ensure the outcomes required by the human rights framework. While there was evidence of engagement between the criminal justice agencies, as well as with minority ethnic groups, the outcomes secured, such as community safety, convictions, and victim experiences were not as

good as they might otherwise have been. This appeared to have been caused in part by an overreliance by one agency upon the other.

The primary legislative instrument used to address racist hate crime in NI is the 2004 Order. The NIHRC found that while the Order complies with international standards, it has been underutilised by the criminal justice agencies. This is as a consequence of a number of actions and inactions by the criminal justice agencies. No one criminal justice agency is solely responsible.

In particular, the criminal justice agencies did not sufficiently understand the two operative elements of the 2004 Order. They appeared to conflate the 'demonstrated' and 'motivated' elements of 'aggravated by racial hostility'. It was evident that staff did not always understand that the 'demonstrated' element exists separately and can, alone, be a basis for a finding of 'aggravated by racial hostility'. As a consequence, cases where racial hostility was demonstrated were often not progressed.

Further, the NIHRC also found that the full remit of legislative instruments available to the criminal justice agencies were not consistently and comprehensively engaged to achieve the required outcomes.

The following recommendations are premised upon the relevant international human rights standards and the findings of the investigation.

The duty to prevent

Community safety

1. Community safety policing and local policing plans should prioritise where appropriate, measures directed towards addressing racist signal incidents and racist hate crimes. This should be done through coordination between the PSNI and representative bodies, including the PCSPs at a local level.

Promotion of good relations between communities

2. The NI Executive should take steps to ensure that immediate and effective measures to promote good relations between communities are fully reflected in the domestic legislative and policy framework. The criminal justice agencies should also ensure that this standard is reflected in their practices.
3. The NI Executive should consider the development of a coordinated and strategic approach to addressing racist hate crimes and the provision of guidance to the criminal justice agencies in this regard.

Promotion of racial equality and non-discrimination (including, where necessary, the introduction of temporary special measures)

4. The NI Executive should publish an updated Racial Equality Strategy without further delay. Any future NI Executive actions should include specific targeted measures to address racist hate crimes in compliance with the international human rights standards, specifically the duties to prevent, prohibit, prosecute and protect.
5. The criminal justice agencies, in particular the PSNI, should implement strategies to increase the level of representation from members of ethnic minority communities within their services.

Collection and disaggregation of data

6. Criminal justice agencies should ensure that the collection and disaggregation of data is integrated consistently into the practices. There should be an effective approach to classifying the ethnicity and background of the victims of racist hate crimes. Criminal justice agencies staff should be made aware of the importance of data collection for the purpose of monitoring trends and evaluating performance.

The duty to prohibit

Prohibition of racial discrimination

7. The NI Executive should examine the NI Act 1998, Section 76, the Race Relations Order 1997 and other domestic laws, with a view to introducing legislative measures that will fulfil the obligation to prohibit racial discrimination by any person, group or organisation.
8. Criminal justice agencies should make their staff fully aware of their duty to provide services without discrimination. In particular, justified differential treatment to address indirect discrimination should be prioritised.

Criminalisation of hate speech

9. The NI Executive should introduce legislative measures to sanction organisations which promote and incite racial discrimination.
10. The PSNI and PPS should introduce measures to ensure that staff fully understand relevant domestic laws pertaining to hate speech. The PPS should review the application of relevant domestic laws with regard to the prosecution of racist hate speech.

Criminalisation of racist violence

11. The criminal justice agencies, in particular the PSNI and PPS, should introduce measures to ensure that staff are made fully aware that 'aggravated by hostility' under the 2004 Order, Article 2, includes both 'motivation' and 'demonstration' of racial hostility. This measure should be subject to intermittent and regular review.
12. The PSNI should ensure that officers are made fully aware of the potential cumulative effects of multiple racist incidents, and in particular, how those incidents may constitute harassment and could engage the criminal law.

Effectiveness of sanctions

13. The Judiciary should consistently demonstrate how they integrate attention to the racial hostility dimension in their sentencing practice.
14. The NICTS should publish information concerning the judicial decisions on offences aggravated by racial hostility.

The duty to prosecute

The initial report

15. The NI Executive and criminal justice agencies should intensify efforts to ensure all reported racist incidents are recorded appropriately, (including in the context of the next periodic examination by the ECRI).
16. The PSNI should introduce measures aimed at increasing the accessibility of reporting for victims who cannot speak English and for those with English as an additional language.

17. The PSNI should reaffirm among its officers the rationale for applying the 'Perception Test' and its importance in effectively addressing racist hate crimes, consistent with recommendations of the MacPherson report.

The investigation

18. The PSNI should ensure recognition and implementation of the particular expediency required to investigate racist hate crimes.
19. The PSNI should ensure that, in addition to an effective investigation of the base offence, equal attention is paid to investigating suspected racial hostility.

The decision to prosecute

20. The PPS should review the application of the 'Evidential Test' in cases of suspected racist hate crimes to ensure that prosecutors make consistent determinations as to whether an offence will be prosecuted as 'aggravated by hostility' under the 2004 Order, Article 2.

Judicial process

21. The PPS should ensure that court prosecutors alert the judiciary to the fact that a case is being pursued as aggravated by racial hostility under the 2004 Order.
22. The PPS should ensure that defendants are alerted, at the earliest opportunity, that a case is being pursued as aggravated by racial hostility under the 2004 Order.
23. The DoJ should review the mechanisms in place to ensure that victims of racist hate crimes may be heard in court, regardless of the severity of the crime.

The duty to protect

The impact upon the victim, (including the issue of repeat and secondary victimisation)

- 24.** The PSNI should reaffirm among its officers that differential treatment of the victims of racist hate crimes is required to afford due recognition to the unique impact of racism.
- 25.** The PSNI should intensify efforts to ensure that repeat victims are identified at the earliest opportunity.

Access to information

- 26.** The criminal justice agencies should introduce measures aimed at ensuring that victims of racist hate crimes are made aware of their right to access information regarding their case, including: the date of hearing; and that the offence is being prosecuted as aggravated by hostility.
- 27.** The NI Executive should consider improving interpretative services outside of the questioning and testimony context.

Protection measures

- 28.** The criminal justice agencies should institute a process of individualised assessments to identify if special protection measures are required during criminal proceedings. Consideration should be given to introducing a presumption that the victims of racist hate crimes will receive such measures.

Access to free and confidential support services

- 29.** The criminal justice agencies should ensure that their staff are fully apprised of available external support services to guarantee victims of racist signal incidents and racist hate crimes are appropriately referred.

Appendices:

Appendix 1: NGO participants

Formal interviews:

- Bryson Intercultural
- Chinese Welfare Association Northern Ireland
- Horn of Africa People's Aid Northern Ireland
- NICEM's Belfast Migrant Centre
- Polish Welfare Association
- South Tyrone Empowerment Program
- Victim Support Northern Ireland

Meetings:

- Committee on the Administration of Justice
- Community Relations Council
- Institute for Conflict Research

Appendix 2: Legislation (selected excerpts)

The Criminal Justice (No. 2) (Northern Ireland) Order 2004

Increase in sentence for offences aggravated by hostility

- 2.—(1) This Article applies where a court is considering the seriousness of an offence.
- (2) If the offence was aggravated by hostility, the court—
- (a) shall treat that fact as an aggravating factor (that is to say, a factor that increases the seriousness of the offence); and
 - (b) shall state in open court that the offence was so aggravated.
- (3) For the purposes of this Article an offence is aggravated by hostility if—
- (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on—
 - (i) the victim’s membership (or presumed membership) of a racial group;
 - (ii) the victim’s membership (or presumed membership) of a religious group;
 - (iii) the victim’s membership (or presumed membership) of a sexual orientation group;
 - (iv) a disability or presumed disability of the victim; or
 - (b) the offence is motivated (wholly or partly) by hostility towards—
 - (i) members of a racial group based on their membership of that group;
 - (ii) members of a religious group based on their membership of that group;
 - (iii) members of a sexual orientation group based on their membership of that group;
 - (iv) persons who have a disability or a particular disability.
- (4) It is immaterial for the purposes of sub-paragraph (a) or (b) of paragraph (3) whether or not the offender’s hostility is also based, to any extent, on any other factor not mentioned in that sub-paragraph.
- (5) In this Article—
- “disability” means any physical or mental impairment;
- “membership”, in relation to a racial, religious or sexual orientation group, includes association with members of that group;
- “presumed” means presumed by the offender;
- “racial group” has the same meaning as in the Race Relations (Northern Ireland) Order 1997 (NI 6);
- “religious group” means a group of persons defined by reference to religious belief or lack of religious belief;
- “sexual orientation group” means a group of persons defined by reference to sexual orientation.

The Public Order (Northern Ireland) Order 1987

PART III Stirring up hatred or arousing fear

Acts intended or likely to stir up hatred or arouse fear

Meaning of “fear” and “hatred”

8. In this part—

“fear” means fear of a group of persons in Northern Ireland defined by reference to religious belief, colour, race, nationality (including citizenship) or ethnic or national origins;

“hatred” means hatred against a group of persons in Northern Ireland defined by reference to religious belief, colour, race, nationality (including citizenship) or ethnic or national origins.

Use of words or behaviour or display of written material

9.—(1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—

- (a) he intends thereby to stir up hatred or arouse fear; or
 - (b) having regard to all the circumstances hatred is likely to be stirred up or fear is likely to be aroused thereby.
- (2) An offence under this Article may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.
 - (3) In proceedings for an offence under this Article it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling.
 - (4) A person who is not shown to have intended to stir up hatred or arouse fear is not guilty of an offence under this Article if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.
 - (5) This Article does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme broadcast or included in a cable programme service.

Publishing or distributing written material

10.—(1) A person who publishes or distributes written material which is threatening, abusive or insulting is guilty of an offence if—

- (a) he intends thereby to stir up hatred or arouse fear; or
 - (b) having regard to all the circumstances hatred is likely to be stirred up or fear is likely to be aroused thereby.
- (2) In proceedings for an offence under this Article it is a defence for an accused who is not shown to have intended to stir up hatred or arouse fear to prove that he was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.
- (3) References in this part to the publication or distribution of written material are to its publication or distribution to the public or a section of the public.

Distributing, showing or playing a recording

11.—(1) A person who distributes, or shows or plays, a recording of visual images or sounds which are threatening, abusive or insulting is guilty of an offence if—

- (a) he intends thereby to stir up hatred or arouse fear; or
 - (b) having regard to all the circumstances hatred is likely to be stirred up or fear is likely to be aroused thereby.
- (2) In this part “recording” means any record from which visual images or sounds may, by any means, be reproduced; and references to the distribution, showing or playing of a recording are to its distribution, showing or playing to the public or a section of the public.
- (3) In proceedings for an offence under this Article it is a defence for an accused who is not shown to have intended to stir up hatred or arouse fear to prove that he was not aware of the content of the recording and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.
- (4) This Article does not apply to the showing or playing of a recording solely for the purpose of enabling the recording to be broadcast or included in a cable programme service.

Broadcasting or including programme in cable programme service

12.—(1) If a programme involving threatening, abusive or insulting visual images or sounds is broadcast, or included in a cable programme service, each of the persons mentioned in paragraph (2) is guilty of an offence if—

- (a) he intends thereby to stir up hatred or arouse fear; or
 - (b) having regard to all the circumstances hatred is likely to be stirred up or fear is likely to be aroused thereby.
- (2) The persons are—
- (a) the person providing the broadcasting or cable programme service;
 - (b) any person by whom the programme is produced or directed; and
 - (c) any person by whom offending words or behaviour are used.
- (3) If the person providing the service, or a person by whom the programme was produced or directed, is not shown to have intended to stir up hatred or arouse fear, it is a defence for him to prove that—
- (a) he did not know and had no reason to suspect that the programme would involve the offending material; and
 - (b) having regard to the circumstances in which the programme was broadcast, or included in a cable programme service, it was not reasonably practicable for him to secure the removal of the material.
- (4) It is a defence for a person by whom the programme was produced or directed who is not shown to have intended to stir up hatred or arouse fear to prove that he did not know and had no reason to suspect—
- (a) that the programme would be broadcast or included in a cable programme service; or
 - (b) that the circumstances in which the programme would be broadcast or so included would be such that hatred would be likely to be stirred up or fear would be likely to be aroused.
- (5) It is a defence for a person by whom offending words or behaviour were used and who is not shown to have intended to stir up hatred or arouse fear to prove that he did not know and had no reason to suspect—
- (a) that a programme involving the use of the offending material would be broadcast or included in a cable programme service; or
 - (b) that the circumstances in which a programme involving the use of the offending material would be broadcast, or so included, or in which a programme broadcast or so included would involve the use of the offending material, would be such that hatred would be likely to be stirred up or fear would be likely to be aroused.

- (6) A person who is not shown to have intended to stir up hatred or arouse fear is not guilty of an offence under this Article if he did not know, and had no reason to suspect, that the offending material was threatening, abusive or insulting.
- (7) This Article does not apply—
 - (a) to the broadcasting of a programme by the British Broadcasting Corporation or the Independent Broadcasting Authority; or
 - (b) to the inclusion of a programme in a cable programme service by the reception and immediate re-transmission of a broadcast by either of those authorities.
- (8) The following provisions of the Cable and Broadcasting Act[1984 c. 46] 1984 apply to an offence under this Article as they apply to a “relevant offence” as defined in section 33(2) of that Act— section 33 (scripts as evidence); section 34 (power to make copies of scripts and records); section 35 (availability of visual and sound records); and sections 33 and 34 of that Act apply to an offence under this Article in connection with the broadcasting of a programme as they apply to an offence in connection with the inclusion of a programme in a cable programme service.

Possession of matter intended or likely to stir up hatred or arouse fear

- 13.—**(1) A person who has in his possession written material which is threatening, abusive or insulting, or a recording of visual images or sounds which are threatening, abusive or insulting, with a view to—
- (a) in the case of written material, its being displayed, published, distributed, broadcast or included in a cable programme service, whether by himself or another; or
 - (b) in the case of a recording, its being distributed, shown, played, broadcast or included in a cable programme service, whether by himself or another, is guilty of an offence if he intends hatred to be stirred up or fear to be aroused thereby or, having regard to all the circumstances, hatred is likely to be stirred up or fear is likely to be aroused thereby.
- (2) For this purpose regard shall be had to such display, publication, distribution, showing, playing, broadcasting or inclusion in a cable programme service as he has, or it may reasonably be inferred that he has, in view.
 - (3) In proceedings for an offence under this Article it is a defence for an accused who is not shown to have intended to stir up hatred or arouse fear to prove that he was not aware of the content of the written material or recording and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.
 - (4) This Article does not apply to the possession of written material or a recording by or on behalf of the British Broadcasting Corporation or the Independent Broadcasting Authority or with a view to its being broadcast by either of those authorities.

Supplementary provisions

Powers of entry and search

14.—(1) If a resident magistrate is satisfied on a complaint on oath made by a constable that there are reasonable grounds for suspecting that a person has possession of written material or a recording in contravention of Article 13, the resident magistrate may issue a warrant under his hand authorising any constable to enter and search the premises where it is suspected the material or recording is situated and to seize and remove anything which the constable reasonably suspects to be or include the material or recording.

(2) A constable entering or searching premises in pursuance of a warrant issued under this Article may use reasonable force if necessary.

(3) In this Article “premises” means any place and, in particular, includes—

(a) any vehicle, vessel, aircraft or hovercraft;

(b) any offshore installation as defined in section 1(3)(b) of the Mineral Workings (Offshore Installations) Act[1971 c. 61] 1971; and

(c) any tent or movable structure.

Savings for reports of parliamentary, Assembly or judicial proceedings

15.—(1) Nothing in this part applies to a fair and accurate report of proceedings in Parliament or in the Assembly.

(2) Nothing in this part applies to a fair and accurate report of proceedings publicly heard before a court or tribunal exercising judicial authority where the report is published contemporaneously with the proceedings or, if it is not reasonably practicable or would be unlawful to publish a report of them contemporaneously, as soon as publication is reasonably practicable and lawful.

Punishment of offences under part III

16.—(1) A person guilty of an offence under this part shall be liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or to a fine, or to both.

(2) For the purposes of the rules against charging more than one offence in the same count or complaint, each of Articles 9 to 13 creates one offence.

Interpretation of part III

17. In this part—

“broadcast” means broadcast by wireless telegraphy (within the meaning of the Wireless Telegraphy Act[1949 c. 54] 1949) for general reception, whether by way of sound broadcasting or television;

“cable programme service” has the same meaning as in the Cable and Broadcasting Act[1984 c. 46] 1984;

“distribute”, and related expressions, shall be construed in accordance with Article 10(3) (written material) and Article 11(2) (recordings);

“dwelling” means any structure or part of a structure occupied as a person’s home or other living accommodation (whether the occupation is separate or shared with others) but does not include any part not so occupied, and for this purpose “structure” includes a tent, caravan, vehicle, vessel or other temporary or movable structure;

“fear” and “hatred” have the meanings assigned to them by Article 8;

“programme” means any item which is broadcast or included in a cable programme service;

“publish”, and related expressions, in relation to written material, shall be construed in accordance with Article 10(3);

“recording” has the meaning given by Article 11(2), and “play” and “show”, and related expressions, in relation to a recording, shall be construed in accordance with that provision;

“written material” includes any sign or other visible representation.

The Protection from Harassment (Northern Ireland) Order 1997

Interpretation

2.—(1) The [1954 c. 33 (N.I.)] Interpretation Act (Northern Ireland) 1954 shall apply to Article 1 and the following provisions of this Order as it applies to a Measure of the Northern Ireland Assembly.

- (2) In this Order references to harassing a person include alarming the person or causing the person distress.
- (3) For the purposes of this Order a “course of conduct” must involve conduct on at least two occasions and “conduct” includes speech.
- (4) In this Order “statutory provision” has the meaning assigned by section 1(f) of the Interpretation Act (Northern Ireland) 1954.

Prohibition of harassment

- 3.**—(1) A person shall not pursue a course of conduct—
- (a) which amounts to harassment of another; and
 - (b) which he knows or ought to know amounts to harassment of the other.
- (2) For the purposes of this Article, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.
- (3) Paragraph (1) does not apply to a course of conduct if the person who pursued it shows—
- (a) that it was pursued for the purpose of preventing or detecting crime; .
 - (b) that it was pursued under any statutory provision or rule of law or to comply with any condition or requirement imposed by any person under any statutory provision; or
 - (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

Offence of harassment

4.—(1) A person who pursues a course of conduct in breach of Article 3 shall be guilty of an offence.

[(2) A person guilty of an offence under this Article shall be liable—

- (a) on conviction on indictment, to imprisonment for a term not exceeding two years, or a fine, or both; or
- (b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.] .

Para. (3) rep. by 1998 NI 6

Putting people in fear of violence

6.—(1) A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him shall be guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.

- (2) For the purposes of this Article, the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.

- (3) It is a defence for a person charged with an offence under this Article to show that—
- (a) his course of conduct was pursued for the purpose of preventing or detecting crime;
 - (b) his course of conduct was pursued under any statutory provision or rule of law or to comply with any condition or requirement imposed by any person under any statutory provision; or
 - (c) the pursuit of his course of conduct was reasonable for the protection of himself or another or for the protection of his or another's property.
- (4) A person guilty of an offence under this Article shall be liable—
- (a) on conviction on indictment, to imprisonment for a term not exceeding [seven years], or a fine, or both; or
 - (b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.
- (5) If on the trial on indictment of a person charged with an offence under this Article the jury find him not guilty of the offence charged, they may find him guilty of an offence under Article 4.

Para. (6) rep. by 2004 NI 15

Restraining orders

7.—(1) A court sentencing or otherwise dealing with a person ("the defendant") convicted of an offence under Article 4 or 6 may (as well as sentencing him or dealing with him in any other way) make an order under this Article.

- (2) The order may, for the purpose of protecting the victim of the offence, or any other person mentioned in the order, from further conduct which—
- (a) amounts to harassment; or
 - (b) will cause a fear of violence,
- prohibit the defendant from doing anything described in the order.

- (3) The order may have effect for a specified period or until further order.
- (4) The prosecutor, the defendant or any other person mentioned in the order may apply to the court which made the order for it to be varied or discharged by a further order.
- (5) If without reasonable excuse the defendant does anything which he is prohibited from doing by an order under this Article, he shall be guilty of an offence.
- (6) A person guilty of an offence under this Article shall be liable—
 - (a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both; or
 - (b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.

The Anti-social Behaviour (Northern Ireland) Order 2004

Anti-social behaviour orders on application by relevant authority.

Anti-social behaviour orders on application to magistrates' court

- 3.—**(1) An application for an order under this Article may be made by a relevant authority if it appears to the authority that the following conditions are fulfilled with respect to any person aged 10 or over, namely—
- (a) that the person has acted, since the commencement date, in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself; and
 - (b) that such an order is necessary to protect relevant persons from further anti-social acts by him.
- (2) Such an application shall be made by complaint to a magistrates' court for the county court division in which it is alleged that the harassment, alarm or distress was caused or was likely to be caused.
 - (3) If, on such an application, it is proved that the conditions mentioned in paragraph (1) are fulfilled, the magistrates' court may make an order which prohibits the defendant from doing anything described in the order.
 - (4) For the purpose of determining whether the condition mentioned in paragraph (1)(a) is fulfilled with respect to any person, the court shall disregard any act of that person which he shows was reasonable in the circumstances.
- [(4A) Nothing in this Article affects the operation of Article 78 of the Magistrates' Courts (Northern Ireland) Order 1981 (limitation of time in respect of complaints made in courts of summary jurisdiction).]

- (5) The prohibitions that may be imposed by an order under this Article are those necessary for the purpose of protecting persons (whether relevant persons or not) from further anti-social acts by the defendant.
- (6) An order under this Article shall have effect for a period (not less than two years) specified in the order or until further order.
- (7) Subject to paragraph (8), the relevant authority or the defendant may apply by complaint to the court which made an order under this Article for it to be varied or discharged by a further order.
- (8) Except with the consent of the relevant authority and the defendant, no order under this Article shall be discharged before the end of the period of two years beginning with the date of service of the order.
- (9) An appeal shall lie to the county court against the making by a magistrates' court of an order under this Article.
- (10) On such an appeal the county court—
 - (a) may make such orders as may be necessary to give effect to its determination of the appeal; and
 - (b) may also make such incidental or consequential orders as appear to it to be just.
- (11) Any order of the county court made on such an appeal (other than one directing that an application be re-heard by a magistrates' court) shall, for the purposes of paragraph (7), be treated as if it were an order of the magistrates' court from which the appeal was brought and not an order of the county court.

Interim anti-social behaviour orders on applications under Article 3

4.—(1) If, before determining an application for an order under Article 3, the court considers that it is just to make an order under this Article pending the determination of that application ("the main application"), it may make such an order.

- [(1A) An application by a relevant authority for an order under this Article may be made without notice being given to the defendant.]
- (2) An order under this Article is an order which prohibits the defendant from doing anything described in the order.
 - (3) An order under this Article—
 - (a) shall be for a fixed period;
 - (b) may be varied, renewed or discharged;
 - (c) shall, if it has not previously ceased to have effect, cease to have effect on the determination of the main application.

- (4) The prohibitions that may be imposed by an order under this Article are those necessary for the purpose of protecting persons (whether relevant persons or not) from further anti-social acts by the defendant.
- (5) The relevant authority or the defendant may apply by complaint to the court which made an order under this Article for it to be varied or discharged by a further order.
- (6) An appeal shall lie to the county court against the making by a magistrates' court of an order under this Article.
- (7) On such an appeal the county court—
 - (a) may make such orders as may be necessary to give effect to its determination of the appeal; and
 - (b) may also make such incidental or consequential orders as appear to it to be just.
- (8) Any order of the county court made on an appeal under this Article (other than one directing that an application be re-heard by a magistrates' court) shall, for the purposes of paragraph (5), be treated as if it were an order of the magistrates' court from which the appeal was brought and not an order of the county court.

Breach of anti-social behaviour orders

- 7.**—(1) If without reasonable excuse a person does anything which he is prohibited from doing by an anti-social behaviour order, he shall be guilty of an offence and liable—
- (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both; or
 - (b) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both.
- (2) Proceedings for an offence under paragraph (1) may be brought by a district council [if—
 - (a) in the case of an order under Article 3 or 4, the order was made on the application of the council; or
 - (b) in the case of an order under Article 6 or 6A, the council is a specified authority in relation to the order.]
 - (3) Proceedings for an offence under paragraph (1) may be brought by the Northern Ireland Housing Executive [if—
 - (a) in the case of an order under Article 3 or 4, the order was made on the application of the Executive; or
 - (b) in the case of an order under Article 6 or 6A, the Executive is a specified authority in relation to the order.]

[(3A) In proceedings for an offence under paragraph (1), a copy of the original anti-social behaviour order, certified as such by the proper officer of the court which made it, is admissible as evidence of its having been made and of its contents to the same extent that oral evidence of those things is admissible in those proceedings.]

- (4) Where a person is convicted of an offence under paragraph (1), it shall not be open to the court by or before which he is so convicted to make an order under paragraph (1)(b) (conditional discharge) of Article 4 of the Criminal Justice (Northern Ireland) Order 1996 (NI 24) in respect of the offence.

The Criminal Evidence (Northern Ireland) Order 1999

PART II Special measures directions in case of vulnerable and intimidated witnesses

Witnesses eligible for assistance on grounds of age or incapacity

4.—(1) For the purposes of this Part a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this Article—

- (a) if under the age of 17 at the time of the hearing; or
 - (b) if the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances falling within paragraph (2).
- (2) The circumstances falling within this paragraph are—
- (a) that the witness—
 - (i) suffers from mental disorder within the meaning of the [1986 NI 4.] Mental Health (Northern Ireland) Order 1986, or
 - (ii) otherwise has a significant impairment of intelligence and social functioning;
 - (b) that the witness has a physical disability or is suffering from a physical disorder.
- (3) In paragraph (1)(a) “the time of the hearing”, in relation to a witness, means the time when it falls to the court to make a determination for the purposes of Article 7(2) in relation to the witness.
- (4) In determining whether a witness falls within paragraph (1)(b) the court must consider any views expressed by the witness.
- (5) In this Part references to the quality of a witness’s evidence are to its quality in terms of completeness, coherence and accuracy; and for this purpose “coherence” refers to a witness’s ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively.

Witnesses eligible for assistance on grounds of fear or distress about testifying

5.—(1) For the purposes of this Part a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this paragraph if the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.

- (2) In determining whether a witness falls within paragraph (1) the court must take into account, in particular—
- (a) the nature and alleged circumstances of the offence to which the proceedings relate;
 - (b) the age of the witness;
 - (c) such of the following matters as appear to the court to be relevant, namely—
 - (i) the social and cultural background and ethnic origins of the witness,
 - (ii) the domestic and employment circumstances of the witness, and
 - (iii) any religious beliefs or political opinions of the witness;
 - (d) any behaviour towards the witness on the part of—
 - (i) the accused,
 - (ii) members of the family or associates of the accused, or
 - (iii) any other person who is likely to be an accused or a witness in the proceedings.
- (3) In determining that question the court must in addition consider any views expressed by the witness.
- (4) Where the complainant in respect of a sexual offence is a witness in proceedings relating to that offence (or to that offence and any other offences), the witness is eligible for assistance in relation to those proceedings by virtue of this paragraph unless the witness has informed the court of the witness's wish not to be so eligible by virtue of this paragraph.

Contact us

If you would like to know more about the work of the Commission, or any of the services we provide, please contact us.

Northern Ireland Human Rights Commission
Temple Court
39 North Street
Belfast
Northern Ireland
BT1 1NA

Telephone: +44 (0) 28 9024 3987

Fax: +44 (0) 28 9024 7844

Email: info@nihrc.org

www.nihrc.org

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