



**De-escalating parade disputes:  
Interpreting the European Convention on  
Human Rights**

**Democratic Dialogue Freedom of Assembly Working Group**

**February 2003**

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## Preface and Acknowledgements

In May 2002, Democratic Dialogue proposed that a Working Group be established to examine more closely the interpretation of the European Convention on Human Rights in the context of parades in Northern Ireland. This report documents the Working Group's consultation findings and its analysis of the issues raised.

The January 2003 deadline set by the Northern Ireland Office in relation to its consultation on the Report of the *Review of the Parades Commission and Public Processions (NI) Act 1998* conducted by Sir George Quigley (the *Quigley Report*) has led to the Working Group's recommendations being precipitately framed largely in answer to the Quigley proposals. Significantly, therefore, this paper does *not* include the Working Group's conclusions relating to the Human Rights Commission's Bill of Rights consultation. Members of the Working Group felt that the Bill of Rights process raised issues of such importance and complexity that further detailed consideration was required. In due course, the Group therefore hopes to circulate a short supplemental paper focusing solely on matters pertaining to the Bill of Rights. Notwithstanding, the Group believes that its conclusions have significance beyond both the *Quigley Review* and the Northern Ireland Human Rights Commission's consultation on a Bill of Rights for Northern Ireland.

Democratic Dialogue is extremely grateful to the Parades Commission for funding this project, and also, more generally to both the Parades Commission and the Northern Ireland Human Rights Commission for supporting its inception. The drafting and re-drafting of this report would have been impossible but for the many interviewees who gave generously of their time and spoke candidly of their experiences of parades, protests, policing and the legal framework within which these occur. Many bodies also kindly allowed us to have sight of their submission to the Quigley Review. More generally, the emerging debate concerning the integration of human rights and community relations approaches has guided the tenor of our argument, and the papers presented at the round-table conference organised by the Institute for Conflict Research on 26 November 2002 helped clarify and refine preliminary thoughts on this subject.

Finally, the support and guidance of members of the Working Group has been invaluable, and earlier drafts of this paper benefited enormously from their comments. Many sections of this final report directly reflect the contributions brought to the Group by individual members. Their expertise and commitment to working towards a sustainable resolution of parade disputes has made involvement in this project both stimulating and rewarding. That said, responsibility for any errors remains mine alone. The views documented and options suggested in this document are not necessarily shared by the observer members of the Working Group, or by the Parades Commission or Human Rights Commission. Where members of the Working Group themselves did not reach consensus, the divergent opinions are recorded.

Michael Hamilton  
February 2003

# Contents

	<u>Page.</u>
<b>Preface and Acknowledgements</b> .....	<b>2</b>
<b>1. Introduction</b> .....	<b>5</b>
Project Background .....	5
Democratic Dialogue’s past involvement in the parades issue .....	7
Terms of Reference .....	7
Membership of the Working Group .....	8
Consultation, Methodology and Difficulties Encountered .....	8
<b>2. Different Perspectives</b> .....	<b>11</b>
Introduction .....	11
‘Pulling up the roots’? .....	11
A rights based approach? .....	14
Interpreting the ECHR and the Margin of Appreciation .....	16
‘Peaceful Assembly’ .....	16
‘Necessary in a Democratic Society’ .....	21
(a) A pressing social need .....	21
(b) Proportionate to the legitimate aim being pursued .....	25
The Legitimate Aims .....	28
(a) In the interests of national security or public safety .....	28
(b) The prevention of disorder or crime .....	29
i) The anticipated source of disorder .....	30
ii) The political climate .....	32
iii) The potential for widespread disorder .....	33
iv) Pre-existing community tensions & the impact of a parade on community relations .....	35
(c) The protection of health or morals .....	36
(d) The protection of the rights and freedoms of others .....	36
i) Respect for private and family life (Article 8) .....	39
ii) Protection of property & peaceful enjoyment of one’s possessions (Article 1, Protocol 1) .....	41
iii) Freedom of thought, conscience and religion (Article 9) .....	43
iv) A right to freedom from sectarian harassment .....	44
Procedural Issues .....	51
(a) Transparency .....	50
(b) Adjudication and mediation .....	53
i) Retention and/or refinement of the current arrangements .....	54
ii) Greater separation of the adjudication and mediation functions in line with Quigley .....	55
iii) Complete separation of the mediation and adjudication functions .....	56
<b>3. The Working Group’s Conclusions</b> .....	<b>58</b>
Introduction .....	58
‘Pulling up the roots’? .....	59
A rights based approach? .....	60
Interpreting the ECHR and the Margin of Appreciation .....	64
‘Peaceful Assembly’ .....	65
‘Necessary in a Democratic Society’ .....	70
The Legitimate Aims .....	74

(a) In the interests of ‘national security’ or public safety -----	76
(b) The prevention of disorder or crime -----	77
i) The anticipated source of disorder -----	77
ii) The political climate and the potential for widespread disorder -----	78
(c) The protection of the rights and freedoms of others -----	79
i) The frequency of parades in any particular location over a specified period of time -----	79
ii) Respect for private and family life (Article 8) -----	80
iii) Protection of property & peaceful enjoyment of one’s possessions (Article 1, Protocol 1) ---	80
Procedural issues -----	81
(a) Transparency -----	81
(b) Adjudication and mediation -----	82

#### **4. Recommendations ----- 84**

A) The Public Processions (NI) Act 1998 -----	84
B) The Guidelines -----	85
C) The Procedural Rules -----	87
D) The Notification and Police Report Forms -----	87
E) General Practice and Training -----	88

#### **Select Bibliography ----- 89**

#### **Appendices:**

- A – Consultation Interview Questions
- B – Relevant Articles from the European Convention on Human Rights
- C – Summary of relevant Judicial Review proceedings involving decisions of the Parades Commission
- D – Definitions of Sectarianism, harassment, intimidation and incitement to racial and religious hatred
- E – Offences Connected with Public Assembly
- F – Draft Revised Guidelines
- G – Draft Risk Assessment
- H – Outline of the pre-parade procedure recommended by the Quigley Review

# 1. Introduction

## Project Background

- 1.1 The Fourth Annual Report of the Parades Commission explains that the two conferences, held in January and March 2002 as part of the Commission's outreach programme, and organised collaboratively with INCORE and the Community Relations Council, represented "an attempt to open up the debate on human rights and bring greater clarity." It was further suggested that "given the relative lack of European rulings in this area and the prominence of these freedoms in practice and in principle in Northern Ireland a responsibility lies with our society to take a lead in this debate." The Commission was therefore "minded to support further independent study on the core freedoms involved."<sup>1</sup>
- 1.2 The Freedom of Assembly Working Group was established by Democratic Dialogue against this backdrop. Funded by the Parades Commission, the Group was mandated to produce a report examining the interpretation of the various rights and freedoms which can be affected by public processions.
- 1.3 Disputes about parades in Northern Ireland are often described, fundamentally, as being about conflicting rights.<sup>2</sup> Some, however, have regarded this analysis as secondary, instead arguing that such disputes more importantly reflect a legacy of fractured communal relationships. The policy implications of these diagnoses are often presented as being antithetical, and their respective proponents have been reluctant to embrace the other for fear that doing so would undermine their own work.
- 1.4 Strenuous efforts were made to ensure that as many different perspectives as possible were carefully considered by the Working Group. Consequently, the Group's discussions drew upon both human rights and community relations discourses in the belief that neither should be overlooked. This report is thus premised on the assertion that far from being antithetical, these policy approaches are necessarily complementary and mutually reinforcing. The same argument has recently been made by Michelle Parlevliet of the Centre for Conflict Resolution in Cape Town. Parlevliet asserts that "a synergy exists between the two fields which, if left untapped, complicates and undermines processes that work towards peace, justice and reconciliation." Furthermore,

[a]ctors addressing rights-related conflict need not rely exclusively on a rights-based approach. Interest and needs-based methods can also promote the protection of rights. Thus litigation and mediation should be seen as options on a spectrum of conflict management techniques...[N]egotiation or mediation of rights-related conflict takes place within set parameters consisting of constitutional and international human rights standards; these processes do not require a compromise of fundamental principles.<sup>3</sup>

- 1.5 While much has been written about the exercise of the right to freedom of peaceful assembly in Northern Ireland (including work by SACHR,<sup>4</sup> CAJ,<sup>5</sup> CRC,<sup>6</sup> INCORE,<sup>7</sup> Democratic Dialogue,<sup>8</sup>

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<sup>1</sup> Parades Commission, *4<sup>th</sup> Annual Report*, pp.15-16.

<sup>2</sup> See for example, the *Report of the Independent Review of the Parades Commission* (the *Quigley Report*) at paras. 10.1(vi), 15.13 and the Executive Summary, para. 13.

<sup>3</sup> Parlevliet, M., "Bridging the divide: Exploring the relationship between human rights and conflict management," *Track Two*, Vol.11, No.1 March 2002, pp.8-43, at p.8 and p.29. Available online at [http://ccrweb.ccr.uct.ac.za/two/11\\_1/bridging.html](http://ccrweb.ccr.uct.ac.za/two/11_1/bridging.html)

<sup>4</sup> *Submission by the Standing Advisory Commission on Human Rights (SACHR) to the Independent Review of Parades and Marches*, October 1996, pp.185-200, Annex F, SACHR 22<sup>nd</sup> Annual Report, 1996-97.

<sup>5</sup> *CAJ Submission to the Independent Review of Parades and Marches*, October 1996; *Commentary on 1996 Primary Inspection report by Her Majesty's Inspectorate of Constabulary with reference to the RUC*, March 1997; *Policing the*

and NIHRC<sup>9</sup>), extensive consultations and legislative reviews have been conducted,<sup>10</sup> and the subject has been debated at numerous conferences,<sup>11</sup> the case for an integrated policy approach in Northern Ireland has so far had few champions. One early attempt at such is contained in the seven principles recommended by the North Review Team:<sup>12</sup>

- the right to peaceful free assembly should (subject to certain qualifications) be protected,
- the exercise of that right brings with it certain responsibilities; in particular, those seeking to exercise that right should take account of the likely effect on their relationships with other parts of the community and be prepared to temper their approach accordingly,
- all those involved should work towards resolution of difficulties through local accommodation,
- in the exercise of their rights and responsibilities, those involved must not condone criminal acts or offensive behaviour,
- the legislation and its application must comply with the Government's obligations under international law, and provide no encouragement for those who seek to promote disorder,
- the structure for, and process of adjudication for disputes over individual parades should be clear and applied consistently with as much openness as possible,
- any procedures for handling disputes over parades and the enforcement of subsequent decisions should be proportional to the issues at stake.

1.6 The legal context in which the Parades Commission takes its decisions, however, has changed since these principles were first enunciated. The Human Rights Act 1998 (which came into force in October 2000 and incorporates most of the European Convention on Human Rights (ECHR) into domestic law) has reinvigorated an interest in the level of protection being afforded to the various rights at stake. This serves as a reminder that the building of relationships will only be sustainable if, in the process, core rights are upheld.

1.7 The Working Group's report aims to stimulate further debate about how this so-called 'legal route' can be travelled in a way that substantially improves the prospect of a long-term resolution to parade disputes. Too often, the ECHR is viewed as a ceiling rather than as a floor. Consequently, insufficient thought is given to *how* the protection of those rights might best be achieved. Unless the legal and conflict resolution approaches inform one another, gains made in one field will often be interpreted as losses in the other, thereby stymieing the potential for progress in both. A failure to work towards an integrated policy framework will mean that efforts to resolve contentious parades may pull in opposite directions, store up difficulties for the future, and ultimately become part of the problem rather than the solution.

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*Police: A Report on the policing of events during the summer of 1997 in Northern Ireland*, November 1997; *Comments on the Public Processions (NI) Bill*, November 1997; *CAJ Response to the Guidelines Code of Practice and Procedural Rules issued by the Parades Commission*, February 1998; *CAJ's commentary on Public Order Policing 1998*; *CAJ's submission to the Progress Review of the work of the Parades Commission*, November 1999; *Policing and Public Order in Northern Ireland 1996-2000: Some CAJ reflections*, May 2001; *CAJ's Submission to the Review of the Parades Commission being carried out by Sir George Quigley*, May 2002.

<sup>6</sup> Hadden, T. and Donnelly, A., *The Legal Control of Marches in Northern Ireland*, CRC, January 1997.

<sup>7</sup> Kelly, G. (ed.), *Mediation in Practice*, INCORE, 1998.

<sup>8</sup> See paras. 1.8-1.9 overpage.

<sup>9</sup> Hamilton, M., Jarman, N., and Bryan, D., *Parades, Protests and Policing: A Human Rights Framework*, NIHRC, March 2001.

<sup>10</sup> Including those by the Northern Ireland Political Forum, the Independent Review of Parades and Marches (the North Review), the NIO Review of the Parades Commission, the Northern Ireland Affairs Select Committee Review of the Parades Commission, and the Review of the Parades Commission and Public Processions (NI) Act 1998 conducted by Sir George Quigley.

<sup>11</sup> Most recently, "Freedom of Expression and Freedom of Assembly: International and European Comparisons" organised by Democratic Dialogue on 21<sup>st</sup> September 2001, and the two conferences organised collaboratively by the Parades Commission, INCORE and the Community Relations Council – "Parades: A Vision for the Future" – on 26<sup>th</sup> January and 9<sup>th</sup> March 2002.

<sup>12</sup> These principles "should form the basis for the development of processes and procedures to address the issue of conflict over parades" (*North*, p.130, para. 11.19). They are now referred to in each determination Parades Commission issued by the Parades Commission.

## Democratic Dialogue's past involvement in the parades issue

- 1.8 Democratic Dialogue has a long standing involvement and interest in the resolution of contentious parades. After the parades controversy in Northern Ireland escalated in 1995, Democratic Dialogue convened an *ad hoc* working group comprising academics working in the area and people involved in mediation efforts with the marching orders and residents' groups on the ground. This work not only fed into Democratic Dialogue reports 7 & 8, *With All Due Respect* and *Politics in Public*<sup>13</sup> respectively, but also generated policy advice to the *Independent Review of Parades and Marches* (the *North Review*), notably in recommending the establishment of a Parades Commission to make objective adjudications on the conflicts of rights involved.
- 1.9 That group was in regular contact with the Northern Ireland Secretary of State, and not only responded to the Public Processions Bill prepared by government, but also later assisted the Parades Commission in drafting its guidelines and procedures. The work led to a further research project on public order and parades, together with the Belgian Gendarmerie and South African Police Service who face similar challenges in working in a divided society, and to a practical report on the monitoring and stewarding of parades, *Independent Intervention*, published in conjunction with the North Belfast Community Development Centre. In the spring of 2000, the director of Democratic Dialogue was appointed to the Northern Ireland Community Relations Council. In autumn 2000, he was invited by the Northern Ireland Human Rights Commission to join a working group advising the Commission on how a Bill of Rights for Northern Ireland might address the critical questions of culture and identity. He later drafted that group's report. In November 2000, represented by three members of the present Working Group, Democratic Dialogue presented oral evidence to the Northern Ireland Affairs Select Committee, and on 21 September 2001, Democratic Dialogue organised a conference entitled: 'Freedom of Expression and Freedom of Assembly: International and European Comparisons'.
- 1.10 Outlined below are the Working Group's terms of reference, membership, and the methodologies employed in consultation.

## Terms of Reference

- 1.11 The following terms of reference were agreed by the members of the Working Group:

The Democratic Dialogue Freedom of Assembly Working Group shall examine how the European Convention on Human Rights might be interpreted and/or supplemented to reflect the particular circumstances surrounding the exercise of the right to freedom of peaceful assembly in Northern Ireland. In particular, the Working Group shall consider:

- 1) Article 11(1) of the European Convention which enshrines the right to peaceful assembly, and Article 11(2) of the Convention, under which restrictions can be imposed on the exercise of this right so long as they pursue one of a number of "legitimate aims" contained therein.
- 2) The rights which might be affected by the exercise of the right to freedom of peaceful assembly<sup>14</sup> and the threshold of protection to be afforded to these rights.
- 3) The implications of (1) and (2) for the procedures involved in restricting the exercise of the right to freedom of peaceful assembly.

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<sup>13</sup> Jarman, N., Bryan, D., Caleyron, N., and de Rosa, C. *Politics in Public: Freedom of Assembly and the Right to Protest*, Democratic Dialogue, 1998.

<sup>14</sup> This might include rights not contained in the European Convention.

## Membership of the Working Group

- 1.12 Initially it was proposed that the Freedom of Assembly Working Group would have a maximum complement of 16 persons (including the chairperson). Invitations were therefore extended to one representative of Democratic Dialogue, one representative of the Parades Commission and one of its Secretariat, two representatives of the Human Rights Commission, one representative of the Committee on the Administration of Justice, one representative of the *Independent Review of the Parades Commission* (the *Quigley Review*), four lawyers who had previously acted on behalf of parties to parades disputes in cases raising Convention issues (two for parading organisations and two for residents groups), and five academics who had published work in this specific area. It was emphasized that no-one was being invited to sit on the Group in a representative capacity, but rather only on account of their experience and knowledge of the pertinent issues. However, for a variety of reasons, only eight individuals agreed to sit on the Working Group, including only one of the four lawyers approached.
- 1.13 Furthermore, the representatives of the Human Rights Commission and the Parades Commission agreed to participate only as observers. Observer status granted full speaking rights to parties, but placed such members under no obligation to endorse the Working Group's recommendations. The Group's membership is as follows:
- Mr. Robin Wilson, Director, Democratic Dialogue (**Chair of the Working Group**)
  - Dr. Michael Boyle, Parades Commission Secretariat (**Observer**)
  - Professor Tom Hadden, Northern Ireland Human Rights Commission (**Observer**)
  - Ms. Nadia Downing, Northern Ireland Human Rights Commission (**Observer**)
  - Mr. Neil Faris, Solicitor
  - Dr. Dominic Bryan, Director, Institute of Irish Studies, Queen's University of Belfast
  - Dr. Neil Jarman, Deputy Chief Executive, Institute for Conflict Research
  - Mr. Michael Hamilton, School of Law, University of Ulster

## Consultation Methodology and Difficulties Encountered

- 1.14 In fulfilling its remit under the above terms, the Working Group agreed that it would:
- a) Examine judicial interpretation of Article 11 and any other relevant Articles of the European Convention on Human Rights;<sup>15</sup>
  - b) Convene a number of discussion groups and consult with interested parties focusing particularly on the three issues raised in the terms of reference above;
  - c) In light of (a) and (b), suggest possible legislative amendments, and draft, supplementary clauses and/or interpretive guidelines which might be included in the proposed Bill of Rights for Northern Ireland;
  - d) Present a report to the Northern Ireland Human Rights Commission, Parades Commission and the Independent Review of the Parades Commission

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<sup>15</sup> Analysis of the European Court jurisprudence can be found in *Parades, Protests and Policing: A Human Rights Framework*, Northern Ireland Human Rights Commission (March 2001).



outlining possible options on the way forward. This paper should also be presented at a public seminar.

- 1.15 It was hoped that a consultation process could be designed which would stimulate and draw out new thinking in relation to what constitutes ‘peaceful assembly,’ the circumstances in which it might legitimately be restricted, the rights of those affected by the exercise of the right to freedom of peaceful assembly, and the procedures by which all such rights are adjudicated upon. As paragraph (b) above suggests, it was envisaged that this would involve invited discussion groups drawn, separately, from each of the broad community constituencies (loyalist/unionist and republican/nationalist), as well as other interested parties including the police, business interests, and those with previous experience of intervening in and mediating parade disputes.
- 1.16 Each discussion group would thus comprise a broad range of opinions whilst still being ‘intra-community’ orientated. It was felt that this would enable the necessary dialogue between different groups within each of the two main communities, while at the same time providing a relatively ‘safe’ environment for that dialogue. This, it was hoped, could have added value as a single-identity community relations initiative given that recent research has highlighted the need for work which can provide a “safe retreat” for the discussion of contentious issues involving the parties most affected.<sup>16</sup>
- 1.17 Unfortunately, the discussion groups did not materialize. This was, in some part, due to the unavoidably short notice given to invitees because the Working Group was anxious to hold these discussions before the start of July 2002. Consequently, members agreed to proceed instead by way of semi-structured interviews with individual parties. The primary and supplementary interview questions are listed in *Appendix A*. In the time available to it, Democratic Dialogue has therefore solicited the views of as many parties, who have an interest in the resolution of contested parades, as possible. To maintain confidentiality, none of these interviewees is identified in this report. Nonetheless, it is instructive to provide a breakdown, by community affiliation, of the meetings which took place (noting that in several of these meetings, more than one interviewee was present). The total number of meetings which took place was 12. The number of individuals who attended these meetings was 25. The meetings can be broken down as follows:

**Republican/Nationalist: 2**  
**Loyalist/Unionist: 4**  
**Other: 6**

Written contributions were also received from five groups.

- 1.18 Consultation, however, proved difficult, and many parties appeared reluctant to become involved. This might be explained in a number of ways. First, seeking interviews during the summer months presents obvious practical difficulties of itself. Indeed, that the *Independent Review of the Parades Commission* – hereinafter, the *Quigley Review* – was also taking place during this period led some parties – who emphasized their limited resources – to channel their energies into that Review. Secondly, however, the difficulties encountered might indicate a widely held fear that to examine the substance of the rights which are claimed by the protagonists in, and parties affected by, parade disputes has the potential to undermine closely guarded positions. As one interviewee put it, many people are more comfortable to engage in

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<sup>16</sup> Hughes, J., and Donnelly, C., *Single Identity Community Relations in Northern Ireland*, Ulster Papers in Public Policy and Management, No.77, University of Ulster (1998). Hughes, J., “Community Relations in Northern Ireland: Lessons from Drumcree”, *Journal of Ethnic and Migration Studies* (July 1998) Vol.24, No.3, pp.433-450.

the “hot air” of rights language – content with its ambiguities – because disputes can safely be played out from the security of the trenches.

1.19 Furthermore, in the context of such disputes, the lack of trust between many of the parties compounds the fear that any exploratory steps might later be used against those willing to take them. Quite simply, parties may not have wanted to be seen to lend credibility to Democratic Dialogue’s process (particularly if it was perceived as attempting to prescribe a ‘route map’ for the future of parading). Our experience has been similar to that articulated by the Parades Commission in its report from the two conferences. Namely, that “discussions revealed that there was not an appreciation of a comprehensive range of rights and responsibilities from all sides.” It may also be, therefore, that parties still lack the confidence to engage in debate about ostensibly legal issues.

1.20 Notwithstanding, one interviewee, whilst stating that he would have felt slightly uncomfortable in the ‘single-identity’ discussion group to which he was allocated, believed strongly that further *intra*-community dialogue was needed in order to challenge the discourses that so often monopolize the debate. As acknowledged by the Civic Forum in its submission to the *Quigley Review*:

Society needs more space where diverse groups of people can engage beyond politeness on such themes in order to model new ways to deal with contentious issues and encourage the growth of a plural society.

1.21 An earlier version of this report served as both an interim discussion document for the Working Group, and the Group’s submission to the *Quigley Review*. Section 2 documents the views obtained through our consultation process and literature review; section 3 explains the Working Group’s conclusions; and section 4 summarizes the Group’s recommendations by suggesting how its conclusions might best be implemented.

1.22 Meetings of the Working Group (totalling 18 hours in length) were held on:

- Thursday 20 June 2002, 2.00-4.00pm
- Friday 2 August 2002, 2.00-4.00pm
- Tuesday 20 August 2002, 9.30am-1.00pm
- Tuesday 3 September 2002, 9.30am-12.30pm
- Tuesday 24 September 2002 (with Authorised Officers), 1.00-3.00pm
- Tuesday 15 October 2002, 9.30am-11.30am
- Thursday 9 January 2003, 9.30am-1.00pm

## 2. Different perspectives

### Introduction

- 2.1 This section of the report records the range of views expressed during the Working Group's consultation. The temptation to filter opinion has been resisted – this has been necessary only to ensure that some focus is maintained on the interpretation of the ECHR in so far as this relates to parades and protests in Northern Ireland (as specified in our terms of reference at *para. 1.11* above). These views are supplemented, where appropriate, by further views and information obtained from a comprehensive literature review (see the select bibliography). While the aggregate of this information crucially informed the Working Group's discussions, nothing in this section should be read as foreshadowing the Group's conclusions. The latter are set out in section 3 of this report, which loosely follows the structure below so that cross-referencing is made easier.
- 2.2 The views expressed by interviewees are not attributed to them in this paper. The only exception to this is where views are already in the public domain or the relevant party's consent was obtained. In such circumstances, attribution should not be understood as imputing greater significance to those views.

### 'Pulling up the roots'?<sup>17</sup>

- 2.3 Some interviewees argued that the existing law – the *Public Processions Act 1998* – is entirely adequate, and that the axiom – “if it ain't broke, don't fix it” – applies. A number of those interviewees felt that on account of a general decline in the overall level of violence surrounding the marching season over recent years, that progress was beginning to be made.<sup>18</sup> Others have suggested that while this may be so, the current legislation is left wanting in interpretation, while still others remonstrated that the legislation is fundamentally flawed.
- 2.4 Central to this debate is the question of how progress ought to be measured. Our attention was drawn to the findings of the Omnibus survey conducted by the Northern Ireland Statistics and Research Agency (NISRA) between 26 February and 30 March 2001 which revealed that only 35% of Catholics and 8% of Protestants felt the Parades Commission had improved the situation, with 50% of Protestants and 14% of Catholics believing that the Commission had actually made the situation worse.<sup>19</sup> This can be compared with the earlier Research and Evaluation Services Survey conducted in March 1999 which found that only 15% of those surveyed felt that the Commission was successful.<sup>20</sup>
- 2.5 Other suggestions as to how progress could be measured included the annual number of parades considered to be contentious (see further below at *paras. 2.42-2.43*),<sup>21</sup> the prevalence

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<sup>17</sup> The Chair of the Parades Commission, Mr. Tony Holland, when asked whether the Commission had made any recommendations to the Secretary of State concerning its operation stated: “There is a great temptation, if you like in planting terms, to pull up the roots of the plant to see how it is growing. If you do that, in the end the plant dies.” Northern Ireland Affairs Committee, Second Report Session 2000-01, *The Parades Commission*, HC 120-II, p.169, Q.521.

<sup>18</sup> See for example, the content of the Secretary of State's announcement on 31/12/02 that the members and Chairman of the Parades Commission would be re-appointed for a further year.

<sup>19</sup> Parades Commission, *Third Annual Report*, 2000-2001, pp.30-32.

<sup>20</sup> Parades Commission, *Second Annual Report*, 1999-2000, pp.25-6.

<sup>21</sup> See also *Second Report from the Northern Ireland Committee: The Parades Commission: Session 2000-01: HC 120-II, Vol.I*, para. 26 which states that “[t]he RUC observed that since the establishment of the Commission, the proportion of parades considered to be contentious has increased. In the period 1992 to 1997, about 0.8% of parades had conditions imposed on them by the RUC. The corresponding proportion the subject of determinations by the Commission is 3.9%, a

or otherwise of parading issues in local community safety audits, the annual number of parades restricted, the annual number of parades at which police record the occurrence of disorder, and the annual cost of policing ‘the marching season’. The table below has been largely compiled using statistics from the Parades Commission’s Annual Reports. Figures marked \* were sourced from a ‘*Supplementary Memorandum Submitted by the Parades Commission*’ to the Northern Ireland Affairs Select Committee.<sup>22</sup>

Year	Total no. of parades	Total no. of parades considered contentious	No. of contentious parades notified by Portadown LOL No.1	% of total no. of parades considered contentious	Total no. of parades with route restrictions	Total no. of parades restricted	% contentious parades with no route restrictions	% contentious parades not restricted
1998-1999	3211*	203	c. 38	6.3	119	132*	41	35
1999-2000	3403	197	c. 52	5.7	151*	217*	23	10
2000-2001	3440	235	c. 59	6.8	130	175	45	26
2001-2002	3301	220	c. 59	6.6	130	152	41	31

2.6 The commentary in the 2001-2002 Annual Report of the Parades Commission, however, argues that the “disruptive potential” of a parade “is often of more significance in assessing the current scale of the parading conflict than the simple arithmetic of comparing the number of contentious parades in one year to those occurring in the next year.”<sup>23</sup> Similarly, in a Supplementary Memorandum to the Northern Ireland Affairs Select Committee, the Commission stated that “[t]he heat of the situation is often a better index than the actual numbers of contentious parades”, and pointed to a “general reduction in tension around parading” citing a number of specific examples.<sup>24</sup>

2.7 ‘Engagement’ has also, on occasion, been heralded as indicating progress. The *Quigley Report*, however, points to the fact “that...nearly 6 years on, there are still situations where there is no real engagement.”<sup>25</sup> The *Quigley Report* also stresses that:

No process of change management goes smoothly but it is always essential to be able to demonstrate success – to show that things are working – and thereby provide encouragement to keep rolling out the process.<sup>26</sup>

2.8 Various other indicators were suggested by interviewees, and these can be summarily categorised using the four dimensions of conflict – issues, feelings, behaviour and relationships – as identified by *Mediation Northern Ireland* (formerly, the *Mediation Network*). It was suggested that a lack of progress in any one of these areas will prevent progress in the other three:

- **Issues:** Progress is measured by the degree of consensus surrounding the causal factors underlying parade disputes (for example, the rights issues at stake and how particular parades affect these), and whether or not there is a common understanding of these factors (as evidenced, for example, by the Surveys conducted for the

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more than fourfold increase. The RUC attributed this principally to two factors: the broadening of the factors to be considered in relation to parades and the establishment, through the Authorised Officers, of new conduits of communication that previously did not exist, particularly in relation to some residents’ groups. It conceded that further factors might be involved, such as less tolerance of controversial parades, the routine notification of proposed Orange Order parades along the Garvaghy Road in Portadown, and intentions on the part of some to exploit the parades issue politically.”

<sup>22</sup> Northern Ireland Affairs Committee, Second Report Session 2000-01, *The Parades Commission*, HC 120-II, Vol.II, Minutes of Evidence and Appendices, p.19.

<sup>23</sup> 4<sup>th</sup> Annual Report of the Parades Commission 2001-2002, p.35.

<sup>24</sup> Northern Ireland Affairs Committee, Second Report Session 2000-01, *The Parades Commission*, HC 120-II, Vol.II, Minutes of Evidence and Appendices, Appendix 22, p.301.

<sup>25</sup> Quigley, para. 13.11.

<sup>26</sup> Quigley, para. 13.20(iv).

*Independent Review of Parades and Marches (the North Review)*, by the proceedings of local community forums or by independent research);

- **Feelings:** Progress is measured by the level of antagonism between the parties to contested parades and more widely between the two broad ethnic constituencies in Northern Ireland (see, for example, the Northern Ireland Life and Times Surveys) and by how individuals perceive their own identity (as recorded, for example, in the Northern Ireland Census statistics);
- **Behaviour:** Progress is measured by local behavioural trends during periods of heightened tension between communities (using, for example, prosecution statistics for public order offences by police District Command Unit, local community safety audits, or by maintaining a record, by location, of breaches of the Parades Commission’s Code of Conduct as detailed in the reports of Parades Commission monitors);
- **Relationships:** Progress is measured by the quality of relationships within and between parties to parade disputes (demonstrated, for example, by the genuineness of hitherto non-existent dialogue),<sup>27</sup> and by assessing the capacity for such experiences to be extrapolated to the wider community (possibly assessed by examining whether all parties to the particular dispute, or the wider public, are aware of and informed about this dialogue).

2.9 Before leaving the question of whether or not the present system ‘ain’t broke’, it is instructive to list the *Quigley Report’s* criticisms of the current arrangements. Arguing that such criticism “in no way reflects on the work which the Commission has done” and that its recommendations build “on the foundations laid by the Commission,”<sup>28</sup> the *Quigley Report* states that:

#### *The overall process*

- [T]he annual cliffhanging over routes...raises tension as decisions on individual parades are awaited (para. 10.1(ix)).
- So much of the Commission’s work is crammed into such a short period of the year immediately leading up to, and including the marching season... (para.15.12(iv)).

#### *The legislative criteria and Guidelines*

- The system of criteria by which the Commission takes its decisions is characterised by too much complexity and insufficient clarity. It is a compound of principles and factors from North, criteria on the face of the 1998 Act, the Commission’s own Guidelines and the ECHR. Revised Guidelines, having indicated the sources they were drawing on, could pull all this material together into more intelligible form, though it would be difficult to do this entirely satisfactorily in terms of the existing legislation. (para.15.12(i))

#### *The Commission’s determinations*

- ...difficulty has been experience in classifying the factors germane to Determinations regarding parades. (para.15.9)
- ...a determination...seldom distinguishes between the elements of ‘prevention’ and ‘protection’ as factors in its decision. Relatively rarely, a Determination will say explicitly that the rights and freedoms of others are not affected by the proposed march but does not necessarily say on what grounds this conclusion rests. (para.15.11)

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<sup>27</sup> The *Response of the Community Relations Council to the Review of the Parades Commission* suggests, at para.5, that “[e]ngagement should be measured in terms of genuine listening and receptiveness to the views of others, and not simply contact. Since most of the disputed parades are in predictable locales the Commission’s monitoring of dialogue and engagement should not be confined to the marching season but information should be gathered throughout the year.”

<sup>28</sup> Quigley, para. 11.17.

- Determinations seem primarily concerned to ensure that, if challenged, the Commission can be seen to have faithfully discharged its duty to have regard to everything to which it is obliged to have regard (para.15.12 (iii)).

#### *The Transparency of the Commission's procedures*

- Both sides allege lack of openness and transparency, with the Loyal Orders arguing that it is unjust that their membership is asked to defend their rights without knowing what evidence is presented that is so fundamental that those rights should be denied. (Exec. Summary, para.46)
- The test of fairness cannot be fully met within the tight confidentiality constraints by which the Commission is bound by its Procedural Rules (Exec Summary, para.49)

#### *Facilitating mediation*

- The difficulties associated with the current process can lead to mutual recrimination, as each side seeks to explain the failure to engage. There are accusations of unwillingness on one side or other to enter talks without preconditions and of agendas being too loose, too broad or too narrow. There are interminable arguments about process. An already tense situation risks becoming even more charged when even the machinery for alleviating it becomes a bone of contention. (para.13.13)
- More could be done to explain why so much importance is attached to engagement (Para 13.20 (i)).
- More could be done to demonstrate what it is believed is being achieved by engagement and thereby encourage increased effort. (para.13.20(iv)).
- Given the charge of inconsistency...the Commission might also have made it clearer how it applies the engagement factor and why...the weight it has given to it or to particular manifestations of engagement may have differed from case to case. (para.13.20(v)).

## **A rights based approach?**

2.10 The *Quigley Report* notes a degree of consensus that rights issues are central to parade disputes:<sup>29</sup>

It was asserted on all sides that it was rights that were at the heart of disputes. It was not always clear whether the rights being claimed bore the claimant's own stamp of validation or were more independently grounded. There was, however, considerable support for the ECHR as the best available framework, although this was occasionally tempered by a hankering for adjustments (perhaps via a customised Northern Ireland Bill of Rights) which would bring the Convention more into line with the view of the world held by whoever was proposing the adjustment.

2.11 One of the 'key issues raised' at the two conferences (see *para. 1.1* above) was that the possible incorporation of rights around parades and protests into a Northern Ireland Bill of Rights was an area which should be investigated more fully by both the Parades Commission and Human Rights Commission. This view was also borne out by our own discussions.

2.12 In relation to Article 11 ECHR (the right to freedom of peaceful assembly, see *Appendix B*), several interviewees from a unionist/loyalist background spoke of their disappointment that the Human Rights Commission had provisionally concluded that "it is not necessary to supplement the Convention Article with any other provisions reflecting the particular circumstances of Northern Ireland." At the same time, we sensed a widely held suspicion in the nationalist/republican constituency that any attempt to supplement the Bill of Rights in relation to this issue would seek to bolster a right to march. Suspicions seemed particularly rife because the *Quigley Review* was itself a by-product of the Weston Park talks,<sup>30</sup> and widely perceived as

<sup>29</sup> At para. 10.1(vi), and similarly Exec. Summary, para. 13.

<sup>30</sup> See Quigley paras. 1.3-1.4. Also, the *Weston Park document*, available at <http://www.nio.gov.uk/pdf/proposals0108.pdf> at para. 17 (proposals on normalisation): "In order to help create greater consensus on the parades issue and a less contentious environment in which the new police service will operate, the British Government will review the operation of the Parades Commission and the legislation under which it was established. The Government believes the Parades Commission has had four successful years of operation against a difficult background. But this review, which will take place in consultation with the parties and others with an interest including the Irish Government, will consider whether

a concession to Unionism. Some parties also feared that parts of the *Quigley Report* would be traded in an attempt to restore the devolved administration. It was also emphasized, however, that those from a unionist/loyalist background were not alone in raising concerns about the Parades Commission's application of human rights principles. The Northern Ireland Affairs Select Committee itself recommended urgent consideration of the Commission's procedures in terms of transparency (Article 6 ECHR and the rules of natural justice), and noted the "very real complexities and uncertainties" in human rights law.<sup>31</sup> Furthermore, in 2001 a nationalist/republican band applied for leave to Judicially Review the Parades Commission's procedural rules (again, in terms of transparency). This case has been delayed on several occasions because the applicants have been denied Legal Aid.

- 2.13 Fears were expressed, particularly by those with experience of mediating parade disputes, that to now encourage greater recourse to legal rights and remedies could only lead to greater contention and litigation. To raise people's expectations that *their* rights may be enforced would seriously compromise the perceived potential for 'satisfactory accommodations' because it would effectively signal a shifting of the goalposts. To create 'winners', it was suggested, does not help people take cognisance of their responsibilities. The Evangelical Contribution on Northern Ireland (ECONI) has similarly argued that:

The dispute between the Orange Order and the Garvaghy Road Residents' Association in Portadown over the route of the Order's parade from Drumcree Parish Church has regularly been expressed in the language of rights. These demands for rights are mutually exclusive and allow no scope for a resolution of the situation based on compromise, negotiation, or consensus. The demand for rights – even though it may be largely rhetorical – works against the attempt to use other means of social engagement and negotiation to address the issue. These legal models – conflictual by their very nature – provide little scope for mediation, compromise or agreement.<sup>32</sup>

- 2.14 In contrast, the Northern Ireland Office (NIO) has argued that whilst the Human Rights Act has been something of a 'voyage of discovery'<sup>33</sup>, a rights framework can provide a "commonly understood level playing field" for the resolution of parade disputes.<sup>34</sup> The NIO's review of the Parades Commission – in considering the question of early implementation of the HRA (which ultimately did not occur) – noted that:

Ministers took the view that, if the courts moved early to clarify the Convention points at issue, the Commission's job could be made easier in framing future decisions and in demonstrating their underlying even-handedness and predictability. While both sides would not necessarily be satisfied with the outcome, the fact that both had called for a more rights-dominated approach would increase the PR price for resorting to violence if they lost. The move to a courts-based system would also move once and for all the suspicion that these determinations were made on political grounds by the Government, and make the task of policing determinations easier.<sup>35</sup>

- 2.15 Quigley concludes by urging that "the criteria to be applied to parades should be exactly aligned with the ECHR."<sup>36</sup>

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there are any changes which could promote further public confidence on all sides, respect for the rights of all and the peaceful resolution of disputes on parades. Any legislative changes would take effect after summer 2002."

<sup>31</sup> *Second Report from the Northern Ireland Committee: The Parades Commission: Session 2000-01: HC120-I*, paras. 118 (k) and (p) respectively.

<sup>32</sup> ECONI, *A Shared Vision: Human Rights and the Church*, p.23.

<sup>33</sup> Evidence of Mr. David Watkins, NIO, to the Northern Ireland Affairs Select Committee, 17 January 2001, *Second Report from the Northern Ireland Committee: The Parades Commission: Session 2000-01: HC 120-II*, The Stationery Office, p.96, Q.338.

<sup>34</sup> *Ibid.*, p.88, question 295.

<sup>35</sup> *Second Report from the Northern Ireland Committee: The Parades Commission: Session 2000-01: HC 120-II*, The Stationery Office, p.101.

<sup>36</sup> Quigley, para. 18.2; also para. 15.13.

## Interpreting the ECHR and the Margin of Appreciation

2.16 The Human Rights Commission's *Parades, Protests and Policing* report argued<sup>37</sup> that:

The margin of appreciation is fundamentally an international doctrine,<sup>38</sup> and the Northern Ireland courts could, in theory, scrutinize the necessity of any impugned measure much more closely. Indeed, rather than blindly applying the European jurisprudence, the Courts here could actively re-interpret those cases in which the decision relied heavily upon the wide margin granted to national authorities (eg *Chorherr v Austria* (1993) and *Rai, Allmond and Negotiate Now* (1995)).

2.17 Similarly, the *Quigley Report*<sup>39</sup> stated that:

It has been suggested that the doctrine of the margin of appreciation – described as ‘a spreading disease’ – has the power to undermine the Convention but it has been defended on the ground that it is based on respect for the different cultural and judicial traditions of the states which are party to the Convention ... There is support for the view that, since the domestic courts are an integral part of the system within the State for protecting human rights, the ‘margin of appreciation’ doctrine should have no place in domestic law. That might have implications for how the domestic courts use cases which have been decided by the European Court in accordance with that doctrine.

### ‘Peaceful assembly’

2.18 The first question posed to interviewees (see *Appendix A*) concerned the type of behaviour which ought to attract the protection of ‘the right to freedom of peaceful assembly’. In essence, what should be regarded as ‘peaceful assembly’?

2.19 Several interviewees felt that an organiser of any event who had evidenced his/her peaceful intentions should be afforded the protection of Article 11(1). They would forfeit this protection in the future should violence materialize (either on the part of participants in, or supporters of, their event). A different view, however, was also expressed by a number of interviewees: certain types of event – even if the organiser has avowedly peaceful intentions – can never be viewed as ‘peaceful’ in certain contexts given the deeply divided nature of society in Northern Ireland. Again, others countered the latter assertion by suggesting that public assembly is implicitly *about* difference, and that no-one would suggest that a Gay-Pride march should not be viewed as peaceful simply because a majority of those who lived or worked along part of its route were homophobic. A similar analogy was drawn with pro-choice marches passing through areas in which residents were thought to be implacably opposed to abortion. One interviewee argued that care should be taken not to treat some assemblies differently just because their content had political overtones.

2.20 Some also made the point that even if there was no obvious cultural value in a parade passing through a particular area, the principle should be that it is still protected by the right to peacefully assemble. They considered that the *purpose* of a parade was irrelevant to the question of whether or not it was ‘peaceful’, and referred to US jurisprudence which holds that content based restrictions are unconstitutional. It was also noted that assurances of peaceful

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<sup>37</sup> At p.20, para. 2.3.3.

<sup>38</sup> See Fenwick, Helen, “The Right to Protest, the Human Rights Act and the Margin of Appreciation” (1999) 62:4 *Modern Law Review* 491-514. Also *R. v DPP ex parte Kebilene* [1999] 3 WLR per Lord Hope: “This technique is not available to the national courts when they are considering Convention issues arising within their own countries”, although “[i]n some circumstances it will be appropriate for the courts to recognize that there is an area of judgment within which the judiciary will defer, on *democratic* grounds, to the considered opinion of the *elected* body or person whose act or decision is said to be incompatible with the Convention” [emphasis added].

<sup>39</sup> Quigley, p.135, para. 12.22.



intent of themselves do not necessarily guarantee the peaceful nature of the event. One example was given where the police had relied on such assurances, but doing so had compromised their own safety.

2.21 We were also told that the traditionality of certain parades bore testament to their peaceful nature. Others, though, pointed to so-called ‘traditional’ parades which they considered would be equally provocative, and which had on occasion sparked disorder. Some felt that ‘traditionality’ should not be a factor at any stage of the inquiry, as it was not in keeping with international human rights standards, and it could further serve to maintain inequalities of power.

2.22 In a number of decisions the Parades Commission has emphasized that:

The Commission has accepted that there is a right of lawful and peaceful protest vested in those who legitimately object to the notified parade. However, there is neither right nor justification for unlawful or violent protest.

2.23 The *Quigley Report* recommends that an amended *Public Processions Act* should include a provision that everyone has the right to freedom of peaceful assembly.<sup>40</sup> ‘Peaceful assembly’ would be defined to include ‘peaceful procession’ in line with the definition in *Christians Against Racism and Fascism v UK (1980)*:

The freedom of peaceful assembly covers not only static meetings but also public processions. It is moreover a freedom capable of being exercised not only by the individual participants of such demonstration but also by those organising it, including the corporate body.<sup>42</sup>

2.24 It was noted in the NIHRC’s ‘*Parades, Protests and Policing*’ report<sup>43</sup> however, that the term ‘assembly’ has not been defined by either the European Commission or Court of Human Rights. One commentator on the UN Covenant on Civil and Political Rights argued that “only intentional, temporary gatherings of several persons for a specific purpose are afforded the protection of freedom of assembly.”<sup>44</sup> In any case, it was argued that ‘assembly’ applies equally to all kinds of organised public events including, for example, parade related protests.<sup>45</sup> Immediately this raises the question of whether the Parades Commission (or its successor) should be given jurisdiction over all public assemblies rather than merely public processions. This question is also addressed in chapter 19 of the *Quigley Report*, which proposes that protests as well as parades *should* fall within the scope of the determining body.

2.25 The *Quigley Report* accords substantial weight to the distinction between *peaceful* assembly and that which is not peaceful:<sup>46</sup>

... any parade which the organiser could not show would involve peaceful assembly would not merely face the prospect of re-routing but would not take place at all ... Breaches of the Code of Conduct in respect of previous parades would be taken into consideration.

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<sup>40</sup> Quigley, para. 15.13.

<sup>42</sup> Quigley, para. 12.7; *CARAF* (1980), European Commission, p.148 at para.4. See also *Ezelin v France* (1991), European Commission, para. 32.

<sup>43</sup> *Parades, Protests and Policing*, pp.14-16, paras. 2.2.2-2.2.4.

<sup>44</sup> Nowak, Manfred, *UN Covenant on Civil and Political Rights: CCPR Commentary*, Engel Publisher, Kehl-Strasbourg-Arlington, 1993, p.373.

<sup>45</sup> Quigley, para. 15.30.

<sup>46</sup> Quigley, para. 18.2.

Indeed, the *Quigley Report* recommends that where ‘gross’ breaches of a determination or the Code of Conduct are involved, a bond up to a maximum of £500 would have to be posted by the organiser before any subsequent parade notified by him could take place (see below at *paras. 2.121* and *3.30*).<sup>47</sup>

2.26 Noting that the Code of Conduct could be more rigorous than that which currently exists,<sup>48</sup> the *Quigley Report* concludes that if:

...the rights and freedoms of others are not adversely affected by a peaceful procession or where conditions are imposed which protect those rights, the event itself should pass off peacefully unless the marchers reneged on their peaceful intentions or a violent attempt was made to negate the outcome of the process.<sup>49</sup>

And again:

I must make clear, however, that, in the context of the rights-based regulatory régime which I propose, public safety ought not to be an issue. The procession must be peaceful: otherwise it would not have passed the first test under Article 11(1) of the ECHR.<sup>50</sup>

2.27 As was stated in the Human Rights Commission’s *Parades, Protests and Policing* report, the European institutions have offered some guidance as to the boundaries of ‘peaceful’ behaviour. By and large, ‘peaceful’ has been held to *include* actions which “may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote,”<sup>51</sup> but to *exclude* that which actually obstructs the activities of others, or where the organisers and participants “have violent intentions which result in public disorder.”<sup>52</sup> It has often been stated in Europe that the rights to freedom of expression and peaceful assembly are foundational in a democratic society and should not, therefore, be interpreted restrictively.<sup>53</sup> One question, therefore, is whether ‘peaceful’ can ever properly encompass ‘illegal’ activity where, for example, the illegality arises from a technical breach of the law (e.g. failure to satisfy the statutory notice requirements).<sup>54</sup> An example of this is where the European Commission held that an *illegal* demonstration in which demonstrators blocked the road for twelve minutes every hour, still constituted a ‘peaceful assembly’. The applicant’s subsequent conviction, however, did *not* constitute a violation of his right. Rather, it was a necessary and proportionate restriction for the purpose of preventing public disorder.<sup>55</sup> The question then arises as to whether a sit-down protest which, for example, *completely* blocks a legal parade should be deemed ‘peaceful’.

2.28 While not addressing the specific question of whether any such protest ought, technically, to be deemed ‘peaceful’, the Ulster Unionist Party’s submission to the Review of the Parades Commission suggested that Article 17 ECHR ought to apply in such instances:

The current legislation does not adequately reflect the primacy of the freedom of assembly in contradistinction to the right to counter-demonstrate ...

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<sup>47</sup> Quigley, para. 18.3.

<sup>48</sup> Quigley, para. 22.1(ix).

<sup>49</sup> Quigley, para. 20.2.

<sup>50</sup> Quigley, para. 20.16.

<sup>51</sup> *Plattform Ärzte für das Leben v Austria* (1988), para. 32.

<sup>52</sup> *G v Federal Republic of Germany* (1989), at p.263.

<sup>53</sup> See, for example, *Handyside v the United Kingdom* (judgement of 7 December 1976), Series A no. 24, p.23, para. 49; *Gerger v Turkey* [GC], appl. 24919/94, para. 46, 8 July 1999, unreported; *Plattform "Ärzte für das Leben" v Austria* (judgement of 21 June 1988), Series A no. 139, para.32; *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* (judgement of 2 October 2001), Applications nos. 29221/95 and 29225/95, para. 97.

<sup>54</sup> The Criminal Justice Review’s Research Report No. 14, for example, addresses the issue of police dispersal of “assemblies that are unlawful but non-violent.” Livingstone, S. and Doak, J., *Human Rights Standards and Criminal Justice*, Criminal Justice Review Group (2000), p.20, para. 13.

<sup>55</sup> *G v Federal Republic of Germany* (1989).

Article 17 (Prohibition of Abuse of Rights) of the ECHR should also be more fully reflected in the primary legislation. This Article provides that: “Nothing in this Convention may be interpreted as implying for any ... group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.” Article 17 is clearly relevant to the balance between the otherwise conflicting rights of freedom of assembly and freedom to counter-demonstrate. It follows from Article 17 and the jurisprudence of the European Court that the right to counter-demonstrate should not be asserted in order to deny others their legitimate entitlement to exercise their freedom of assembly.

The requirement of Article 17 of the European Convention should be enshrined in the legislation and the commission should be obligated to balance the right of assembly against counter protest with reference to this requirement.

2.29 Quigley envisages *compliance* with either a legal determination or Code of Conduct as being an important factor in determining whether the organiser of a proposed parade or protest has peaceful intentions. He argues that a revised Code should include provisions relating to ‘**Organiser responsibility**’, ‘**Risk Assessment**’, ‘**Marshals**’, ‘**Paramilitary Trappings**’, ‘**Urination**’ and ‘**Accompanying Persons**’,<sup>56</sup> and outlines his conclusions in relation to each of these. Concerning risk assessment, the report argues that:

No one should embark on any public enterprise of this kind without undertaking a risk assessment, identifying what the risks are, how they can be removed or mitigated and what contingency plans need to be in place if something unexpected occurs. For a church parade involving 30 or 40 people on a Sunday in a quiet village, the risk assessment process will be very simple and informal. For major parades it should be as thoroughgoing as the scale and complexity of the event and the potential attendant risks require. It should be formally written down so that it can be produced as evidence of the organiser’s concern to promote a peaceful, well-conducted event. The parade should be followed by a de-briefing, when any necessary lessons are drawn and built into future plans.<sup>57</sup>

2.30 And in relation to marshals and stewarding:

An assessment should urgently be made as to how much and how fast local provision needs to be expanded (and in which locations) to ensure that, within 3 years, it can be made a firm requirement that all parade marshals have at least basic training and that a proportion of those involved in the larger parades are trained to NVQ standard. Some modest financial support from public funds may be needed to enable the programme to gain adequate momentum but, given the pay-off from well-conducted events which reduce the pressure on police resources, the results should give a good return on the outlay. Since stewarding/marshalling in a wide variety of contexts (including sport and musical events) where crowd management is an issue, is now a major element in any community safety strategy, a coordinated approach to meeting the entirety of the need may prove rewarding, at least so far as the provision of common core skills is concerned ...

... In most small parades of an uncontentious nature, two or three marshals for the average-sized lodge and accompanying band should be adequate but more elaborate arrangements will be needed for larger occasions. In this connection it may be useful, when revising the Code, to bear in mind the following points distilled from a document prepared by West Midlands Police for those organising events:

- When preparing an event the organiser should determine how many stewards are needed and exactly what they will be required to do. When people are arriving by coach, it may be necessary to appoint one or more stewards per coach.
- It is vital that organisers retain control of their event. To assist, a definite chain of command should be set up so that stewards are fully aware to whom they are responsible and to whom they can refer any issues.

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<sup>56</sup> Quigley, para. 23.10.

<sup>57</sup> Quigley, para. 23.10 (ii).

- A ‘head steward’ should be appointed, preferably from the organising committee, who will have overall responsibility for all briefing. The head steward should make him/herself known to the senior police officer in charge of the event on the day or at a time convenient to both prior to the event.
- ‘Chief stewards’ should also be appointed and have responsibility for either a section of the march or route and/or specific locations.
- On occasions the police may have to redirect a procession to prevent breaches of the peace. Accordingly, stewards must follow instructions given to them by the police – not the organiser. If a steward ignores such instructions, he or she may be guilty of obstructing police in the execution of their duty.

2.31 Finally, concerning accompanying persons, the *Quigley Report* states:

Where it is the case that certain lodges, clubs or bands participating in processions seem persistently to attract unruly elements, it may be more difficult for them to establish that they seek to exercise their right to *peaceful* freedom of assembly.<sup>58</sup>

2.32 To oversee compliance with the Code of Conduct, Quigley recommends that a ‘Compliance Branch’ be established. This...

...would receive reports from monitors and police immediately after events in respect of which it had issued a Determination. It would also consider any matters raised by members of the public in regard to parades which had taken place. Allegations of breaches considered by the Chairman to be sufficiently serious to be relevant to proceedings related to any future Determination should be followed up by the Compliance Branch and the outcome (including any formal warning as to the consequences of further breaches) recorded in correspondence with the organiser of the parade. Where an agreement regarding action to be taken (and, if necessary, a formal warning) was not considered by the Chairman to be commensurate with the gravity of the breach, he could arrange for a formal hearing, following which, depending on the findings, a sanction could be imposed as suggested in Chapter 18.<sup>59</sup>

2.33 The following factors can be distilled from the above evidence as being possibly relevant to the assessment of whether or not an assembly is ‘peaceful’:

- (a) the declared purpose of the assembly;
- (b) the past conduct of the notified participants in the event (including their conduct in similar events in other areas) and their compliance with previous determinations;
- (c) any assurances of peaceful conduct, or efforts made by the event organiser to ensure that it proceeds peacefully (including, for example, their willingness to engage with the local community, the provision of an adequate number of stewards/marshals, and the submission of an event specific risk assessment, see also *paras. 2.59, 2.70, and 3.33-3.34* below);
- (d) the traditionality of the event;
- (e) the context in which the event will take place, including for example,
  - the demographic profile of the area in which a parade or other public meeting is notified to take place;
  - the perceived purpose of the assembly;
  - the history of the community living along a parade route or in the vicinity of an area where a public assembly has been notified to take place;
  - the history of public events, generally, along the notified route or in the relevant area;
  - any sites along the notified route (such as memorials and churches) which might give rise to sensitivity within the local community.

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<sup>58</sup> Quigley, para. 23.10 (vi).

<sup>59</sup> Quigley, para. 21.18.

## ‘Necessary in a democratic society’

2.34 In terms of the specific factors which should be taken into account when assessing the *necessity* of interfering with the exercise of the right to freedom of peaceful assembly, the judgement of the Lord Chief Justice in *Re Tweed’s Application for Judicial Review* (2001)<sup>60</sup> is relevant. Addressing the charge that in reaching its determination to restrict Dunloy LOL No.496, the Parades Commission had relied upon criteria (those contained in ss.8(6)(b)-(e) of the *Public Processions (NI) Act 1998*) which fell outside the terms of Art.11(2) ECHR, Carswell LCJ held that:

... the basis for [the Commission’s] conclusion was the risk that public disorder would ensue if the parade went ahead. It was bound to have regard to the other matters specified in s8(6) of the 1998 Act, but they did not form the ground for its decision to impose the restrictions, which was placed firmly on the prevention of public disorder. The other considerations came into play in that part of the Commission’s decision which was concerned with the issue of whether those restrictions were necessary in a democratic society and proportionate.

2.35 Drawing again upon the NIHRC’s ‘*Parades, Protests and Policing*’ report,<sup>61</sup> ‘necessary’ means that any restrictions imposed upon the exercise of the right must correspond to a ‘*pressing social need*’, and, in particular, must be ‘*proportionate*’ to the legitimate aim being pursued by the authorities. The *Quigley Report* cites Jacobs and White’s commentary on the European Convention, which similarly states that the requirement of ‘necessity’ involves ‘showing that the action is taken in response to a pressing social need and that the interference with the rights protected is no greater than is necessary to address that pressing social need’.<sup>62</sup> These two requirements – of a pressing social need and proportionality – are examined separately below. The potentially relevant factors in assessing whether restrictions are necessary are then listed at *para. 2.54* below.

### (a) ‘A Pressing Social Need’

2.36 One view was that the term ‘necessary in a democratic society’ should be interpreted in the particular context of Northern Ireland. Some interviewees therefore believed that ‘necessary’ should be read as being ‘necessary for establishing and consolidating the democratic society sought by all the parties to the Agreement’. Others emphatically stressed that the interpretation of ‘necessary’ must offer equal protection to views opposed to the Belfast Agreement. As stated in ‘*Parades, Protests and Policing*’,<sup>63</sup> the particular circumstances of Northern Ireland, in so far as freedom of peaceful assembly is concerned, might also be inferred from the *North Report*, subsequent reviews of the Parades Commission, and other research conducted on the parades issue.<sup>64</sup>

2.37 The European Court’s dicta in *Plattform Ärzte für das Leben v Austria* (1988) was also cited as being relevant in clarifying the boundaries of what might be expected in a democratic society. The Court stated that “[i]n a democracy, the right to counter-demonstrate cannot extend to inhibiting the right to demonstrate.”<sup>65</sup>

<sup>60</sup> [2001] NILR 165 at 170j –171a. See further *Appendix C*.

<sup>61</sup> *Parades, Protests and Policing*, p. 20, para. 2.3.5.

<sup>62</sup> Quigley, para. 15.29, citing Jacobs, F.G. and White, R.C.A., *The European Convention on Human Rights*, 2<sup>nd</sup> Ed, (1996).

<sup>63</sup> *Parades, Protests and Policing*, pp. 20-21, para. 2.3.5.

<sup>64</sup> Following *Ahmed and Others v UK* (2000), in which the ECtHR took account of the extent of the national debate about the relevant issue. In this case, the Widdecombe Report had examined in detail the regulation of the political activities of civil servants.

<sup>65</sup> (1988) 13 EHRR 204 at p.210.

2.38 In *Stankov and United Macedonian Organisation Ilinden v Bulgaria* (2001) the European Court found that the Bulgarian government *had* overstepped its margin of appreciation by preventing the applicant organisation (a Macedonian separatist group) from carrying placards, banners and musical instruments to, and from making speeches at, the historical sites where it wished to hold a protest. The Court ruled that even though the issues at stake touched on national symbols and national identity, that was not sufficient reason for the national authorities to be granted a wide discretion. The bans on Ilinden’s demonstrations were held to have breached the applicant’s Article 11 right as they did not meet the test of ‘necessity’. In this case, the Court considered the past record of the organising body when assessing whether curtailment of its activities constituted a pressing social need and was therefore necessary:

Admittedly, it cannot be ruled out that an organisation’s programme may conceal objectives and intentions different from the ones it proclaims. To verify that it does not, the content of the programme must be compared with the organisation’s actions and the positions it defends.<sup>66</sup> An essential factor to be taken into consideration is the question of whether there has been a call for the use of violence, an uprising or any other form of rejection of democratic principles.<sup>67</sup> Where there has been incitement to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.<sup>68</sup>

2.39 Some interviewees felt that in a democratic society, people should be prepared to tolerate the expression of views which they may find offensive. Some, however, felt that those who were asking others to be tolerant were often themselves intolerant of opinions different to their own. Furthermore, it was argued that because of what many people have suffered over the past 35 years, it is unreasonable to expect people to tolerate certain parades. As one interviewee put it, “Northern Ireland is not Scandinavia, and a libertarian approach is not suited to a divided society struggling to come to terms with its hurts.” The *Quigley Report*<sup>69</sup> notes that ECHR case law envisages a democratic society characterised by ‘pluralism, tolerance and broadmindedness’<sup>70</sup> and cites a number of cases pertinent to the question of tolerance. In *Handyside v UK* (1976), the demands of tolerance were held to extend “not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population.” More recently, in *Aberdeen Bon Accord Orange Lodge 701 v Aberdeen City Council* (2001) the Sheriff stated that “[t]olerance is what is required in a democratic society and that includes tolerance of views or sentiments which may not coincide with one’s own.” The *Stankov* (2001) case also noted that:

[I]f every probability of tension and heated exchange between opposing groups during a demonstration were to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing different views on any question which offends the sensitivity of the majority opinion.<sup>71</sup>

2.40 The *Quigley Report*<sup>72</sup> also observes that the clause, ‘necessary in a democratic society’, is intended to “ensure that the interference conforms to the genuine interests of democracy and is

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<sup>66</sup> See *The United Communist Party of Turkey*, judgement, para. 58.

<sup>67</sup> See *Freedom and Democracy Party (ÖZDEP) v Turkey*, para. 40.

<sup>68</sup> At para. 90. See *Incal v. Turkey*, judgement of 9 June 1998, *Reports* 1998-IV, p. 1567, para. 48, and *Sürek (No. 1) v. Turkey* [GC], no. 26682/95, para. 61, ECHR 1999-IV.

<sup>69</sup> *Quigley Report*, paras. 12.13-12.15

<sup>70</sup> This wording has been adopted in a number of European cases – see, for example, those listed at n.25 above. Similar wording – ‘mutual respect and tolerance’ – also featured strongly in the evidence given by the Bogside Residents’ Group to the Northern Ireland Affairs Select Committee, see Q.455, Q.465 and Q.468.

<sup>71</sup> Judgement of 2 October 2001, paras. 86 and 106-107.

<sup>72</sup> *Quigley*, para. 12.13.

not merely political expediency in disguise.” The report cites two commentaries in relation to the interpretation of this clause:

...the Court works according to a ‘rich’ model of democracy, which is different from mere majority rule. In a democracy which protects Convention rights, minorities must be adequately protected against unfair treatment and abuse by the majority of a dominant position.<sup>73</sup>

...it will be difficult, if not impossible, to establish a pressing social need to protect intolerance and narrow-mindedness.<sup>74</sup>

2.41 It was argued that it might be helpful if the concepts of tolerance, and the avoidance of communal separation were included in the statutory criteria in place of the reference to relationships in the community. The concept of ‘shared space’ was also mentioned by a number of interviewees. While some felt that city centres can be distinguished from routes passing near or through communities as these routes could be clearly associated with one or other of the two main communities, others argued that ‘shared space’ must apply to *all* public space. Article 3 of the *UN Convention on the elimination of all forms of racial discrimination* is noteworthy in this regard. It affirms that “Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.” It was also noted that the Parades Commission do, occasionally, explicitly underline the need to keep a particular route ‘open.’ On precisely this point, the *Quigley Report*<sup>75</sup> notes that:

Denying access to certain routes on the basis of considerations closely linked to the demography would consolidate and strengthen the trend towards segregation and separation which is already so strong in many spheres in Northern Ireland.

2.42 The definition of what constitutes a ‘pressing social need’ might also be argued to overlap with the question of what constitutes a ‘contentious parade’. One view was that the Parades Commission should only become involved in adjudicating on parades where there was the prospect of increasing sectarian tensions. That said, the contrary view was also expressed that while a parade may not increase sectarian tensions and therefore not be seen as contentious, it could have the potential to unreasonably disrupt the community in which it takes place. Few interviewees knew how the current mechanism for designating parades as ‘contentious’ operated. Whilst therefore speculative, one specific criticism was that too much weight may be being attached to the police assessment of the potential for disorder or to the likelihood of a parade related protest being held.<sup>76</sup> Consequently, too little consideration may be being given to the level of provocation inherent in particular parades in areas where residents felt too intimidated to register objections let alone publicly protest. Indeed, some interviewees argued that too little attention was given to areas where, irrespective of the feelings of residents, the conduct of those on parade was ‘blatantly sectarian’ (for example, through the display of paramilitary emblems). There was also some concern as to whether the process adequately allowed for the views of *all* those who might have concerns about a particular parade to be considered (including, for example, business interests).

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<sup>73</sup> Feldman, D., *Civil Liberties and Human Rights in England and Wales* (2<sup>nd</sup> Edition, 2002), p.56.

<sup>74</sup> Starmer, K., *European Human Rights Law* (1999), p.180.

<sup>75</sup> Quigley, p.124, para.11.13.

<sup>76</sup> In evidence to the Northern Ireland Affairs Committee, the Chair of the Parades Commission, Mr. Tony Holland, stressed that the Commission did not treat police evidence ‘as gospel’: Second Report Session 2000-01, *The Parades Commission*, HC 120-II, p.176, Q.565. See also the comment by another Commissioner, the Rev. Roy Magee, that “not all parades are deemed to be contentious and only those that are classified as contentious we would look at for determination,” *ibid*, p.173, Q.544.

2.43 The current procedure for a parade being designated as contentious was outlined by Assistant Chief Constable Alan McQuillan in oral evidence to the Northern Ireland Affairs Select Committee.<sup>77</sup> Once a parade is notified to the police, that notification is immediately passed to the Parades Commission. The police also provide the Commission with an assessment of whether or not they believe the parade to be contentious on the 11/4 form (which is a covering report submitted by the police to the Commission together with the completed 11/1 notification form).<sup>78</sup> The Commission may also decide to consider a parade contentious even where the police do not do so. Then, if a parade is deemed contentious, an 11/9 form is completed by the police and this includes factors such as the recent history of parades in the area, the extent to which past parades have complied with the Commission's Code of Conduct, any evidence of previous disorder. It also includes an assessment of the impact of the parade on relationships within the community from a police perspective (a community impact assessment) and a human rights impact analysis in which the impact of the parade on the rights protected by Article 2, 5, 8, 9, 10, 11, and 14 ECHR is assessed. Some doubts were expressed regarding the level of detail likely to be provided by a local police commander in relation to these very specific rights provisions, and some therefore questioned the utility of the police conducting such a prescriptive human rights assessment. These doubts may be compounded following the concerns, raised in the Human Rights Commission's evaluation of human rights training for student police officers, about the superficial nature of training given to PSNI recruits on Articles 2, 3, 5, 6, 8, 9, 10, 11, 12 and 14, and Protocol No.1 of the ECHR.<sup>79</sup> The Working Group's consideration of the statutory notification and police report forms<sup>80</sup> is outlined at *para. 3.54* below.

2.44 The *Quigley Report* appears to suggest that the trigger for the proposed new facilitation function to 'swing into action' would be the notification of objections<sup>81</sup> as well as monitors' reports and evidence compiled by the 'Compliance Branch'.<sup>82</sup> Paragraph 18.8 states:

There are locations which have not hitherto been contentious where it may become apparent that (because of breaches of the Code of Conduct or for other reasons) there are the initial signs of imminent difficulty which, if promptly addressed, can be averted. Police should be advised to identify any incipient concerns promptly so that appropriate action can be taken.

2.45 Significantly, chapter 17 of the *Quigley Report* also proposes that the organizers of parades be required to notify intention to parade no later than 1 October, or six months in advance of a parade, whichever comes sooner (see the diagram outlining the proposed procedure in *Appendix H* of this report). The purported aim of this increase is to "make the full year available to the Facilitation and Determination functions, thereby ensuring that each can deliver its full potential in resolving difficulties which are identified."<sup>83</sup> While few interviewees touched upon this issue, some noted that many parties simply don't want to talk about parades once the marching season is over. Furthermore, it was noted in the *Parades, Protests and*

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<sup>77</sup> Q. 228, Q.245 and Q.249.

<sup>78</sup> The 11/4 report might include, for example, a statement from the police as to whether or not they consider the reasons given by the organiser for failing to meet the statutory notification requirements satisfy the requirement that notice was given 'as soon as it is reasonably practicable to do so' (s.6(2)(b) PPA).

<sup>79</sup> Kelly, M., *An Evaluation of Human Rights Training For Student Police Officers in the Police Service of Northern Ireland*, NIHR, November 2002, pp.20-22, paras. 30-35.

<sup>80</sup> Notice of Intention to Organise a Public Procession [Form 11/1]; Notice of Intention to Organise a Related Protest Meeting [Form 11/3]; PSNI Notice of Intention to Organise a Public Procession [Form 11/4 – Covering facsimile message which accompanies the Form 11/1 when submitted by the police to the Parades Commission]; PSNI Post Public Procession Return [Form 11/8 – post-procession police report submitted to the Commission in relation to contentious parades]; PSNI Public Procession Report [Form 11/9 – pre-procession police report requested by the Commission in relation to contentious parades].

<sup>81</sup> Quigley, para. 14.22 (ii)

<sup>82</sup> Quigley, para. 21.18.

<sup>83</sup> Quigley, para.17.7.



*Policing report*<sup>84</sup> that the European Commission in *Rassemblement Jurassien & Unité Jurassienne v Switzerland* (1979), held that:

... subjection to a prior authorization procedure does not normally encroach upon the essence of the right. Such a procedure is in keeping with the requirements of Article 11(1), if only in order that the authorities may be in a position to ensure the peaceful nature of the meeting, and accordingly does not as such constitute interference with the exercise of the right.

- 2.46 It is unclear from the European jurisprudence whether the time span of any such procedure is a relevant consideration in deciding whether or not it constitutes an interference with the exercise of the right. This factor, might however be viewed as important given the increase proposed by the *Quigley Report* and the further suggestion that any “concession should be rigorously policed.”<sup>85</sup>
- 2.47 Finally, it was argued by one interviewee that the impact of any restrictions on the potential for reaching an accommodation in that area (see similarly below at *para. 2.88*) should be taken into account when applying the test of ‘necessity’.

#### (b) ‘Proportionate to the legitimate aim being pursued’

- 2.48 The interviews conducted for this research yielded few suggestions as to what might reasonably constitute proportionate restrictions in the pursuit of each legitimate aim (see below). It was stated that what is proportional will largely depend upon local circumstances, and that the proportionality of any particular restriction is necessarily contingent upon the availability and/or effectiveness of alternative, less stringent, measures. In evidence to the Northern Ireland Affairs Select Committee, the Assistant Chief Constable, Alan McQuillan, stated that:

Other cases in the UK ... have indicated that rerouting of parades or forcing them to use alternative routes is a proportionate way of addressing the risk of public order and the risk to life and other rights ...<sup>86</sup>

- 2.49 The *Quigley Report* also touches specifically on this question of proportionality:

... if the necessity for a restriction is convincingly established, the means employed to limit the right must be proportionate to the permissible purpose which is being relied on to justify the limitation. **A sledgehammer cannot be used to crack a nut.** The seriousness of the interference therefore has to be balanced against the seriousness of the threat to the interests protected by those permissible purposes eg public safety, rights and freedoms of others, to see whether there is a less restrictive but equally effective alternative: ‘The principle of proportionality is a vehicle for conducting a balancing exercise. It does not directly balance the right against the reason for interfering with it. Instead, it balances the nature and extent of the interference against the reason for interfering’.<sup>87</sup>

- 2.50 In *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* (2001), the European Court of Human Rights clarified its role in determining the proportionality of any restriction. The Court suggested that the reasons adduced by national authorities to support any claim of proportionality must be “relevant and sufficient” and based on “an acceptable assessment of the

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<sup>84</sup> *Parades, Protests and Policing*, p.17, para.2.3.1.

<sup>85</sup> *Quigley*, para. 17.3.

<sup>86</sup> Second Report from the Northern Ireland Affairs Select Committee: The Parades Commission: Session 2000-01: HC 120-II, p.80, Q.276. See also Q.486 (evidence of Mr. Richard Monteith) and Q.575 (evidence of Mr. Tony Holland).

<sup>87</sup> *Quigley*, para. 12.16, citing Feldman, D. *Civil Liberties & Human Rights in England and Wales*, 2<sup>nd</sup> ed., (2002) p.57. (emphasis added).

relevant facts.”<sup>88</sup> In this case, the Court found that the measures banning the applicants from holding commemorative meetings were not necessary in a democratic society:

Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be – do a disservice to democracy and often even endanger it.<sup>89</sup>

... Any isolated incident could adequately be dealt with through the prosecution of those responsible.<sup>90</sup>

The Government suggested that a fair balance was achieved through the relative flexibility shown – when supporters of Ilinden were allowed to approach the historical sites provided that they did not brandish banners or make speeches –, and that the applicants should have chosen other sites for their meetings. The Court considers that depriving the applicants of the right to express their ideas through speeches or slogans at meetings cannot reasonably be characterised as evidence of flexibility. Indeed, the authorities had adopted the practice of imposing sweeping bans on Ilinden’s meetings ... Furthermore, it was apparent that the time and the place of the ceremonies were crucial to the applicants, as well as for those attending the official ceremony. Despite the margin of appreciation enjoyed by the Government in such matters the Court is not convinced that it was not possible to ensure that both celebrations proceeded peacefully either at the same time or one shortly after the other.<sup>91</sup>

2.51 That domestic courts, in applying this test of proportionality, must examine the relevance and sufficiency of the reasons adduced by national authorities in restricting Convention rights, as well as the acceptability of the national authorities’ assessment of the facts, goes beyond the traditional Judicial Review concept of ‘*Wednesbury unreasonableness*’. This point is well stated in the *Quigley Report*:<sup>92</sup>

It will be apparent that there is a material difference (as well as an overlap) between the orthodox approach by British courts to traditional judicial review and the proportionality approach. Lord Steyn addressed the issue in another recent case (*R on the application of Daly v Secretary of State for the Home Department*, [2001]). Making clear that the review undertaken by the courts could still not be a merits review, he said: ‘... the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not whether it is within the range of rational or reasonable decisions ... the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.’ In the same case, Lord Bingham, referring to a 1999 case where the European Court had ruled that the orthodox judicial review approach by the English Courts had not given the applicants an effective remedy for the breach of their Convention rights, said: ‘Now, following the incorporation of the Convention ..., domestic courts must themselves form a judgment whether a Convention right has been breached (conducting such inquiry as is necessary to form that judgment) and, so far as is permissible under the Act, grant an effective remedy.’

2.52 Quigley further suggests that the demands on ‘scarce police resources’ should factor into any assessment of the proportionality of restrictions:<sup>93</sup>

... it is not clear if, in deciding whether a Determination can be policed, regard is had to the extent to which that will cause undue demands to be made on the police or army, whereas this is one of the matters to which the Secretary of State has to have regard when deciding whether to exercise

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<sup>88</sup> At para. 87. See also, *United Communist Party of Turkey and Others v Turkey* (judgement of 30 January 1998), *Reports* 1998-I, para. 47.

<sup>89</sup> At para. 97.

<sup>90</sup> At para. 103.

<sup>91</sup> At paras. 108-9.

<sup>92</sup> Quigley, pp.135-6, para. 12.23.

<sup>93</sup> Quigley, p.229, para.20.12.

his powers to prohibit any proposed public procession. There must be an issue of proportionality here, given the demands on scarce police resources and the need to establish priorities.

2.53 Finally, in considering the proportionality of any restriction, one suggestion was that the Parades Commission should take into account the factors derived from the general limitation clause in section 36 of the Constitution of South Africa 1996. As stated by the Human Rights Commission, these factors are “intended to ensure that limitations to rights are few and far between and that when they do exist they can be reasonably justified in the ways indicated.”<sup>94</sup> These factors are:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

2.54 In conclusion then, all the factors which were considered relevant to the evaluation of whether or not an assembly should be deemed ‘peaceful’ (*para. 2.33* above) were also considered to be relevant to the assessment of whether restrictions were necessary in a democratic society. Several *additional* factors, however, were identified as potentially being relevant to the assessment of the ‘necessity’ of restrictions. These can be summarised as follows:

- (a) The importance of the particular route and/or other aspects of the event in serving the purpose of the event;
- (b) The importance of the purpose of the limitation;
- (c) The nature and extent of the limitation;
- (d) The relation between the limitation and its purpose;
- (e) The availability and effectiveness of less restrictive means to achieve the purpose of the limitation (for example, the risk of minor incidents of disorder being more appropriately dealt with by way of subsequent prosecution);
- (f) The demands of policing specific restrictions upon police and military resources;
- (g) The degree of ‘contention’ (broadly defined) surrounding the event. This might include:
  - the disruption caused by the event (including the attendant policing operation);<sup>95</sup>
  - the impact of the event on community relations;<sup>96</sup>
  - the impact of any restrictions on the potential for reaching an accommodation in that area.
- (h) The frequency of parades in any particular location over a specified period of time;
- (i) The impact of any restrictions on the potential for increased communal separation;
- (j) The degree of *mutual tolerance* demonstrated by parties to the dispute;
- (k) Further factors identified through independent research on the parades issue.

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<sup>94</sup> *Making a Bill of Rights for Northern Ireland: A Consultation by the Northern Ireland Human Rights Commission*, September 2001, pp.89-90.

<sup>95</sup> Drawing on the existing Parades Commission Guidelines, ‘disruption’ might include restriction of freedom of movement for local residents, restriction of normal commercial activity, restriction of access to public amenities such as hospitals, restriction of access to places of worship, and the duration of the procession.

<sup>96</sup> While noting the critique of how this factor has so far been measured (below), drawing upon the current Guidelines, relevant considerations might be whether the route comprises mainly residential or commercial property, the demographic balance of residents in the immediate vicinity, sites which might give rise to sensitivities, purpose of the parade, necessity of the route in serving that purpose, availability of alternative routes, numbers taking part, experience of the manner in which previous parades were conducted, regalia, nature and number of bands, type of music, frequency of parades along the route, communication with the local community, and the impact on relationships within the wider Northern Ireland community.

## The Legitimate Aims

2.55 The *Quigley Report* proposes a division of labour between the police and determining body. This division is grounded in the aims, listed in Article 11(2) ECHR, for which restrictions may legitimately be imposed on the exercise of the right of peaceful assembly. These aims are:

- i) in the interests of national security or public safety;
- ii) for the prevention of disorder or crime;
- iii) for the protection of health or morals; and/or
- iv) for the protection of the rights and freedoms of others.

2.56 Quigley recommends that the determining body – which he calls the ‘Rights Panel’<sup>97</sup> – should be responsible for making decisions based on the protection of health or morals or the rights and freedoms of others. However, his report argues that it is properly the role of the police to take any decisions concerning disorder, crime, or public safety.<sup>98</sup> What is proposed is a two tier determination process: First, it appears that the determining body would assess whether a notified parade or protest was peaceful. If considered to satisfy the conditions of ‘peaceful assembly’, the body would then decide how the event should proceed so as not to interfere with the rights and freedoms of others. The determining body would impose whatever conditions it considered to be necessary in order to protect those rights. Second, the police would consider the *implementation* of the determining body’s determination, and decide whether *further* restrictions were justified on the grounds of public order, crime prevention, and public safety. In doing so, the police would have regard to the extent to which implementation of the rights based determination will cause undue demands to be made on the police or army. The police would not be able overturn the decision of the determining body and could not therefore allow a parade or protest which had been judged to infringe the rights and freedoms of others. The Secretary of State would have a reserve power to review the police decision (including on grounds of national security), but would not be empowered to review that of the determining body. This process is outlined in *Appendix H* in diagrammatic form.

2.57 Irrespective of *who* interprets these aims, the European Court in *Stankov* made it clear that “the enumeration of exceptions to freedom of expression and assembly, contained in Articles 10 and 11, is exhaustive. The definitions of those exceptions are necessarily restrictive and must be interpreted narrowly.”<sup>99</sup> These aims are examined individually below.

### (a) In the interests of National security or public safety

2.58 As explained above, the *Quigley Report* proposes “...that the legislation should empower the police to make the public safety decision but that the Secretary of State should have a reserve power to intervene if he felt that the re-routing of a parade was necessary in a democratic society in the interests of national security or public safety or for the prevention of disorder or crime.”<sup>100</sup> Furthermore, “[t]he public safety factors which are related to the police function would have had nothing whatsoever to do with the view which is taken on the rights issues.”<sup>101</sup>

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<sup>97</sup> Quigley, paras. 21.11– 21.17.

<sup>98</sup> Quigley, Exec Summary paras. 63-6, and chapter 20.

<sup>99</sup> At para. 84. See too, *Sidiropoulos v. Greece* (judgement of 10 July 1998), *Reports of Judgments and Decisions* 1998-IV, paras. 37-39.

<sup>100</sup> Quigley, Exec. Summary, para.63. See also the main text, para. 20.13(ii).

<sup>101</sup> Quigley, Exec. Summary, para. 65.

2.59 Our interviews focused primarily upon the aims of protecting the rights and freedoms of others and preventing disorder and crime, although the interests of national security or public safety were often perceived as overlapping with the latter.<sup>102</sup> Notwithstanding, one view was that the public safety implications of parades and protests should, in part, be evaluated through a comprehensive risk assessment carried out by the event organiser(s). It was also suggested that community safety audits conducted by Local Community Safety Partnerships would, in the future, provide an important source of detailed information regarding local issues, and the potential for a parade or protest to aggravate these. Such audits should, *inter alia*, map patterns of disorder, and benchmark local problems (such as sectarian intimidation), providing a baseline for future evaluation.<sup>103</sup> It was emphasized that these will differ from area to area, a similar point having previously been made by Democratic Dialogue in oral evidence to the Northern Ireland Affairs Select Committee in relation to public order:

Order, like beauty, exists in the eye of the beholder, and competing definitions of public order are in reality functions of power relations in different communities, and in each community, in each town, in each city, there will be an underlying community equilibrium which is implicitly different. Disorder in Portadown is not the same as disorder in Rosslea.<sup>104</sup>

2.60 It was also noted that measures adopted in implementing the NIO's 2002-2007 Community Safety Strategy might have relevance to any assessment of the impact of an assembly on public safety.<sup>105</sup> The NIO Strategy document identifies nine key areas, against which objectives have been set, and these give some idea of the breadth of the concept of 'public safety'. They are:

- i) Car crime
- ii) Domestic burglary
- iii) Business and retail crime
- iv) Offences against women, particularly domestic violence
- v) Youth offending and reducing criminality
- vi) Offences motivated by prejudice and hatred
- vii) Fear of crime amongst older people, vulnerable adults, victims and children
- viii) Drug, substance and alcohol abuse
- ix) Street violence, low level neighbourhood disorder and anti-social behaviour

2.61 Areas (vi) and (ix) were suggested as being the most likely to be potentially relevant to the exercise of the right to peaceful assembly. Significantly, the NIO has recently published a consultation paper reviewing the current legislative arrangements in relation to racial and sectarian crime.<sup>106</sup> This is addressed in greater detail in the section examining a possible right to freedom from sectarian harassment (*paras. 2.123-2.148* below).

## **(b) The prevention of public disorder or crime**

2.62 Consideration of this aim is structured around four different factors which were variously raised by interviewees:

- i) the anticipated source of disorder,

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<sup>102</sup> Indeed, the *Quigley Report* often appears to treat 'public order' and 'public safety' as coterminous (see particularly chapters 15 and 20).

<sup>103</sup> *Community Safety Auditing: Sound Opinions – Hard Facts: Guidance Paper III: A model for reviewing neighbourhood levels of crime, anti-social behaviours and the concerns of local people*, p.4, Community Safety Centre in conjunction with the Northern Ireland Office. Available at:

[http://www.communitysafetyni.gov.uk/publications/pdfs/csm\\_evaluation\\_report.pdf](http://www.communitysafetyni.gov.uk/publications/pdfs/csm_evaluation_report.pdf)

<sup>104</sup> *Second Report from the Northern Ireland Committee: The Parades Commission: Session 2000-01*: HC 120-II, p.42, Q.153.

<sup>105</sup> *Creating a safer Northern Ireland through Partnership: A consultative document*. Available at:

<http://www.communitysafetyni.gov.uk/publications/pdfs/Strategy%20Document.pdf>

<sup>106</sup> *Race Crime and Sectarian Crime Legislation in Northern Ireland: A Consultation Paper*, Northern Ireland Office, November 2002. Available at: <http://www.nio.gov.uk/pdf/race.pdf>

- ii) the political climate,
- iii) the potential for widespread disorder, and
- iv) pre-existing local community tensions and the impact of a parade on community relationships.

2.63 It was suggested that the factors in (ii), (iii) and (iv) are closely related in that they are usually beyond the control of local event organisers. A number of interviewees therefore thought that introducing these factors would disempower organisers and reduce the incentive for them to take cognisance of their responsibilities (see similarly *paras. 2.79 and 2.89* below). Furthermore, it was pointed out that decisions based on (ii) and (iii) can override local factors including the rights of the parties directly involved. This can result in apparently inconsistent outcomes. The question is raised of how the rights of parties in the immediate locality of an event should be balanced with the rights of the wider community in Northern Ireland (see, for example, the impact of parades on service industries at *paras. 2.119-2.121* below).

*i) The anticipated source of disorder*

2.64 The Guidelines issued by the Parades Commission provide as follows:

**2. Public Disorder or Damage to Property which may result from the procession**

Past experience has shown how decisions about contentious processions can provoke disorder. The Commission is obliged by the Act to have regard to any potential public disorder or damage to property. In doing so, it will seek and consider advice from the RUC.

2.65 Drawing upon both the *Parades, Protests and Policing* report, as well as subsequent judgements of the European Court, the decisions in at least three ECHR cases appear to provide authority for the proposition that unless individuals wishing to exercise their right to freedom of peaceful assembly have *themselves* acted ‘reprehensibly’ or incited others to violence, the aim of preventing disorder cannot be relied upon as the basis for restricting the exercise of their rights.<sup>107</sup> Many European cases have, however, indicated that restrictions can, ultimately, be justified in pursuit of this aim irrespective of the anticipated source of disorder.<sup>108</sup> The Parades Commission’s Guidelines document does not state whether the anticipated source of disorder is a factor which is taken into account. This can be contrasted to paragraph 3.1 of the Guidelines which, in relation to *disruption to the life of the community*, reads:

In gauging disruption, the Commission will take care to distinguish between disruption caused by the procession itself and disruption caused by the any associated protest activity or police action taken in response to that activity.

2.66 The ‘prevention of disorder or crime’ clause contained in Articles 10(2) and 11(2) is similar to section 8(6)(a) of the *Public Processions (NI) Act 1998*, and to the earlier provision in Article 4 of the *Public Order (NI) Order 1987*. The latter was argued by the North Review Team to provide “an incentive for those who threaten disorder” (North Report, para.11.10). The question is raised as to whether the anticipated source of disorder (*e.g.* parade participants including bands, supporters and ‘hangers-on’, participants in a related protest, or the policing operation) should influence any decision to restrict an assembly on public order grounds, and if so, how such decisions should reflect this anticipated source.

<sup>107</sup> *Plattform “Ärzte für das Leben” v Austria* (1988), *Ezelin v France* (1991) and *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* (2001).

<sup>108</sup> For example, *Christians Against Racism and Fascism (CARAF)* (1980) – “it was not unreasonable for the authorities to apply an objective criterion rather than a subjective test relating to the violent or peaceful intentions of the organisers of such demonstrations.”

2.67 The Ulster Unionist Party, in its submission to the current Review of the Parades Commission argued that:

Section 8(6)(a) should be redrafted to place emphasis only on considering the behaviour of participants of a procession not on counter demonstrators. E.g. 'any public disorder or damage to the property by persons engaged in the procession or its supporters which may result from the procession'.

2.68 The *Quigley Report* similarly cites David Feldman in support of the argument that:

... through the combination of common law developments and the impact of the Human Rights Act 1998, it might now be regarded as unreasonable, in the absence of special circumstances, for the police to interfere with a person who is doing something lawful in order to forestall an unreasonably violent response by an opponent.<sup>109</sup>

2.69 However, a number of those interviewed felt that the *actual source* of disorder arising from a parades dispute might sometimes be impossible to determine. Some argued that the source of disorder is always ultimately the parade itself, even though this might sometimes be manifested in missiles being thrown at the parade, or in scuffles between protesters and the police. Others were reluctant to be too prescriptive in relation to the anticipated source of disorder, arguing that each case needed to be considered on its own merits, that rigidly adhering to such a formula might lead to police resources being over-stretched on occasion, that it would potentially be counter-productive to engage in 'finger-pointing,' and indeed, that doing so might lead to sources of information and intelligence quickly drying up. Still others noted that on some occasions it will not be possible to say where the violence might come from, but only that there is a possibility it might occur. This interactive nature of crowds during public events, as evidenced by contemporary public order theorists such as David Waddington<sup>110</sup> and Stephen Reicher,<sup>111</sup> precludes, to some degree, the reliable forecasting of the source of disorder. This led some to conclude that, in situations where fears of disorder were grounded solely in that potentially arising from interaction between opposing groups (rather than from any specific pre-determined source) the public order evidence of itself could never be strong enough to justify interference with a fundamental right. The corollary of this argument was that where fears *were* grounded in a specific pre-determined risk, determinations should reflect the source of that risk.

2.70 One suggestion to assist in determining where disorder might emanate from (also raised in relation to other issues) was the introduction of a statutory requirement that organisers of all public events (including both parades and related protests) undertake and complete an event specific risk assessment. Such a mechanism, it was argued, would provide another source of information apart from police intelligence. One interviewee intimated that police intelligence is not always reliable, and is often based on what groups might intend or desire to happen, rather than what is likely to materialize. The same interviewee also suggested that grave public order concerns could be 'manufactured' by the police to engineer a situation where a parade would have to get the go ahead (or, indeed, be re-routed) simply to make the policing operation easier. That said, the same interviewee accepted the police imperative of acting in good faith on received intelligence.

2.71 Most of those who were reluctant to be too prescriptive about the source of anticipated disorder did however feel that the message should be sent out that a parade would not be re-routed or, alternatively, be allowed to go ahead, simply on the basis of the highest level of threatened

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<sup>109</sup> Quigley, para. 20.10.

<sup>110</sup> Waddington, D. et al *Flashpoints: Studies in Public Disorder* (1989).

<sup>111</sup> Reicher, S. and Stott, C. 'Crowd action as intergroup process: introducing the police perspective', *European Journal of Social Psychology* 28, 509-529 (1998).

disorder. Some noted that there were clear examples of the Parades Commission not relenting to the threat of violence while others noted examples of when the Commission did appear to have capitulated in the face of violence. A number of those interviewed felt that the only way of sending out this message was to face down any such threat in all circumstances. It was noted, though, that this becomes acutely difficult when there is intelligence to suggest that a threat to life exists. It was argued by some that no principle is worth a life. One interviewee felt that a comparison could be drawn between parades at which a very serious risk of public disorder was identified, and the funerals of the men who died in the IRA hunger strike. The point was made that these funerals had to go ahead despite police intelligence that snipers may be present and the grave risk to life that that posed.

2.72 The Committee on the Administration of Justice (CAJ) argued in its submission to the Review of the Parades Commission that:

... on very rare occasions it is conceivable that the police might simply be overwhelmed by force and be unable to comply with the Parades Commission ruling. While expressing the hope that such incidents would be extremely rare, CAJ recommended that the legislation provide for such a situation by placing an obligation on the Chief Constable in such situations to make a full report to the Parades Commission of the reasons for his/her action as soon as practicable thereafter.

2.73 This raises the question of whether the existing ‘fall-back’ position whereby the Secretary of State can revoke or amend the Commission’s decision is a suitable mechanism through which pragmatic decisions can, on occasion, be taken (*e.g.* where there is a serious threat to life – see further below at *para. 2.95*). An alternative ‘half way house’ was suggested whereby the Parades Commission Guidelines and determinations would unambiguously state that in principle the source of disorder is an important factor, and distinguish this where possible. However, it would also be stressed that in practice this factor could not always be decisive. By at least doing this, groups might feel some satisfaction in having sometimes been recognised to occupy the moral high ground, even if ultimately the decision was not in their favour. A number of consultees, however, felt that this option would lead to Pyrrhic victories, where parties would win in principle but lose in effect. This, in turn, would lead to disaffection with the determining process.

## *ii) The political climate*

2.74 A key issue raised at the two recent conferences was the impact which the macro political context has on the attitudes and positions taken by both those who parade and those who object to parades.<sup>112</sup> Some interviewees therefore argued that the Parades Commission should not take its decisions in a political vacuum and that it must have the discretion to be able to make politically expedient judgements.

2.75 A different hypothesis, however, was also put forward: If public order partnerships between the police and community, and initiatives such as the monitoring of interfaces and community mobile phone networks are to be taken seriously, then the prevention of parade related disorder must be viewed as a much larger civic project, and not one which is the sole responsibility of the Parades Commission. As the Civic Forum stated in its submission to the Review of the Parades Commission:<sup>113</sup>

The issue of contentious parades we believe is not just a local responsibility but also a wider political, business and civic responsibility. It was recognised that contentions over parades have been linked, to

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<sup>112</sup> A contemporary example was given by one interviewee who believed that the dynamics of public order would change if Sinn Fein were to join the Policing Board.

<sup>113</sup> Civic Forum, A Submission to the Review of the Parades Commission, p.4.



a greater or lesser extent, with contention over both the political and peace processes. Nevertheless, the resolution of contentious parades could not be left hostage to the vagaries of the political process; they affect the quality of life in a local area and among the general public and hence resolution should be focused on those who are affected and responsible ... The involvement of third parties such as non-governmental organisations, trade unions and local businesses can be an important factor in reaching consensus on contentious parades.

2.76 Others were also opposed to any linking of the marching issue to the wider political process. It was stated that the marching issue concerns the human rights and fundamental freedoms of local communities, independent of other issues in the wider peace process. The safety of local communities should not be dependent upon issues such as decommissioning or devolved government.

2.77 In a similar vein, CAJ has acknowledged that:<sup>114</sup>

The Parades Commission has a difficult enough task seeking to adjudicate and manage disputes around parades and protests without taking responsibility for tackling the even more fundamental causes that often underlie these problems – social disadvantage, political alienation, a legacy of discrimination and major social and economic inequalities.

2.78 The Ulster Unionist Party's submission to the Review of the Parades Commission cites the European cases of *Christians Against Racism and Fascism v UK* (CARAF) and *Ezelin v France*:

The test should place greater emphasis on upholding as a point of principle the right to assemble or process peacefully. In particular a greater reflection of the European Courts Jurisprudence on this matter. In CARAF (1980) the European Commissioners report held that: "... the right to freedom of peaceful assembly is secured to everyone who has the intention of organising a peaceful demonstration ... The possibility of violent counter demonstration, or the possibility of extremists with violent intentions, not members of the organising association joining the demonstration cannot as such take away that right. Even if there is a real risk of a public procession resulting in disorder by developments outside the control of those organising it, such procession does not for this reason alone fall outside of the scope of Article 11(1)..."

Whilst it is recognised in Article 11(2) that certain restrictions may be placed upon the exercise of those rights contained in Article 11(1) the onus should remain upon protecting the expression of those rights as was stated in the *Ezelin v France* (1991) 'It is not necessary to restrict those freedoms in any way unless the person in question has committed a reprehensible act when exercising his rights'

2.79 An extension of these arguments is that either restricting *or allowing* a parade because it might spark disorder *given political tensions*, does not adequately prioritise the Convention rights involved. It was suggested that, in such instances, a parade should only proceed without restriction if it does not affect the rights and freedoms of others and there is no reason to believe that participants in the parade will themselves behave in a disorderly fashion. The view was also advanced that the judgement made by the Parades Commission on the potential for public disorder when community and political tensions are high is often a blind one between the lesser of two evils (the potential for disorder exists irrespective of the Commission's determination and decisions are sometimes described as 'the least worst option'). Some interviewees thus believed that the argument for event organisers not being penalised for circumstances beyond their control was strengthened (see *paras. 2.63* and *2.89* below).

*iii) The potential for widespread disorder*

2.80 The Northern Ireland Affairs Select Committee concluded, *inter alia*, that:

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<sup>114</sup> CAJ Submission to the Review of the Parades Commission, p.5

It seems likely, therefore, that the courts may have to decide on some important matters, such as the balance between the various rights, and the scope for their restriction on the grounds of a wider public interest.<sup>115</sup>

2.81 An example of a Commission decision based upon the likelihood of widespread disorder was that to allow the Orange Order along the lower Ormeau Road on 13<sup>th</sup> July 1998. In that case, the Commission warned that:

... the cumulative effect on the loyalist community...particularly when taken in conjunction with the Drumcree decision ... is in danger of spilling over into a serious law and order situation.

2.82 One view was that such trade-offs are escalatory. This particular decision, for example, was criticised by CAJ (amongst others) as a return to giving in to the greatest threat.<sup>116</sup> Notwithstanding, in *Re Pelan's Application for Judicial Review* (1998) Carswell LCJ, in the Court of Appeal, held that:

... in paragraph (b) of s8(6) the disruption referred to appears to be primarily (though not perhaps exclusively) that which may occur in the life of those members of the community who live in the area through which the procession is to pass. When one turns to paragraph (c), however, it seems to us quite possible to interpret the word 'community' as referring to a wider group.<sup>117</sup>

2.83 CAJ noted in 1998:

Across NI, other forms of protest sprung up in support of the Portadown Orangemen. Several caused severe inconvenience and raised the spectre of intimidation and mob-rule. Many, however, were peaceful and, though certainly a matter of some inconvenience to other members of the public, they provided a safety-valve by which people could express their strongly held beliefs in a manner safe to all concerned. All such events were, however, illegal and the police will have been expected to have taken details of the organisers of such protests in order to determine what legal action should follow.<sup>118</sup>

2.84 One argument made was that the potential for this type of widespread protest should not be a factor in the decisions about the threat of disorder posed by individual parades. This argument runs that, instead, these sporadic protests can and should be dealt with in their own right – each as an assembly which involves an adjudication to be made on the rights of the protesters and the rights of others in the locality. Furthermore, such incidents can most effectively be dealt with by way of subsequent prosecutions. It is interesting to note that there were 66 people found guilty of an offence under article 20(1) of the Public Order Order (obstructing traffic in a public place) in 1998 compared with 53 in 1999, 3 in 2000, and 25 in 2001.<sup>119</sup>

2.85 A number of interviewees felt that the implications for police resources should influence the weight accorded to the potential for disorder in the decision making process. Others though felt that this would be to sacrifice principle for expediency. When asked whether it was a non-sensical situation where a determination to re-route a parade involved more police officers than had the parade been allowed to proceed, Mr. Adam Ingram, in evidence to the Northern Ireland Affairs Select Committee, stated:<sup>120</sup>

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<sup>115</sup> *Second Report from the Northern Ireland Affairs Select Committee: The Parades Commission: Session 2000-01: HC 120-II, Vol.I, para. 118(p).*

<sup>116</sup> CAJ Commentary on Public Order Policing 1998, pp.8-9.

<sup>117</sup> [1998] NIJB 260

<sup>118</sup> CAJ Commentary on Public Order Policing 1998, p.11.

<sup>119</sup> Statistics courtesy of the Director of Public Prosecutions, August 2002.

<sup>120</sup> *Second Report from the Northern Ireland Affairs Select Committee: The Parades Commission: Session 2000-01: HC 120-II, p.184, Q.597.*

These are very difficult judgements that the Parades Commission has to make. They do not make it on the basis of the cost element, but on the basis of what is right in terms of the powers which they have been given under the Act ... I would not want policing in Northern Ireland, or anywhere else in the United Kingdom, to be judged on the basis of what it costs but on the basis of what is right...

- 2.86 Again the point was made, that the potential for widespread disorder was a consideration which might more legitimately give rise to intervention by the Secretary of State.

*iv) Pre-existing community tensions and the impact of a parade on community relationships*

- 2.87 Parades Commission determinations often state that “this is an area which has seen much sectarian tension and division in the past...” One view was that it is not clear, though, how this factor is weighted in decisions. Some interviewees believed that the criterion contained in section 8(6)(c) of the *Public Processions Act* (which obliges the Commission to have regard to the impact of a parade on relationships within the community) was virtually impossible to implement. It was also thought that the criterion was little more than ‘a litmus test’ for the potential for public disorder, and that ultimately, it was likely to encourage rather than discourage communal confrontation. While the Parades Commission has stated that it measures the “impact through assessing whether there has been a genuine attempt to gain the respect of the receiving community...through seeking dialogue,”<sup>121</sup> the Community Relations Council has criticized the Parades Commission’s application of section 8(6)(c).<sup>122</sup>

There is no indication of how [the impact of a parade on community relations] is monitored, either before or after the event, so that outcomes can inform future decisions. Nor is there any indication of a base line used in the setting of judgements.

- 2.88 Some interviewees believed that the Commission must consider the local atmosphere prevailing at the time and the existence of pre-existing community tensions. Not to do so, it was argued, would be to ignore the long-term community relations implications of any disorder which a parade might spark. Another view was that what the Parades Commission actually measured under this sub-section was not the impact of a parade on community relations, but rather, its impact *on the potential for reaching an accommodation in that area*, and that this ought to be a factor which is taken into account (see above, *para. 2.47*, under ‘necessary in a democratic society’). Other interviewees, though, argued that if it offends one community if the procession is allowed, surely it offends the other community in almost an equal and opposite fashion if the procession is not allowed.
- 2.89 A further argument was made that the capacity of parading organisations to resolve wider community relations problems is often limited. Consequently, it was stated that they should not be penalised or held responsible for pre-existing tensions (see similarly *para. 2.63* above). Some felt that this argument partially explained why community forums *might* be irrelevant to parade disputes. Others though emphasized that the contribution which such forums can make is fundamentally to build relationships. Indeed, forums might benefit from having a rule precisely that they *cannot* be used as a place for negotiation or decision-making. Members *may* then be emboldened to engage each other about parades outside of the formalities of the forum because of the relationships nurtured within.

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<sup>121</sup> “Memorandum submitted by the Parades Commission,” Northern Ireland Affairs Committee, Second Report Session 2000-01, *The Parades Commission*, HC 120-II, p.3.

<sup>122</sup> “Submission to the Northern Ireland Office on the Review of the Parades Commission from Community Relations Council,” *Second Report from the Northern Ireland Affairs Select Committee: The Parades Commission*: Session 2000-01: HC 120-II, p.210.

2.90 The cumulative impact of parades in an area was also discussed in this context. The possibility of linking (or ‘bundling’) decisions in relation to a number of parades in an area was suggested as one way of recognising community tensions and taking these into account to reduce the potential for disorder over the entire ‘marching season’. Linkage was also argued to increase the incentive to compromise by enabling a view to be taken in relation to the quantity of parading expected in any particular locality over the entire ‘marching season.’ That said, two specific reservations were expressed about this practice:

- The rights of the individual parties involved may be ignored if linkage is allowed;
- The autonomy of individual lodges, clubs and bands and the importance of their local parade means that linkage would not necessarily reduce local tensions.

2.91 The *Quigley Report* affirms the Parades Commission’s view that it should be empowered to link determinations.<sup>123</sup> In addition, the report argues that because there is unlikely to be a significant material change in the short-term situation “[w]here the Determining Body decides that a parade of a particular nature, size and frequency would not adversely affect the rights and freedoms of others, or, alternatively, would do so...”<sup>124</sup>

...discretion could be given to the Determining Body to make rulings for periods of up to, say, 5 years, subject to the proviso that these could be reviewed if any material change was brought to the attention of the Body.

#### **(b) The Protection of Health and morals**

2.92 Whilst arguing that revised Guidelines should “specify factors which would be taken into consideration when determining whether restrictions should be placed on the right for the protection of health or morals,”<sup>125</sup> the *Quigley Report* does not indicate what these factors might be.

2.93 One specific situation raised during our interviews was the Holy Cross dispute in Ardoyne, North Belfast. It was queried whether different standards should be expected of organisers of public events and protests where children were involved. One interviewee felt that the issue was less about the exposure of children to such protests but more – in psychological terms – about their inability to understand such events. This interviewee stressed that the focus should be on explaining such activities to children, thereby giving them a framework to understand them, rather than about restricting those activities per se.

2.94 Recently, the mental health charity ‘Threshold’ published a report examining the psychological impact of the troubles.<sup>126</sup> The report notes that Northern Ireland has 25% greater mental health needs than G.B., 37% higher anti-depressant prescription use than England, and 75% higher tranquilliser prescriptions than England. It concludes that:

Having a safe place to talk is fundamental to the talking cure. We must provide safe havens with no riot zones for people to get help and deal with the human effects of conflict.

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<sup>123</sup> Quigley, paras. 11.3; 15.19, and 15.21. See also, Northern Ireland Affairs Committee, Second Report Session 2000-01, *The Parades Commission*, HC 120-II, p.8, Q.13; and pp.177-8, Qs.569-571; Appendix 20 (Supplementary Memorandum submitted by the Parades Commission), pp.298-299.

<sup>124</sup> Quigley, paras.15.26 – 15.27.

<sup>125</sup> Quigley, para. 15.16.

<sup>126</sup> Kapur, R., Moore, B., and Webb, K., “*A Troubled Mind Afraid to talk: Group Therapy in N. Ireland*”, Threshold (2002) Report submitted as an article to the International Journal of Group Psychotherapy.

### (c) The Protection of the rights and freedoms of others

2.95 A number of interviewees argued that parades only had an impact on the rights and freedoms of others because of the violence sometimes associated with them, and the trickle-down effect of public order considerations was emphasized. It was highlighted that a risk of serious disorder invokes the positive obligation of the State to protect the right to life under Article 2, ECHR (also discussed at *paras. 2.71-2.73* above), and it was noted that the Parades Commission often asserts that it has been mindful of its obligation in this regard.

2.96 The European Court has held that “it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.”<sup>127</sup> One view, though, was that this provision could be easily abused, and an example was given of the ‘ironic indignation’ of parties on both sides – when fearing that a determination might not go their way – if the Parades Commission did *not* cite a threat to life. The question raised is an extension of that discussed in *paras. 2.64-2.73* – should the source of the anticipated disorder or threat to life affect how its impact on the rights of others is weighed in the adjudicatory process? Again, the view was expressed that unless the source *is* distinguished, the message conveyed will be that the threat of violence works, albeit indirectly.

2.97 Of course, rights can be infringed in many ways other than as a consequence of violence. In situations, therefore, where public disorder is not the primary concern, one argument was that:

Members of any communal group should have the right to express their cultural identity save to the extent that this imposes unreasonable burdens on others. In the special context of parades and marches there should be a general right to process along a highway but subject to control and recognition of the impact on the rights of others. Accordingly, one important factor to be taken into account in the control of the right to process is the view of a majority of the people in a significant geographical locality along the route.<sup>128</sup>

2.98 Others – including those from a unionist/loyalist background – similarly argued that those who lived in areas through which parades pass have rights which parade organisers must take into account. It was stated that if a parade is offensive or even perceived to be such, residents clearly have a right to protest, and the moral justification for doing so is strengthened if the organiser makes no attempt to address residents’ concerns. This was felt by many to be a basic issue of recognition and respect.

2.99 Furthermore, the *Quigley Report* suggests that the frequency of parades in any single location should be a relevant factor when assessing the impact on the rights and freedoms of others:

Except in circumstances where parades have the overwhelming support of the local population, it would be surprising if the number of parades planned for a particular location over what could be a relatively short space of time were not a factor. One parade along a route in a season might be deemed to have insignificant impact on the rights and freedom of others. One a night – to take the case to the other (unlikely) extreme – might be regarded as intolerable intrusion.<sup>129</sup>

Quigley further argues that ‘traditionality’ should be a legitimate consideration only if decisions had to be taken to prioritise the parades notified to take place in any particular area. Such prioritisation would be necessary either if it was considered that there were too many parades (in which case, parties themselves would be given the opportunity to prioritise their

<sup>127</sup> *Osman v UK* (1998), at paras.115-116. See further *Parades, Protests and Policing*, p.58.

<sup>128</sup> Submission by the Church of Ireland Working Group on Political Developments to the NIHRC.

<sup>129</sup> Quigley, para. 15.21.

events), or because two events were notified to take place at the same location at the same time.<sup>130</sup>

2.100 One interviewee, however, viewed the ‘protection of the rights and freedoms of others’ clause in Article 11(2) as being ‘less robust’ than the ‘prevention of public disorder’ clause. As the ‘*Parades, Protests and Policing*’ report notes, none of the European cases addresses the question of what these rights and freedoms might be in the context of peaceful assembly. Furthermore, while the Parades Commission has often noted its obligation to uphold the right to life (Article 2), the right to private and family life (Article 8), and the right to peaceful enjoyment of one’s possessions (Article 1 of Protocol 1), a number of interviewees deposed that it was not at all clear from the Commission’s determinations or Guidelines how these rights are being interpreted.

2.101 The Ulster Unionist Party’s submission to the Review of the Parades Commission argues that:

There is a clear distinction between a parade on a main thoroughfare walking past residences and going through a residential area. The test to be applied in balancing rights of the residents against those of parade organisers should be simply the protection of those European Convention rights enjoyed by citizens namely a right to private life and family contained in Article 8 and of peaceful enjoyment of possessions contained in Article 1 of Protocol 1. However in applying these rights it should be noted that individuals living in a local community would be unable to demonstrate any proprietary interest in the roads and highways along which a parade might pass.

2.102 The *Quigley Report* records a similar viewpoint, and urges that the focus should be on precisely this issue – the rights at stake – “as...North intended.”<sup>131</sup> Quigley therefore suggests that “it should be possible to assess the extent to which a parade would affect the rights and freedoms of others by considering five broad areas, with the key factors to be taken into account in relation to each...and the Guidelines could be drawn accordingly.”<sup>132</sup> These five broad areas are:

- The nature of the parade
- Arrangements for the parade
- Characteristics of contested part of route
- Potential for disruption
- Any other matter concerning the parade which arises under any Article of the ECHR or any other international human rights agreement to which the UK is a party or under the general law which affects the rights and freedoms of others.

The report, however, makes no attempt to enunciate how these broad areas and the key factors should correspond to the interpretation of specific rights and freedoms.

2.103 Similarly (not explicitly relating factors to specific rights), or attempting to detail an exhaustive list, members of the Parades Commission stated that they may take into account:<sup>133</sup>

- The time of day or night that a parade takes place;
- The date of the particular event;
- Whether or not it is a public holiday;
- Whether it passes through a residential area;
- Whether it is a small village or a large town;

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<sup>130</sup> Quigley, para. 15.19.

<sup>131</sup> Quigley, para. 15.15.

<sup>132</sup> Quigley, para. 15.16.

<sup>133</sup> *Second Report from the Northern Ireland Affairs Select Committee: The Parades Commission: Session 2000-01: HC 120-II*, pp.172-3, Qs.544-5.

- Potential access problems;
- The size and estimated duration of the parade;
- The impact on commercial and domestic life;
- Assurances given by the parade organiser.

2.104 Unfortunately, only a minority of interviews generated the detailed information sought in this regard, and the time constraints – which inevitably factor when addressing a subject of this magnitude – provide one partial explanation. Notwithstanding, there also appeared to be a general discomfort when talking about legal technicalities, resulting in interviewees prefacing their answers with words to the effect of “I’m not a lawyer, so...”. This discomfort might have been assuaged by couching the interview questions more in terms of parties’ needs and interests and less in terms of defining specific ‘rights’.

*i) Respect for private and family life, home and correspondence (Article 8 – see Appendix B)*

2.105 The essence of ‘privacy’ – whether, for example, property, information, autonomy, secrecy, intimacy, dignity, or identity – has long been the subject of academic, political and legal debate. Whitty, Murphy and Livingstone surmise that the search for privacy’s core value “has been, is – and probably can only ever be – an unsatisfying pursuit.”<sup>134</sup> As Feldman trenchantly argues, “privacy derives its weight and importance from its capacity to foster the conditions to a wide range of other aspects of human flourishing. The core of privacy therefore depends on one’s idea of humanity and human flourishing, which is in part culturally conditioned.”<sup>135</sup> Feldman suggests a three-stage test to identify when law should protect privacy interests:<sup>136</sup>

- 1) Is the interest really related to privacy?
- 2) How significant is the interest to the maintenance of a justifiable claim to privacy, both generally and in the particular circumstances of the case? and
- 3) How serious is the infringement of the interest?

He emphasizes that ‘[t]he first question must be capable of being answered “yes” before the other two questions can arise’. In contrast, questions two and three ‘are matters of degree, requiring courts and legislators to balance the weight of privacy interests against, other, competing, claims of a private- or public-interest nature.’

2.106 This debate predates the *Human Rights Act*, and the creative judicial interpretation of the law of private nuisance in the mid-1990s demonstrates how the protection of privacy overlaps with the question of what constitutes harassment.<sup>137</sup> It is therefore considered under ‘*A right to freedom from sectarian harassment?*’ (see below, *paras.2.123-2.148*).

2.107 As explained in the *Parades, Protests and Policing* report, ‘private life’ has been held to cover the physical and moral integrity of the person.<sup>138</sup> In this light, it is significant that in Chapter 6

<sup>134</sup> Whitty, N., Murphy, T., and Livingstone, S., *Civil Liberties Law: The Human Rights Act Era*, Butterworths (2001), p.308.

<sup>135</sup> Feldman, D., ‘Privacy-related Rights and their Social Value’ in Birks, P. (ed.), *Privacy and Loyalty*, Clarendon (1997), pp.15-50 at p.21. See also Feldman, D., ‘The Developing Scope of Article 8 of the European Convention on Human Rights’ [1997] *EHRLR* 266.

<sup>136</sup> Feldman, D., ‘Secrecy, Dignity or Autonomy? Views of Privacy as Civil Liberty’ (1994) *CLP* 41, at pp.50-51, cited by Whitty, Murphy and Livingstone, above n.000, at p.309, n.222.

<sup>137</sup> See in particular, *Khorasandjian v Bush* [1993] 3 All ER 669 cf. *Hunter v Canary Wharf* [1997] 2 All ER 426.

<sup>138</sup> Chapter 3.3, pp.43-44.

its consultation on the Bill of Rights, the NIHRC raises the possibility of including the right to personal and/or physical integrity. The Commission notes that:<sup>139</sup>

The phrase “physical integrity” is mentioned in the proposed clause pertaining to harassment in Chapter 4(7), but a number of submissions to the Commission highlighted concerns about the protection and safety of individuals’ physical well-being, their homes and their neighbourhoods, as well as the right to develop one’s own personality.

2.108 In addition, the recent case of *Hatton and Others v The United Kingdom* (2001),<sup>140</sup> which concerned the impact of night time noise levels of aircraft taking off from, and landing at, Heathrow airport, confirmed that the State has a positive duty to take reasonable and appropriate measures to secure the applicants’ rights under Article 8(1) of the Convention.<sup>141</sup> Furthermore, “the right to a healthy environment is included in the concept of the right to respect for private and family life.”<sup>142</sup> This clearly indicates another potential overlap, this time between Article 8 and Article 1 Protocol 1 (see *paras. 2.112-2.121* below). The latter is included in Chapter 14 of the NIHRC’s Bill of Rights consultation document – ‘Social, economic and environmental rights.’ Analogies have also been drawn between parades and ‘noisy neighbours’.

2.109 Whilst arguing, in his evidence to the Northern Ireland Affairs Select Committee, that Article 8 *can* be applicable in a parades situation, Mr. David Watkins (NIO) alluded to the paucity of directly relevant jurisprudence in support of this view.<sup>143</sup> Yet, despite being something of a legal void, *The Legal Control of Marches in Northern Ireland*<sup>144</sup> suggested that:

It is certainly arguable that if action by the police to protect the rights of loyalists to march involves an effective curfew on residents in an area in which opposition is anticipated, as has happened on some occasions in the Lower Ormeau area in Belfast, that in itself would constitute an unacceptable denial of the rights of those residents to liberty under Article 5 of the Convention and to respect for their private and family life under Article 8.

2.110 Similarly, one interviewee asserted that the right to have one’s home, privacy and family life respected was often stronger in relation to the policing of parades than to parades of themselves. This argument continued that it would be important to determine if the policing operation was due to the parade or to the related protest. If due to the former, the argument for restricting a parade because of the need to uphold the Article 8 rights of residents would likely be stronger. It was felt that such an approach would again emphasize that entitlements and responsibilities are inextricably linked, and it was noted that the Parades Commission has often emphasized that it is in the interests of the rights of residents for the organisers of any protest against a parade to take steps to minimize the potential for disorder, and thereby facilitate low key policing.

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<sup>139</sup> See question 16 in the NIHRC’s Bill of Rights consultation document, pp.38-9.

<sup>140</sup> (2002) 34 EHRR 1 (Application no. 36022/97, judgement of 2 October 2001).

<sup>141</sup> *Ibid.*, para. 95. See also *Powell and Rayner v. the United Kingdom*, judgement of 21 February 1990, Series A no. 172, para. 41, and *Guerra v. Italy*, judgement of 19 February 1998, *Reports* 1998-I, para. 58; and *Lopez Ostra v Spain* (1994). **The Working Group has subsequently noted the UK Government’s successful appeal of the *Hatton* judgement in the Grand Chamber. The appeal judgement found that the authorities *had* achieved a proper balance between the rights of the residents to peaceful enjoyment of their homes and their family lives in allocating the number of night flights at Heathrow. Given that only a limited number of people were affected by the noise, and that their house prices had not been devalued, there had not been a disproportionate interference with their rights for the purpose of achieving economic benefit (*The Times*, 10 July 2003).**

<sup>142</sup> *Ibid.*, separate opinion of Judge Costa.

<sup>143</sup> *Second Report from the Northern Ireland Affairs Select Committee: The Parades Commission: Session 2000-01: HC 120-II*, p.97, Q.341.

<sup>144</sup> Hadden, T., and Donnelly, A., *The Legal Control of Marches in Northern Ireland*, CRC (1997), p.49.



2.111 When considering the right to private and family life, references were often made by interviewees to the distinction between ‘residential’ and ‘commercial’ areas (including town centres). However, the difficulty of defining what constitutes a ‘residential area’ was also mentioned. Save for the word ‘estate’, little clarification is provided by the key factors suggested by the *Quigley Report* for inclusion in a revised Guidelines document under the heading ‘*Characteristics of contested part of route*’:<sup>145</sup>

- Location, eg town centre, main road, residential estate.
- Type of property adjoining route eg business, residential.
- Demographic composition of population along the route.
- Presence on the route of sensitive sites eg church grounds, monuments.

These factors are not substantively different from those already contained in para. 4.2 of the existing Guidelines document. Furthermore, Quigley’s self-confessed diffidence in relation to his suggestions regarding the timing of band parades,<sup>146</sup> and his hope that others will ‘put their minds to it’ to come up with a solution, leaves unaddressed the question of what might be an appropriate threshold of intervention in order to uphold the right to private and family life.

*ii) Protection of property and the peaceful enjoyment of one’s possessions (Article 1, Protocol 1 – see Appendix B)*

2.112 The *Parades, Protests and Policing* report observed that “[t]he right to peacefully enjoy one’s possessions has been strictly construed by the European institutions so as to offer protection only to proprietary interests.”<sup>147</sup>

2.113 Article 1, Protocol 1 ECHR is included, verbatim, in the Human Rights Commission’s Consultation document under the heading, ‘Social, economic and environmental rights’.<sup>148</sup> In addition, the NIHRC suggests that there should be a general provision to govern social and economic rights and that all public bodies through which any of the legislative, executive or judicial powers of the State are exercised in Northern Ireland shall take measures to develop and enforce programmatic responses to these rights.

2.114 It was argued that recognition of this right is implicit in section 8(6)(b) of the *Public Processions (NI) Act 1998*, namely that the Commission shall have regard to any disruption to the life of the community which a procession may cause. The Commission’s Guidelines state as follows:

*3. Disruption to the life of the Community*

All processions, no matter how small, cause some disruption, if only by temporarily curtailing the flow of traffic. That is an inevitable feature of processions which is not, by itself, sufficient to require that people should be constrained from exercising this fundamental human right. The question the Commission must therefore address is whether the level of disruption caused by the exercise of the right to assembly is disproportionate to the significance of the procession to those participating, or to the community they claim to represent. In gauging disruption, the Commission will take care to distinguish between disruption caused by the procession itself and disruption caused by any associated protest activity or police action taken in response to that activity.

3.2 The factors taken into account will include the degree of:

- restriction of freedom of movement by local residents.
- restriction of normal commercial activity

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<sup>145</sup> Quigley, para. 15.16.

<sup>146</sup> Quigley, paras. 24.30-24.32.

<sup>147</sup> Hamilton, M., Jarman, N., and Bryan, D. *Parades, Protests and Policing: A Human Rights Framework* (2001), NIHRC, p.44, para. 3.4.

<sup>148</sup> Chapter 14, at p.129.

- restriction of access to public amenities such as hospitals.
- restriction of access to places of worship; and
- the duration of the procession.

2.115 Despite these general guidelines, one view was that disruption is difficult to quantify, and this section of the legislation is so potentially wide ranging in its application that it could enable restrictions on the right of peaceful assembly ‘at will’. The Ulster Unionist Party’s submission to the Review of the Parades Commission argued that “section 8(6)(b) be redrafted to more clearly distinguish between the effect of the procession and subsequent police action.”

2.116 Notwithstanding, others felt that it was not clear what weight the Parades Commission currently accorded to the impact of parades on business interests. The definition of “contentious parades” might again be argued to be relevant here (see above, *paras. 2.42-2.43*). The Civic Forum’s submission to the Review of the Parades Commission noted that:

While a parade may not increase sectarian tensions and therefore not be seen as contentious, it could have the potential to unreasonably disrupt the community in which it took place. Another view was that the Parades Commission should only become involved in adjudicating on parades where there was the prospect of increasing sectarian tensions.

2.117 It may be, therefore, that the current designation of parades as ‘contentious’ does not take sufficient account of the impact of parades on business interests (or indeed, the rights and freedoms of others generally). It was queried whether or not parades which might have a significant impact on these rights, but which are unlikely to give rise to disorder, would necessarily even be considered by the Parades Commission. One interviewee argued that Local Strategic Partnerships (LSPs) provide an ideal forum for business interests to have their voice heard in relation to the impact local parades. It was argued that by using such a forum, business owners would be less fearful about raising any concerns.

2.118 It was suggested by some that this right *should* protect business interests in the context of *disruption* caused by the exercise of the right to assemble. One view expressed was that the impact of parades on commercial life was largely due to the overall atmosphere created during the marching season rather than the inevitable localised, often small-scale, disruption caused by many individual parades. In this light, the Confederation of British Industry’s submission to the current Review of the Parades Commission states that:

The CBI’s primary interest is to ensure that the environment in which business operates is conducive to investment, wealth creation and growth. The events which have taken place every summer since 1996 in relation to parades and marches have been extremely damaging to many aspects of the local economy, including:

- significant damage to the tourism industry and its short to medium-term prospects;
- extremely damaging images of Northern Ireland which deter many potential inward investors;
- a significant loss in business confidence and resulting damage to investment intentions;
- in some years, significant costs incurred by local businesses due to closures (because of intimidation) and inability to service customers (because of road blockages)
- an increase in sectarianism and community polarisation, delaying the transition to a stable society which the community wishes to see and which is essential if Northern Ireland is to achieve the competitiveness essential for success in the global economy.

As long as the existing climate in relation to parades and marches prevails, the blockage of roads, particularly arterial roads, along with access to Northern Ireland’s ports and airports, cannot be ruled out. This creates an unacceptable atmosphere in which to try to do business – when not only is there the possibility that the free movement of goods in to and out of Northern Ireland may be stopped, but there is also the chance that employees may be prevented from travelling to and from their work.

It is therefore essential that the problems and issues associated with parades and marches, particularly that in connection with ‘Drumcree Sunday’, which is now entering its fifth year of stalemate and blighting every July, are resolved in a manner acceptable to all those affected as soon as possible.

2.119 Another view was that parades impact differentially on retail and service industries. Seemingly taking this into account, the *Quigley Report* notes a point made in evidence that:<sup>149</sup>

Parading of all kinds on the scale of former years, when roads were far freer of traffic is no longer appropriate. The increasing importance of service-type businesses (compared with the large, traditional manufacturing enterprises) demands a re-think of the impact of parades on everyday life.

2.120 One interviewee suggested, however, that the service sector has a greater degree of flexibility in that it can simply avoid the area. This means, though, that clients who work along the parade route lose out on custom. It was argued that the economy of Northern Ireland is fundamentally based upon the success of small local businesses, so the economic welfare of a town or village ought not to be overlooked. The cumulative impact of a large number of parades in an area might affect local businesses. Areas could also become stigmatised (with consequential losses) because of the publicity which parade disputes attract. Furthermore, the situation in which shops either staying open or closing implies support for one side or the other was inevitably detrimental to business. The point was also made that insurance doesn’t fully cover losses due to disorder let alone disruption, and that in any case, making a claim causes renewal premiums to rise, and it was noted that the adequacy of compensation arrangements is a factor often considered by the European Court of Human Rights.

2.121 It was stressed that successful business, through taxation, pays for schools, hospitals and roads etc. Some interviewees were therefore angered by the annual drain on the public purse of policing parades and cleaning up the aftermath. It was felt that event organisers should bear at least some of these responsibilities and costs. One possibility which was advocated was to calculate the potential loss of trade along a particular parade route should a parade or protest result in violence (consultants, it was suggested, could arrive at some ‘rule of thumb’ by which this could be assessed) and that organisers of both parades and protests be required to post a financial surety of equivalent value. In this light, whilst unlikely to be of ‘equivalent value’, the *Quigley Report* recommends that where ‘gross’ breaches of a determination or the Code of Conduct are involved, a bond up to a maximum of £500 would have to be posted by the organiser before any subsequent parade notified by him could take place (see *paras. 2.25 and 3.30*).<sup>150</sup>

### iii) Freedom of thought, conscience and religion (Article 9)

2.122 Whilst no interviewee advanced this argument, drawing on the *Parades, Protests and Policing* report, it seems possible that the European Court’s judgement in *Otto-Preminger-Institut v Austria* (1994) could be applied in a parades context to protect the freedom of thought, conscience and religion of residents living in the vicinity of a contested parade. The NIHRC report noted<sup>151</sup> that in this case:

The majority of the Court stated that it could not disregard the fact that the proportion of Roman Catholic believers in the Tyrolean region of Austria (where the film, ‘Council in Heaven’, was advertised and scheduled to be shown) was as high as 87%. The Cinema Operator’s right to freedom of expression had to be balanced with the community’s right to proper respect for their freedom of thought, conscience and religion under Article 9 of the ECHR:

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<sup>149</sup> Quigley, para. 11.5.

<sup>150</sup> Quigley, para. 18.3.

<sup>151</sup> Hamilton, M., Jarman, N., and Bryan, D. *Parades, Protests and Policing: A Human Rights Framework* (2001), NIHRC, pp.34-5, para. 2.3.7.4.

Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.<sup>152</sup>

The Court – over-ruling the decision of the Commission by a majority of 6-3 – accepted the Government’s submission that there was a pressing social need for the preservation of religious peace, and held that it had not overstepped its margin of appreciation in confiscating the film. This sits well with the Swiss Government’s assertion in *Rassemblement Jurassien* (1979) that “the public interest in the freedom of peaceful assembly was bound temporarily to take second place to the equally legitimate public interest in harmonious community life among citizens in a democratic society.”<sup>153</sup> The European Commission did not debate this argument.

However, in contrast, the minority dissenting opinion in *Otto-Preminger-Institut* argued that:

The Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinions of others.<sup>154</sup>

This dissenting opinion accords with the rationale in *Ezelin v France* (1991) where the Commission stated that a sanction based on *the impression* that the applicant’s behaviour *might have given* is incompatible with the strict requirement of a ‘pressing social need’ and is, thus, insufficient to justify restricting the applicant’s freedom.

#### iv) A right to freedom from sectarian harassment

2.123 One view, often expressed, was that parades can create a sense of fear, outrage and humiliation for people living and working in the areas through which they pass. As CAJ and others have noted, statistics in July 1998 relating to attacks on security forces, shooting and bombing incidents, incidents of criminal damage to homes, other buildings and vehicles:

...hide the reality of fear and intimidation which affected many across Northern Ireland in this period, with sectarianism rampant. In the most serious tragedy of all, the lives of three young children were lost when a petrol bomb was thrown into their house in what the police have described as a clearly sectarian attack...[F]rom the perspective of those living on the Garvaghy Road, they have been obliged since early July 1998 to live in siege-like conditions. The promise to ensure freedom from sectarian harassment in the Good Friday Agreement must seem a very empty one to them.<sup>155</sup>

2.124 It was also emphasised by a number of interviewees that in the minds of those who live and work in areas through which parades pass, many parades – even those with different organisers and different participants – are inextricably *associated* with one another. Interviewees also recognised the cumulative impact that a large number of parades might have on communities living in the areas through which they pass.

2.125 Some interviewees noted that proving a causal connection between a particular parade and a sectarian attack which takes place some time thereafter is likely to be difficult. It was suggested, though, that it might be less difficult to prove that behavioural aspects of certain

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<sup>152</sup> Paras. 52 and 55.

<sup>153</sup> At p.115, para. 20.

<sup>154</sup> Joint Dissenting Opinion, para.6.

<sup>155</sup> CAJ *Commentary on Public Order Policing 1998*, p.11 and p.16.

parades are of themselves demonstrably sectarian in nature. These might include dress, language and gestures, music (especially ‘party tunes’), urinating in people’s gardens, insensitivity towards monuments, churches or other such sites of local importance, and the general conduct of parade participants on previous occasions. The Bogside Residents’ Group, for example, in evidence to the Northern Ireland Affairs Committee, focused on specific aspects of parades in Derry, arguing that:

It is not about the marching through Derry City Centre, it is about the disruption, it is about the behaviour of bands, it is about what can happen to people who live in the local area.<sup>156</sup>

Most of our, if you like, engagement with the ABOD is on practical issues. In some cases they have listened to what we said. For example, they agreed not to fly the Union Jack over the Bogside on August 12 parade. That may be a small, but nevertheless important concession on their part to nationalist sensitivities. They agreed not to play what might be regarded as party tunes in those parts of the wall which run through the Bogside and are very close to the Bogside.

2.126 It was also contended by some interviewees that non-compliance with the Parades Commission’s Code of Conduct seems to factor in a relatively small number of its determinations. Moreover, those who were critical on this front believed that the Commission had shied away from enforcing some of the more challenging provisions within the Code. One example cited was para. G of Appendix A which states that:

Flags and other displays often have a legitimate historical significance, but in no circumstances should *such* items relating to a proscribed organisation be displayed. [emphasis added]

2.127 *The Legal Control of Marches in Northern Ireland* suggested<sup>157</sup> that a ‘Code of Conduct for Peaceful Parades in a Divided Society’ should include, *inter alia*, a provision stating that “Conduct, words or music likely to cause undue offence or to stir up sectarian antagonism are to be avoided at all time.” In relation to this question of provocation, the Ulster Unionist Party’s submission to the Review of the Parades Commission pointed to the comments of Lord Justice Sedley in the Court of Appeal, *Redmond-Bate v Director of Public Prosecutions* (1999):

...lawful conduct should not be restricted unless it is so provocative as to give rise to a reasonable apprehension of violence. Moreover, the test for provocation is not whether the message is offensive, but rather whether the conduct in question interferes with the rights or liberties of others, ‘violence is not a natural consequence of what a person does unless it so clearly interferes with the rights of the others so as to make a violent reaction not wholly unreasonable’.

2.128 This case is also referred to in the *Quigley Report*,<sup>158</sup> which notes that the court took into account the impending incorporation of the ECHR into UK domestic law. In contrast, though, Mr. David Watkins (NIO) downplayed its significance on the basis that the case concerned the common law offence of a breach of the peace:<sup>159</sup>

[I]t turned on the application and the interpretation of the common law, whereas...Parliament has established a framework in the *Public Processions Act*, which specifies what is lawful and what is unlawful behaviour in relation to parades, and it is compliance with the *Public Processions Act* in Northern Ireland which I think takes primacy. And I am not sure, therefore, that actually the English case...does have any profound implications.

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<sup>156</sup> *Second Report from the Northern Ireland Affairs Select Committee: The Parades Commission: Session 2000-01*: HC 120-II, p.150, Q.451.

<sup>157</sup> Hadden, T., and Donnelly, A., *The Legal Control of Marches in Northern Ireland*, CRC (1997), p.72.

<sup>158</sup> Quigley, para. 12.14 and para. 20.5.

<sup>159</sup> *Second Report from the Northern Ireland Affairs Select Committee: The Parades Commission: Session 2000-01*: HC 120-II, p.97, Q.343.

2.129 One view was that the balance to guaranteeing freedom of peaceful assembly comes at the point where any such assembly constitutes incitement to hatred (*cf.* violence), or includes behaviour which is deliberately hurtful to others. This, it was suggested, ought to be the behavioural baseline. In so far as this point has been addressed by the European Commission and Court of Human Rights, the *Parades, Protests and Policing* report noted that:

Examining, in particular, the contrasting opinions in the case of *Otto-Preminger-Institut* (1994), it is clear that there is disagreement even within the European Court as to how much protection should be afforded to people's religious sensibilities. Certainly, there is no right not to be offended.

2.130 That said, one of the rights affirmed by the parties to the Belfast (Good Friday) Agreement was that to freedom from sectarian harassment. Sinn Fein's submission to the Northern Ireland Affairs Committee thus emphasised that the Agreement envisaged a society whose members are free from sectarian threat, harassment, and abuse.<sup>160</sup> It has been proposed that such a right be enshrined in legislation or a Bill of Rights for Northern Ireland, possibly expressed in the following terms:

The legislation and its application must also comply with the United Kingdom's obligations and commitments affirmed in the agreement between it and the Irish Government which includes affording protection to the right of citizens to live free from sectarian harassment.

2.131 The concept of 'harassment' suggests something more than mere offence, yet something which possibly falls short of violent activity. Such a right could, conceivably, be a right relied upon by parties on both sides of a dispute given that it would likely place an emphasis on their *perceptions* of the others' behaviour. In any case, Art. 17 ECHR would also have to be borne in mind when balancing such a right with that to peaceful assembly (see above at *para. 2.28*).

2.132 Harassment is currently included in the NIHRC's consultation document in the 'Equality and Non-Discrimination' chapter. The relevant sections read as follows:

One of the 'gaps' identified in the European Convention on Human Rights is the absence of a free-standing provision guaranteeing equality or imposing a positive obligation on the state to redress inequality. Article 14 of the Convention only provides a guarantee against discrimination for the rights included in the European Convention:

**Article 14 of the European Convention – Prohibition of discrimination**

[1] The enjoyment of the rights and freedoms set forth in this Convention 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.

**The Commission's Preliminary Proposals...**

**Non-discrimination**

4. Everyone has the right to be protected against any direct or indirect discrimination whatsoever on any ground (or combination of grounds) such as race or ethnic origin, nationality, colour, gender, marital or family status, residence, language, religion or belief, political or other opinion, possession of a criminal conviction, national or social origin, birth, disability, age, parentage, sexual orientation, status as a victim or any other status.

Unlike Article 14 of the European Convention, the clause above extends to all rights guaranteed by law, not just to those listed in the European Convention or in this Bill of Rights.

...

**Harassment**

7. Harassment or bullying shall be deemed to be a form of discrimination when unwanted conduct related to any of the grounds referred to in clause 4 (the non-discrimination clause) takes place

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<sup>160</sup> p.223, emphasis added.

with the purpose or effect of violating the physical integrity or dignity of a person, or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

The issue of harassment made frequent appearances in submissions to the Commission. Many people argued that harassment and intimidation in the workplace on the grounds of political opinion or gender should be outlawed. Submissions were also concerned with harassment and bullying within the education system. Although Chapter 8 of this document, on the rights of victims, addresses harassment indirectly, the Commission believes that harassment and bullying should be recognised as powerful forms of discrimination.

- 2.133 The question raised, therefore, is whether it is appropriate for harassment to be included in a Bill of Rights in the manner proposed by the NIHRC. It was noted that this question has a number of elements including whether or not ‘harassment’ should be qualified in any regard (*e.g.* prefaced by the adjective ‘sectarian’ as envisaged by the Belfast Agreement), and whether certain aspects or types of parading could reasonably be viewed as a form of discrimination.
- 2.134 In relation to the latter, it was noted that the Northern Ireland Office, in its assessment of parades policy in relation to section 75 of the *Northern Ireland Act 1998* (although excluding the *operation* of this policy by the Parades Commission as that was considered to be a matter solely for the Commission) concluded that:

**Comment**

The policy is predicated on local accommodation of parades issues, with a decision being made by the Parades Commission only where an accommodation cannot be reached. The accusation is that one or other side of the community, in terms of political opinion or religious belief, suffers a differential adverse impact when the Commission makes a decision on a parades issue.

The Government recently conducted a review of the mediation aspects of parades legislation. But in those locations where the positions of the adversaries remain entrenched, **the promotion of good relations** by the Parades Commission is difficult to achieve.

**Conclusion**

This policy is probably subject to more public scrutiny and criticism than any other of HMG’s policies. The facts are well known and have been exhaustively rehearsed. An impact assessment is not required.<sup>161</sup>

- 2.135 Depending on one’s view of parading as a potentially discriminatory practice, question 12 in the NIHRC’s Bill of Rights consultation might also be relevant. It asks whether an individual’s ‘status as victim’ should be a legitimate ground for their being protected from discrimination.
- 2.136 It was suggested that the boundaries of acceptable behaviour in the *context* of a divided society should be more clearly articulated, and that the adequacy (in relation to parades) of existing legislation on harassment and incitement to hatred should be evaluated. It is coincidental that the NIO is currently conducting such a review. The importance of doing so was underscored by the fact that some parties have argued that while anti-racism legislation exists in Britain, there is no parallel anti-sectarianism legislation in Northern Ireland.
- 2.137 A number of possible definitions and sources of guidance are reproduced in *Appendix D*. These include:
- The EU Code of Practice on Sexual Harassment<sup>162</sup>
  - The UN Convention on the elimination of all forms of racial discrimination...
  - The definitions of:

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<sup>161</sup> Revised Draft Equality Scheme for the Northern Ireland Office, Annex F, Outcome of Initial Interim Screening Exercise: A Document for Public Consultation August 2000.

<sup>162</sup> Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work (92/131/EEC).

- “fear” and “hatred” in the Public Order (NI) Order 1987;
- “racially aggravated” in the *Crime and Disorder Act 1998*;
- “course of conduct” in the *Protection from Harassment (NI) Order 1997*;
- “religious hatred” in the *Religious Offences Bill*;
- “racism” in the Report of the Stephen Lawrence Inquiry;
- “sectarianism” as defined by C. Clegg and J. Leichty
- “sectarianism” as defined by R. McVeigh;
- “racial harassment” as defined by the Commission for Racial Equality;
- “intimidation” as defined by J.Darby.

2.138 As noted earlier, the meaning of ‘harassment’ corresponds with that of ‘privacy’, discussed in relation to Article 8 ECHR (*paras. 2.105-2.111* above). The *Protection from Harassment (NI) Order 1997* (see *Appendix D*) is similar to the English *Protection from Harassment Act 1997*. While neither law defines ‘harassment’, under their terms a ‘*course of conduct*’ amounting to harassment of another is both a crime and a civil wrong. These laws were introduced because there was little protection for victims who were upset and frightened by a series of incidents, where the behaviour in question nonetheless fell short of being illegal.<sup>163</sup>

2.139 The intended scope of these provisions has been hotly debated – not least of all by the judiciary.<sup>164</sup> In *DPP v Mosely* (1999)<sup>165</sup> Collins J. held that:

[W]hatever may have been the purpose behind the Act, its words are clear, and it can cover harassment of any sort. Thus there may, perhaps in many instances there will be a need for the court to balance the interests of the victim of the harassment against the rights of the person carrying out the course of conduct which amounts to harassment. Those rights will include, in an appropriate case, the right to protest peacefully. Indeed, the provisions of section 1(3)(c) in particular recognise that it might be reasonable to harass in certain circumstances.

2.140 In *Huntingdon Life Sciences Ltd. v. Curtin and others* (1997)<sup>166</sup> Eady J. made the following observations:

The legislators who passed [the 1997 Act] would no doubt be surprised to see how widely its terms are perceived to extend to some people. It was clearly not intended by Parliament to be used to clamp down on the discussion of matters of public interest or upon the rights of political protest and public demonstration which are so much part of our democratic tradition. I have little doubt that the courts will resist any such wide interpretation as and when the occasion arises, but it is unfortunate that the terms in which the provisions are couched should be thought to sanction any such restrictions.

2.141 Eady J.’s comments were made in the context of an application by the British Union for the Abolition of Vivisection (“BUAV”) to discharge an injunction which had been granted under the 1997 Act. On their application to discharge the BUAV adduced evidence which demonstrated that they had “disavowed violence, harassment and the use of unlawful means.” In this context Eady J. further observed:

<sup>163</sup> Harris, J., *An Evaluation of the use and effectiveness of the Protection from Harassment Act 1997*, Home Office Research Study 203 (2000), p.2.

<sup>164</sup> See in particular [http://www.doughtystreet.co.uk/data/s\\_events/data/privacy.pdf](http://www.doughtystreet.co.uk/data/s_events/data/privacy.pdf) - Hudson, A ‘Alternative Methods of Protecting Privacy’, (27 February 2002). See also Infield, P., and Platford, G., *The Law of Harassment and Stalking*, Butterworths (2000), pp. 44-45, paras. 3.61-3.63, and pp.35-36, paras. 3.20 – 3.23. The latter considers whether the statutory defences contained in the *Protection from Harassment Act* – principally that the course of conduct was pursued under any enactment or rule of law – could be relied upon by a defendant arguing that the Human Rights Act (and Arts.10 and 11 ECHR) constituted such an enactment.

<sup>165</sup> Times, 23.6.99.

<sup>166</sup> Times, 11.12.97.



The significance of that material having been excluded from the consideration of the judge and the Court of Appeal ... is that they were not made aware of the scope for legitimate comment and criticism by [BUAV] which then existed. It was necessary, clearly, to distinguish in the relief sought between that which might be necessary to prevent violence and unlawful harassment, and that which would inevitably stifle legitimate comment on matters of undoubted public interest. That the plaintiffs singularly failed to do. It is manifest from the wide-ranging terms of the injunction sought in the writ that the plaintiffs, if they had obtained it, would be preventing any discussion or communication about the way they conducted their business at a very sensitive time.

- 2.142 These cases are useful in so far as they differentiate between harassment and legitimate expression and assembly. They were, however, heard prior to the coming into force of the *Human Rights Act 1998*. In a case which was heard *after* the *Human Rights Act* came into force – *Thomas v News Group Newspapers Ltd.* (2002)<sup>167</sup> – it was held that harassment must not be given an interpretation which restricts the right of freedom of expression, *save in so far as this is necessary in order to achieve a legitimate aim*. It was suggested that the Working Group might consider how ‘harassment’ could be factored into the interpretation of the legitimate aims in Article 11(2).
- 2.143 Outside the law of harassment, Northern Ireland has broader provisions in its *Public Order (NI) Order 1987* in relation to acts intended or likely to stir up hatred or arouse fear, than currently exist in England. In Northern Ireland, definitions of fear and hatred are framed so as to include fear of, or hatred against, a group of persons defined by (amongst other things) *reference to religious belief*.<sup>168</sup> Two separate Bills are currently before Parliament which would see the introduction of similar terms in England and Wales. These are the *Religious Discrimination and Remedies Bill* which provides for the offence of incitement to religious hatred and the *Religious Offences Bill*<sup>169</sup> which proposes that the Public Order Act 1986 in England be widened in scope so as to cover religious offences in addition to the already covered racial ones (see *Appendix D*). In the Parliamentary debates about the latter Bill, Northern Ireland was highlighted as a model to follow. This is noteworthy given that there appears only to have been one successful prosecution of an Article 9 offence (incitement to hatred) in Northern Ireland between January 1998 and December 2001.<sup>170</sup>

**[Religious Offences Bill (HL) 30 Jan 2002 : Column 315: Lord Avebury]:**

I should point out – it was not a matter which received any attention during those proceedings – that in Northern Ireland provisions almost identical to these have been on the statute book since 1987. Presumably they have acted as a deterrent to religious incitement there. There is exactly the same wording as is already in Part 3 of the Public Order Act in relation to racial hatred offences and, as far as I am aware, there have been no difficulties of interpretation or of limiting freedom of expression and other of the anxieties expressed in our recent discussions. People in Northern Ireland are well known for expressing themselves about religion in a robust manner, and the law has not altered that. Nor is the existence of the law a matter of controversy, as the Northern Ireland Human Rights Commission would confirm.

...

**30 Jan 2002 : Column 316**

If it is common ground that incitement to hatred of religious groups which are not defined by ethnic origin – including Muslims and Christians – does happen, then the question is whether it has now become a real and urgent threat to society requiring legislation, which it was not when the

<sup>167</sup> [2002] EMLR, p.88, para.24.

<sup>168</sup> See Dickson, B., and Hamilton, M., ‘Meetings and Marches’, chapter 8 in *The CAJ Handbook*, 4<sup>th</sup> Ed. (2003 forthcoming). In addition, a useful overview of the existing law is contained in the NIO Consultation Paper: *Race Crime and Sectarian Crime Legislation in Northern Ireland* (November 2002) which is available online at <http://www.nio.gov.uk/pdf/race.pdf> The publication of the latter paper was one of the ‘Action Points’ outlined in the Community Safety Unit’s Consultative Strategy Document, *Creating a Safer Northern Ireland through Partnership*, at p.19 (also available online at <http://www.communitysafetyni.gov.uk/publications/pdfs/Strategy%20Document.pdf>)

<sup>169</sup> Proposed by Lord Avebury after similar clauses were omitted from the Anti-terrorism, Crime and Security Act 2001.

This Bill is currently before the Select Committee on Home Affairs.

<sup>170</sup> Statistics courtesy of the Director of Public Prosecutions, August 2002.

Law Commission reported in 1985. But if it is now, then, as the Law Commission foreshadowed, the logical way of dealing with it is to follow the existing law on religious incitement in Northern Ireland and the law on racial incitement in Britain as closely as possible. It would be intolerable to have one set of provisions in Northern Ireland on religious incitement and another completely different set in the rest of the country.<sup>171</sup>

2.144 Northern Ireland, however, does *not* have the equivalent of section 4A of the *Public Order Act 1986* which prohibits:

Using threatening, abusive or insulting words or behaviour, or disorderly behaviour, or displaying any writing sign or other visible representation which is threatening abusive or insulting, thereby causing that person harassment, alarm or distress, with intent to cause a person harassment alarm or distress.

Nor is there any equivalent to section 5 of the 1986 Act in Northern Ireland. This section provides that a person is guilty of an offence if they use threatening, abusive or insulting words or behaviour *etc.* “within the hearing or sight of a person likely to be caused harassment or distress thereby.” Unlike the terms of the *Protection from Harassment Act*, the concept of harassment under the Public Order Act does not require ‘a course of conduct’ to have occurred. Furthermore, s4A was criticised prior to the enactment of the *Protection from Harassment Act 1997* because the requirement to prove intent on the part of the perpetrator created difficulties. Section 5, while not requiring intent, was also criticised because of the limited penalties available.<sup>172</sup>

2.145 Significantly higher maximum penalties for these offences (and others including assault and criminal damage) were introduced by the *Crime and Disorder Act 1998* where it can be shown that the offence was racially aggravated (see *Appendix D*). The *Anti-terrorism, Crime and Security Act 2001* does the same for religiously aggravated offences (s.39), and increased the penalty for inciting racial hatred from a maximum of two years to seven years in prison.

2.146 The *Race Relations Act 1965* made incitement to racial hatred a criminal offence. However, the Scarman report on the Red Lion Square riot criticized this provision:

Section 6 of the Race Relations Act is merely an embarrassment... Hedged about with restrictions (proof of intent, requirement of the Attorney General's consent)... The section needs radical amendment to make it an effective sanction, particularly, I think, in relation to its formulation of the intent to be proved before an offence can be established.

2.147 Geoffrey Bindman has also criticized this provision because of the requirement that the incitement must be communicated by “threatening, abusive or insulting words”. Bindman argues that “Incitement was thought of as a form of violent public confrontation. More insidious and subtle methods were ignored.” Consequently he believes the present law to fall short of compliance with the UN convention on the elimination of all forms of racial discrimination.<sup>173</sup>

2.148 The question of relying upon the Attorney-General’s discretion to sanction criminal proceedings has also been raised in parliamentary debates around the *Religious Offences Bill*. In contrast to Lord Scarman’s assertion, it was argued that if there are to be criminal sanctions against religious hatred, there must be measures to prevent their abuse, such as keeping authorisation for prosecution in the hands of the Attorney-General. The proper exercise of free speech must be protected, but not its abuse. It was argued that the Working Group should

<sup>171</sup> See also Mr. Thomas, Member for Harrow, West: 19 Jul 2002 : Column 643.

<sup>172</sup> Harris, J., *An Evaluation of the use and effectiveness of the Protection from Harassment Act 1997*, Home Office Research Study 203 (2000), p.2.

<sup>173</sup> *The Guardian*, Monday 8<sup>th</sup> October, 2001 (Comment & Analysis, p.17).

consider whether Article 17 ECHR provides adequate protection against any such abuse of rights.

## Procedural issues

### a) Transparency

2.149 The Civic Forum has argued that:

Adjudication should ensure a common standard applicable to all and which would operate with clear and transparent criteria of determination. The process by which the Parades Commission has arrived at its determinations should be transparent and public...

2.150 Several parties (including the Belfast Walkers' Club ABOD, and Banna Fliuit Naomh Phadraig, Kilkeel) have argued that the current procedures of the Parades Commission may violate the principles of natural justice,<sup>174</sup> and possibly article 6 ECHR (right to a fair trial). This argument runs as follows:

(a) The Commission does not detail the evidential basis of its determinations (including the 11/9 report submitted by the police) because of Rule 3.3 of the Parades Commission's Procedural Rules which states that:

All evidence provided to the Commission, both oral and written, will be treated as confidential and only for the use of the Commission, those employed by the Commission and Authorised Officers. The Commission, however, reserves the right to express unattributed general views heard in evidence but only as part of an explanation of its decision.

(b) This thereby denies organisers of events or other interested parties the opportunity to refute this evidence, produce contrary or other evidence, or test this evidence by cross-examination. Parties to the dispute may thus be at a substantial disadvantage on three accounts:<sup>175</sup>

- In respect of influencing the outcome of the Commission's initial decision;
- In assessing their prospects of bringing an appeal; and
- In the subsequent presentation of any appeal.

2.151 In its submission to the Northern Ireland Affairs Select Committee's Review of the Parades Commission, LOCC argued that:

We have seen the Parades Commission move further and further away from the idea of an independent and fair body, operating in an open and transparent way and making decisions based on clear and quantifiable criteria, as envisaged in the North Report. Our starting point would therefore be that the best way to enhance the effectiveness of the Parades Commission is for the Commission to operate in a way which is demonstrably fair and consistent. A group or individual may not like a decision, but at least the process of decision making is clear and understandable.<sup>176</sup>

Furthermore, the Report of the Northern Ireland Affairs Select Committee recommended that "the Government and the Parades Commission consider urgently whether the procedures need to be improved by greater transparency and, if so, to put the necessary steps in hand." (para. k).

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<sup>174</sup> See the 'Supplementary Memorandum submitted by the General Committee of the Apprentice Boys of Derry', *Second Report from the Northern Ireland Affairs Select Committee: The Parades Commission: Session 2000-01: HC 120-II*, pp.53-56.

<sup>175</sup> See *McMichael v UK* (1995) paras.80 and 82.

<sup>176</sup> *Second Report from the Northern Ireland Affairs Select Committee: The Parades Commission: Session 2000-01: HC 120-II*, p.208.

2.152 Both the Government's and Parades Commission's responses referred to a forthcoming legal action, brought on behalf of a Kilkeel band, concerning disclosure and confidentiality. This case has still not been heard. The Government's response was as follows:

There is a clear conflict between the Commission's desire for transparency in gathering evidence, and the concerns of many on both sides of the community that their evidence be kept strictly confidential. There are many situations, particularly in small, closely-knit communities, where those who gave evidence might find themselves the targets of a backlash – the Commission has had recent experience of allegations of this kind. The police would also have legitimate concerns.

2.153 The Parades Commission responded similarly, stating:

The Commission has legitimate concerns that any weakening of its guarantee of confidentiality to those providing information to the Commission could seriously damage the willingness of people to come forward and engage with the Commission. This could restrict significantly the Commission's ability to carry out its remit in full...The Commission...will make every effort to promote greater transparency where this does not offer risk to the personal safety of individuals who seek to engage with the Commission.

2.154 The Ulster Unionist Party, on the other hand, strongly recommended in its submission to the Quigley Review, that:

...the Commission adopt a policy of openness and transparency in making available all submissions it receives, especially Police reports relating to their assessment of public disorder.

2.155 Perhaps significantly, then, when questioned as to whether any problems might arise for the police if its advice or evidence to the Commission were to be regarded as disclosable to the parties if it was likely to have a material effect on the Commission's decision, the Assistant Chief Constable, Alan McQuillan replied:<sup>177</sup>

In terms of our advice being disclosable, probably not. If we then had to expose the basis of that advice, quite clearly on lots of occasions yes, because some of that advice is derived from intelligence about, for example, the intent of paramilitary organisations to organise or exploit that particular event. Not in every circumstance would that cause a problem but in some circumstances that could cause a problem.

2.156 It was also argued by one interviewee that there is something of a paradox in the Commission's position given that it places great emphasis on the need for dialogue and explanation on the part of the parties, yet erects this barrier of confidentiality within its own procedures. Even should the Commission not be legally bound by Article 6 ECHR (on the ground that the Commission does not determine 'civil rights' within the narrow European construction of that phrase), one view was that this should not prevent the Commission from seeking to implement best practice in this regard. It was further argued that Article 6 aside, the common law principle of natural justice rendered procedural transparency a matter of law and not simply 'best practice.' Another view was that the Parades Commission should make greater use of the media to explain the reasons behind its determinations. Doing so would help prevent misinformation and speculation as to why the Commission reached a particular verdict.

2.157 The case for a more transparent procedural framework is the 'leitmotif' of the *Quigley Report*:<sup>178</sup>

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<sup>177</sup> Second Report from the Northern Ireland Affairs Select Committee: The Parades Commission: Session 2000-01: HC 120-II, p.76, Q.250.

<sup>178</sup> Quigley, para. 10.1(v). See also paras. 2.14; 4.6-4.7; 6.6(v); 11.17; chapter 16; 18.5, 21.3; 21.10; 21.18; 22.1(v); 24.21.

There was a widespread demand for the veil on how decisions were made to be drawn aside, for the black box to be opened, so that people might be better able to be persuaded of the fairness of the decision-making process. The word ‘transparency’ recurred time and again, occasionally in uneasy juxtaposition with the notion that there might have to be some sources of evidence which would not wish their identity to be disclosed. The police were sometimes, but not always, cast in that role.

In explaining the benefits of increased openness, Quigley cites the comments of one MP made during the Parliamentary debates following the North Report:<sup>179</sup>

‘...to know the broad parameters on which any decisions are made, and thus to gain the confidence of all communities, would make it much more difficult for those people who want to exacerbate the situation .....

- 2.158 Another argument advanced was that to increase transparency would actually serve to *reduce* the Commission’s workload in the long term. By making all representations to the Commission available to all parties, disingenuous or fallacious representations would be discouraged. Parties would be required to further substantiate their arguments and, having seen the objections raised by others, would be in a position to address or challenge their concerns. This, it was argued, would advance the prospects for resolution in local situations, ultimately reducing the number of determinations which the Commission need issue.
- 2.159 It is unnecessary to rehearse here all of Quigley’s recommendations regarding procedural transparency – the substantive proposals are contained in para. 16.27 of his report, and an outline of the procedure used by North Lanarkshire Council is usefully provided in para. 16.34 of that document. It is appropriate, though, that one issue be further expounded.
- 2.160 While conscious that the proposed determining process would “entail much more activity than is currently undertaken and administrative responsibilities would be more onerous”<sup>180</sup> it is stressed by Quigley that any new process must be informal, user-friendly, readily intelligible and simple.<sup>181</sup> This is significant, because one fear raised by interviewees, anticipating moves towards a tribunal, was that a more rule-bound, remote and legalistic process would fail to afford parties their ‘need for recognition’, and would thereby hamper progress. Some interviewees also felt that the current Commission did not listen well or engage constructively with parties on occasions when they had come to give evidence. Related to this issue, therefore, is the membership of the proposed ‘Rights Panel’. Many questions have been raised about the ‘representativeness’ or otherwise of the current Parades Commission. Given that the *Quigley Report* suggests a three person Rights Panel (including the Chairman who would be appointed by the Lord Chancellor), the question of their background and experience, and that of ‘representativeness’, was highlighted as requiring further consideration.

## **b) Adjudication and mediation**

- 2.161 The need for greater transparency also appears to have influenced the *Quigley Review’s* recommendations in relation to the separation of powers between adjudication and mediation:<sup>182</sup>

...an attempt to square the circle of unitary Commission and mutually independent functions simply does not work. But, even if some way of making it work could be devised, the effort would be nugatory if, as is more than likely, people were unable to get the old unitary model out of their heads or (even if they were prepared to try to understand the new structure) were unable to

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<sup>179</sup> Ibid., para. 4.6.

<sup>180</sup> Quigley, para. 21.3.

<sup>181</sup> Ibid., paras. 16.27(v) and 16.31.

<sup>182</sup> Ibid., para. 21.10, and similarly, Exec. Summary, para. 68.

appreciate the organisational subtleties or to rid their minds of the suspicion that the different functions would, despite all protestations to the contrary, be working hand in glove. A sophisticated arrangement which contained within it the seeds of such misconceptions would be doomed from the start. Structure, like process, has to be transparent, with possibilities for misunderstanding eliminated so far as is humanly possible.

2.162 Three broad options can be identified from the range of views documented and expressed:

- i) Retention and/or refinement of the current arrangements;
- ii) Greater separation of the adjudication and mediation functions in line with the *Quigley Report*;
- iii) Complete separation of the mediation and adjudication functions.

Further arguments in relation to each of these options are outlined below.

*i) Retention and/or refinement of the current arrangements*

2.163 Currently, the AOs provide regular situation reports to the Commission which indicate how local factors would likely impact on the parade and how a parade is likely to impact on the local area (including its impact on the prospects of finding a long-term resolution to the dispute). The *Quigley Report* refers to the role of the AOs as ‘educating and informing’ the Parades Commission,<sup>183</sup> and identifies three benefits which accrue from the current lines of communication between the AOs and Commissioners. The AOs:

- can report on local efforts to reach accommodation;
- are well placed to harvest public perceptions of issues around parades; and
- can suggest options for the Commission to consider.

2.164 It was argued by some that the current arrangements already adequately separate the two functions (with the AOs being both self-employed and line-managed by an external consultancy). This might explain the Civic Forum’s assertion that, on the one hand, “the adjudication and conciliation functions, with respect to parades, should not be combined in one institution,” while on the other, clearly envisaging that something akin to the present arrangement be retained:

Most held the view that those who are parading and those groups that object should be responsible for seeking conciliation and held accountable at the adjudication stage. If this is done it will impact upon the decisions taken about whether parades are to be permitted and which routes may be taken.

2.165 Informed by the Sheriff’s decision in a Scottish case involving *Aberdeen Bon Accord Orange Lodge 701*, the *Quigley Report* suggests that in the event of the current arrangements being retained, any local information provided by the AOs ought, at least, to be publicly disclosed and explained.<sup>184</sup>

2.166 An alternative suggestion, which would maintain a close link between the adjudication and mediation functions, was that those proposing a parade should be *required* to enter into negotiations or seek consent from representatives of an opposing community, provided that it was clear that consent or a negotiated agreement could not be unreasonably withheld. This, it was argued, might help focus attention on the conditions under which a parade could reasonably go ahead, rather than focusing upon whether it should be allowed at all.

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<sup>183</sup> Ibid., para. 16.39.

<sup>184</sup> Ibid., paras. 16.37-16.40.

2.167 Finally, one specific aspect of the current system which came in for criticism was the direct intervention in disputes by the Commission's secretariat. This, on occasion, was argued to have undermined the work of the AOs. On this point, the *Quigley Report* is somewhat euphemistic, and stops short of recommending non-intervention by the Commission's staff:<sup>185</sup>

The staff of the Commission may also see occasion to develop their own direct initiatives in respect of a particular parade or may be drawn by others into doing so. I was told that things work best when there are good communications maintained between the staff of the Commission and the Authorised Officers. Otherwise, matters may become confused locally.

ii) *Greater separation of the adjudication and mediation functions in line with the Quigley Report.*

2.168 Chapter 14 of the *Quigley Report* appears to suggest that a fixed, obligatory period of 'facilitation' must be completed with parties participating in good faith, before the determining body would be able to initiate the determination process (see the diagram in *Appendix H* and *paras. 3.90-3.92* below). Quigley further argues that there should be a non-permeable wall between the Facilitation function and the Determination process, save for a report on the success or failure of mediation and on the extent to which the parties had acted in good faith towards each other and had participated in a manner that was designed to resolve the issues involved.<sup>186</sup> In allocating roles to structures, the *Quigley Report* proposes that the 'Parades Facilitation Agency' would be charged with preparing the Guidelines, Procedural Rules and Codes of Conduct, the appointment of monitors, education, and the production of an Annual Report.<sup>187</sup>

2.169 One view was that if greater separation of the adjudicatory and mediative functions were to occur, the Commission would still require field officers as 'their eyes and ears' so as not to become too removed from developments on the ground. However, given the 'non-permeable wall' which Quigley argues should exist between the two functions<sup>188</sup> and the minimalist nature of the report to be issued by the Chief Facilitation Officer, it is assumed by Quigley that the existence of an open tribunal-like hearing would obviate the need for the determining body to receive the kind of information currently provided to the Parades Commission by the AOs. In addition to the open hearing, the Panel would also receive information from the proposed Compliance Branch.<sup>189</sup> While Quigley does state that the Compliance function "would also consider any matters raised by members of the public in regard to parades which had taken place,"<sup>190</sup> this information would be of a 'matter-of-fact' nature, and would not catalogue local efforts to reach accommodation or local perceptions.

2.170 In a similar vein to the Quigley recommendations, the Ulster Unionist Party (UUP) have argued that there should be a more structured process which holds parties accountable for their willingness to enter into mediation. In the UUP's submission to the Review of the Parades Commission, the Party argued:

It should be noted that the Act put the mediation role before adjudication. The Commission would argue that it has discharged its function with regard to mediation by encouraging others to mediate.

However the practice of the Commission to rely on outside mediators has proved to be flawed. To the extent that when such mediators failed as was the case in the Garvaghy Road dispute, the Commission did not take other appropriate steps likely to resolve the dispute.

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<sup>185</sup> *Ibid.*, para. 13.5.

<sup>186</sup> Quigley, para. 14.22 (v) and Exec. Summary para.32.

<sup>187</sup> *Ibid.*, para.21.21.

<sup>188</sup> *Ibid.*, para. 14.16(ii).

<sup>189</sup> *Ibid.*, chapter 18.

<sup>190</sup> *Ibid.*, para. 21.18.

1. The Commission should place primary emphasis on the statutory duty to promote and facilitate mediation in relation to public processions. A possible analogy is the requirement under the Matrimonial Causes legislation that proceedings for nullity of marriage or divorce may only be initiated following discussions with the parties as to the possibility of effecting a successful reconciliation between them. Given that disputes relating to parades are often of an inter-communal nature, this analogy would appear to be particularly appropriate.
2. We would therefore recommend the following:  
The Act should be amended to provide an explicit duty on the Commission to pursue mediation in the first instance in relation to any dispute concerning a parade, with the Commission only being permitted to issue a determination in respect of that parade when all reasonable efforts to facilitate mediation had proved unsuccessful.

*iii) Complete separation of the mediation and adjudication functions.*

2.171 A number of interviewees stated that the potential for any side to be rewarded by the determining body for their co-operation in any kind of mediation process should be removed. One interviewee observed that:

It is very important that the idea of participating in mediation should be affirmed by the Commission, but participation should not be viewed as a box-ticking activity to curry favour with the Commission.

2.172 Those who argued for complete separation of the two functions also stressed that mediation efforts would be less vulnerable to the ‘fallout’ from a determination if the mediators themselves were perceived to be entirely separate from the determining process. It was further suggested that to expressly mention a party’s participation in a mediation process in a determination could potentially lead to their leadership being compromised. We were told that, in the past, this has led to the Parades Commission ‘providing cover’ for such quiet, yet courageous, voices. One conclusion, though, was that this leads to a lack of transparency in the determining process, and that it would be better for the determining body to be *entirely* ignorant of parties’ participation in dialogue, whether or not mediated by the Commission’s AOs (or proposed Facilitation Agency). Only if parties themselves chose to mention their participation in dialogue during the proposed informal hearing (noting that doing so may actually reflect poorly upon them) would mediative interventions factor in the determination process.

2.173 While not necessarily making the argument for complete separation of the two functions, the Lower Ormeau Concerned Community (LOCC) has also argued that:<sup>191</sup>

The prospects for local agreement have been damaged by the Parades Commission’s attitude to dialogue, with residents convinced that the Loyal Orders will go through the motions of dialogue in order to sway the Commission rather than trying to seriously understand and resolve the problems around parades. Residents believe that dialogue will be used against them by the Commission.

2.174 Again, while CAJ has not urged that the present arrangements be changed (having found there to be less of a conflict in practice than might have been anticipated between the two functions), it has long argued that whilst the mediation function is an important one, it should not be carried out by the determining body:

If a choice had to be made between adjudication and mediation, the Parades Commission must retain the former role. Adjudication requires statutory powers and cannot be performed by anyone

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<sup>191</sup> *Second Report from the Northern Ireland Affairs Select Committee: The Parades Commission: Session 2000-01: HC 120-II, p.209.*



other than something akin to the current Parades Commission, whereas there are a variety of groups and mechanisms which might be established to carry out a mediation role.

2.175 It was suggested that a separation of these two functions could be achieved by contracting out responsibility for mediation. One view was that the Community Relations Council should be involved in this type of practical work, although it was also pointed out that the ongoing consultation in relation to Community Relations policy<sup>192</sup> left the future of the community relations infrastructure as a matter of uncertainty. The activities of the mediation agency would parallel the Commission's work, rather than being internal to it.

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<sup>192</sup> See *A Shared Future: A Consultation Paper on Improving Relations in Northern Ireland*, NIO, January 2003.

## 3. The Working Group's Conclusions

### Introduction

3.1 Informed by the many different perspectives documented in Section 2 of this report, the members of the Working Group hope that the thoughts outlined here will serve as a catalyst in a reinvigorated and open debate about the interpretation of important human rights principles. We believe that such principles must underpin all efforts to resolve parade disputes in Northern Ireland.

**3.2 The consultation following the *Review of the Parades Commission* by Sir George Quigley, the ongoing review of community relations (with the consultation document 'A Shared Future' having recently been published), and the NIO's consultation on Race Crime and Sectarian Crime legislation in Northern Ireland, provide an ideal backdrop for this work, and offer an obvious conduit for the Group's recommendations. These are summarized in Section 4. It should be noted, however, that while our conclusions may – and often do – address issues raised by these consultations, this report is not intended as an exhaustive response to any of them. The terms of reference for this project limit our contribution to issues involving the interpretation of the ECHR as it relates to parades and protests in Northern Ireland. Moreover, as noted in the *Preface and Acknowledgements to this report*, the January deadline set by the Northern Ireland Office in relation to its consultation on the *Quigley Report* has led to the Working Group's recommendations being precipitately framed largely in answer to the Quigley proposals. Significantly, therefore, this paper does *not* include the Working Group's conclusions relating to the Human Rights Commission's Bill of Rights consultation (see *para. 3.7* below).**

### 3.3 Preliminary comments in relation to the *Quigley Report*:

- (i) Sir George is to be commended for producing such a comprehensive report. It touches upon almost all of the issues which the Working Group would identify as needing to be addressed.
- (ii) The recommendations section of the *Quigley Report* does not do justice to the detailed and nuanced consideration given to these issues in the main body of the text. This means, however, that given the size and structure of the document, some important points risk being lost. The Working Group would urge all interested parties to read the full document, and not merely the *Executive Summary* and *Recommendations* sections.
- (iii) The report's recommendations do not depart from the Parades Commission's foundational policy objective of seeking local accommodation. The Working Group also considers that there should be no change to this policy position.
- (iv) The Working Group endorses a number of the Quigley recommendations (see further below). It is, though, difficult to cherry-pick from the complex edifice proposed and the contingency of many recommendations is clear. Notwithstanding, the Group fears that some of the Quigley recommendations are unnecessary and that some are likely to be unworkable.

- (v) The *Quigley Report* makes few recommendations about how the various rights potentially involved in parade disputes might be interpreted, and appears to suggest that this be left entirely to the determining body (e.g. paras. 15.21 and 15.23). The Working Group believes that in addition to institutional re-structuring and procedural fine-tuning, the substantive basis for decisions concerning freedom of peaceful assembly must be more closely examined. This latter subject has received comparatively little analysis to date. That said, recognising that the ECHR is a living instrument, the Group does not wish to be unduly prescriptive in its own recommendations.

## ‘Pulling up the roots’?

- 3.4 The Working Group has some sympathy with the view that one *could* arrive at an interpretation of the *Public Processions Act 1998* (PPA), the European Convention on Human Rights (ECHR) and European case law which does not preclude the realization of our aim as stated below (*para. 3.7*). It does not, however, subscribe to the ‘it ain’t broke’ diagnosis, and largely concurs with Quigley’s primary criticisms of the existing arrangements (outlined at *para. 2.9* above). In this light, the Working Group has explored the arguments for and against any amendments to:
- a) The Public Processions (NI) Act 1998;
  - b) The Parades Commission Guidelines, Procedural Rules and Code of Conduct;
  - c) The notification and police report forms; and
  - d) The draft provisions of a Bill of Rights for Northern Ireland as proposed in *Making a Bill of Rights for Northern Ireland: A Consultation by the NIHRC*.
- 3.5 The Group has noted the view that radical change to the existing legislation would be perceived as shifting the goal posts, and would thereby set back much of the progress which some argued had recently been made by way of dialogue between marchers and residents. The Group has also been sensitive to the assertion that in recent years parades have progressively become less confrontational, and that both the current framework, and the parameters which have been repeatedly laid down in different localities, are just beginning to ‘bed down’. The Working Group is of the opinion that while the Parades Commission has contributed to a lessening of tensions in respect of some parade disputes, other political factors may also have been significant in doing so.
- 3.6 We also believe that Frank Wright’s admonition that “despite there being periods without overt violence”, relationships built upon mutual deterrence do “not gradually melt into trust”<sup>193</sup> should caution all those working to resolve parade disputes against a complacent belief that progress must be being made simply because parades occupy less ‘front page’ space. Furthermore, the lack of empirical foundation to many of the claims made regarding progress (or the absence of it) highlights the need for a more systematic measurement methodology to be developed. Even if it is believed that some localised progress has been made in the five years since the North principles were first enunciated, the question of whether this has occurred because of, or despite, those principles remains unanswered. That no sustained attempt has been made to baseline or chart progress in any of the four areas identified in *para. 2.8* makes it difficult to evaluate the impact of current strategies of managing and resolving conflict around parades. The Group considers that the Parades Commission, in partnership with other bodies

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<sup>193</sup> Wright, F., *Two Lands on One Soil* (1996) Gill & MacMillan, p.5.

(including the Human Rights Commission, Community Relations Council and Community Safety Unit), should examine the possibility of developing appropriate progress indicators.

3.7 The Group believes that there is an opportunity now to capitalise on the subtle strengths of the existing model, to identify and address its weaknesses, and thereby promote the maxim of tolerance<sup>194</sup> and expedite local accommodation in parade disputes across Northern Ireland. Amendments to the existing legislative framework and revised interpretative guidelines modelled on the amended legislation can help create a de-escalatory spiral whereby all parties are encouraged to demonstrate and ensure the peaceful and non-sectarian nature of any public events which they organise or participate in. As Sir George Quigley says of his own proposals, the Working Group similarly believes that its recommendations look towards enabling:

- a considerable acceleration in the trend towards local accommodation;
- a speedily diminishing number of cases requiring formal Determination; and
- a process whose outcomes are achieved within a framework which is transparently fair and recognised as such.<sup>195</sup>

However, as noted in the *Preface and Acknowledgements* to this report, the Group believes that there is a need to further discuss the issues which arise from the NIHRC's Bill of Rights consultation as these relate to the rights and freedoms affected by the right to peacefully assemble.

## A Rights Based Approach?

In modern catalogues of human rights, all human beings are guaranteed equal legal protection for their standing in society, even though it remains unclear even today what practical legal consequences this should have.<sup>196</sup>

3.8 The *Human Rights Act* 1998 means that recourse to the language of rights in any adjudicatory process is no longer optional. Significantly, the *Quigley Report's* attention to Alternative Dispute Resolution procedures<sup>197</sup> demonstrates that a robust interpretation of the ECHR in adjudication is neither to the exclusion nor demotion of prior efforts to reach local accommodation. This may allay some of the fears expressed to us that a rights based approach is *necessarily* litigious and self-seeking (see *para. 2.13* above).

3.9 Having considered the oral evidence presented by the Northern Ireland Office to the Northern Ireland Affairs Select Committee (see *para. 2.14* above), the Working Group believes that the existing jurisprudence of the European Court and Commission of Human Rights offers a 'playing field' which has few clearly marked boundaries, and which is not entirely level. These weaknesses are largely due to the wide 'margin of appreciation' accorded to national authorities when dealing with freedom of peaceful assembly. The Group agrees with the point emphasised in the *Quigley Report* that rights must be more than rhetorical.<sup>198</sup>

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<sup>194</sup> The Bertelsmann Group for Policy Research in Germany has argued that "A conflict is always a mutual negation, expressing rejection of the values and norms of the other person. Tolerance, defined as a maxim, of necessity leads to a search for a comprehensive perspective, which will allow the parties to the conflict to accept each others certainties – no matter how undesirable they may appear to the other side – as equally legitimate and valid. This acceptance will finally open up ways and means to realise these different needs side by side. Tolerance can thus be seen as the foundation for democratic accord." See *Tolerance: Basis for Democratic Interaction*, Bertelsmann Foundation Publishers, Gütersloh (2000), p.14, available at <http://www.tolerance-net.org/downloads/tolerance.pdf>

<sup>195</sup> Quigley, para. 11.17, and similarly Exec. Summary, para. 17.

<sup>196</sup> Honneth, A. *The Struggle for Recognition*, p.125.

<sup>197</sup> See, in particular, Quigley, chapter 4.

<sup>198</sup> Quigley, p.136, para. 12.24.

The purpose of the Convention would be frustrated if the rights it guaranteed proved merely theoretical or illusory rather than practical and effective.

- 3.10 While ostensibly there is a consensus between parties<sup>199</sup> that a ‘rights-based approach’ would be helpful, the Group argues that this is misleading, precisely because it cannot be claimed that a rights framework is commonly understood. To persist in applying ambivalent ‘principles’ will thwart the development of sustainable resolutions. Loosely defined principles can lead to their inconsistent application. In this light, the dilemma which has bedevilled this project as we have attempted to delimit the parameters of specific rights provisions (and which, we suggest, also faces the Human Rights Commission in drafting a Bill of Rights for Northern Ireland) is well captured by Tom Campbell:

As we institutionalize human rights, they become just another set of rules and principles and just another set of human organizations which embody just another set of negotiated and enforced compromises between the dominant values of the time.<sup>200</sup>

If we seek to positivize human rights in a manner which accords with a version of the rule of law which favours predictability, uniformity, and impartiality in applying and securing human rights, then the higher law becomes ordinary law, subject to all the weaknesses of over- and under-inclusiveness, legalism, and inflexibility. If we leave human rights as open-ended invitations to the exercise of moral judgement by the current legal authorities, this undermines the usefulness of the legal system in providing a stable framework of expectations and remedies. If we emphasize the symbolism of rights, the importance they have for education, and the political impact they can have on political emotions, we need broadly based inclusive statements of rights which are of little use in generating justiciable tests of political legitimacy.<sup>201</sup>

- 3.11 Campbell resolves this ‘catch-22’ by arguing that:

[A]ny satisfactory regime of human rights must be the product of continuing debate, with respect to the precise formulation of human rights law, to which citizens and their representatives are the major contributors.<sup>202</sup>

It is therefore the democratic accountability of rights which warrants their precise delimitation, and the remainder of this report is largely devoted to that task. The underlying assumption is that the meaning and relative importance of rights, while universal in nature, can be interpreted differently in different social, cultural, and political contexts.<sup>203</sup>

- 3.12 Only through such concretization can human rights standards “provide practitioners and parties to a conflict with objective measures for understanding the moral and legal consequences of their actions.”<sup>204</sup>

Conflict management must take place within a framework in which human rights are non-negotiable. While there is much scope for dialogue, negotiation, and accommodation within that framework, practitioners must be aware of its parameters in order to ensure that their interventions are in line with fundamental rights and freedoms.<sup>205</sup>

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<sup>199</sup> Including, for example, the Ulster Unionist Party (see *Northern Ireland Affairs Committee, Second Report Session 2000-01, The Parades Commission, HC 120-II*, p.143, Q.437), and the Bogside Residents’ Group (*ibid.*, p.157, Q.472). Also, ‘NIO Review of the Parades Commission: Rationale behind Recommendations’ (*ibid.*, p.100).

<sup>200</sup> Campbell, T., “Human Rights: A Culture of Controversy”, *Journal of Law and Society*, Vol.26, No.1, March 1999, pp.6-26, at p.14. Also in Clements, L. and Young., J. (eds.), *Human Rights: Changing the Culture*, Blackwell, 1999, pp.6-26 at p.14.

<sup>201</sup> *Ibid.*, at p.22.

<sup>202</sup> Campbell, *loc.cit.*, p.25.

<sup>203</sup> See Parlevliet, p.9.

<sup>204</sup> Parlevliet, p.30.

<sup>205</sup> *Ibid.*

3.13 Similarly, clearly defined parameters are necessary in order for a rights framework to have utility in determining the *validity* of claims.<sup>206</sup> Within these parameters, however, the *interests* of the parties can be examined so as to find the most appropriate means of giving effect to valid claims (thus ensuring the most consensual outcome possible). Parlevliet notes that:

[W]hereas basic human needs are not negotiable, the possible satisfiers are, and these will vary depending on the context...Similarly, fundamental rights and freedoms are not negotiable, but the manner in which they are recognised is indeed negotiable.<sup>207</sup>

3.14 Members of the Working Group, therefore, consider that the argument needs to advance beyond merely emphasizing that the focus should be on the rights issue at the adjudication stage.<sup>208</sup> By conceptualizing the core value of human rights as being the *recognition of 'the other'*, rights can be seen as integral to the *entire* process of managing and resolving conflict around parades, including mediative interventions. The goal of a rights based approach is not to impose a formulaic, prescriptive 'solution', but rather to encourage parties to both recognise each other's needs and interests and acknowledge that each has equal rights. In this light, the Working Group contends that the principles which inform any adjudicatory process can – indeed must – also inform interventions aimed at promoting local accommodation (see *paras. 1.4-1.7* above). As Parlevliet urges, there is a “need to pursue an integrated approach in dealing with conflicts involving issues of rights.”<sup>209</sup> The importance of balancing rights with responsibilities is implicit in such an integrated approach, and it thus addresses ECONI's concern that “merely offering legal protection to cultural and communal rights will not resolve the clash of communal and cultural rights that is a feature of our society generally, and is most clearly manifested in the events surrounding the Orange Order's parade at Drumcree.”<sup>210</sup> The discourse of human rights is not primarily concerned with 'offering legal protection'.

3.15 The Working Group recommends that an integrated human rights and conflict resolution approach be followed. This can assist in the development of a commonly understood, clearly defined, level playing field upon which local accommodation can be pursued. Such an approach, however, will have implications for both the adjudicative and mediative functions. Furthermore, the Working Group notes that in many situations, mediation has not been considered appropriate, or has not succeeded in delivering a local accommodation. Consequently, other conflict resolution techniques have been (and ought to be) employed by the Commission's Authorised Officers – including both conciliation and negotiation. Our comments below, while couched in terms of 'mediation', also apply to other such interventions.

3.16 While the primary purpose of mediation is not generally to educate the parties involved, such interventions *could* seek to build an understanding of the value and meaning of rights.<sup>211</sup> On this foundation, mediated dialogue might then explore the 'rights and freedoms of others' – how, in the particular context, are these rights being infringed, and what could be done to prevent such infringement? Moreover, this needn't be done by beginning with 'legalistic

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<sup>206</sup> See the example given by Parlevliet at pp.28-29. On the 'validity' of 'claims' see Joel Feinberg's compelling argument in "The Nature and Value of Rights" in Feinberg, J., *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (1980), Princeton University Press, Princeton, New Jersey. Feinberg argues that to 'have a claim' is to 'have a *prima facie* case' (*i.e.* a case meriting attention), and that rights are simply 'valid claims' where validity "is justification of a peculiar and narrow kind, namely justification within a system of rules."

<sup>207</sup> Parlevliet, 'Bridging the divide: Exploring the Relationship between human rights and conflict management', *Track Two*, Vol.11 No.1 (March 2002), p.24 (citing Max-Neef's distinction between 'needs' and 'satisfiers', Max-Neef, M.A., *Human scale development: conception, application and further reflections*, New York, London: The Apex Press, (1991) at pp.16-28).

<sup>208</sup> Quigley, para. 15.15.

<sup>209</sup> Parlevliet, loc.cit. p.30.

<sup>210</sup> ECONI, *A Shared Vision: Human Rights and the Church*, p.13.

<sup>211</sup> See Parlevliet, loc.cit., p.31.

rights language’, but rather can be approached through parties’ needs and interests, working towards identifying the congruent rights (see, for example, David Feldman’s test in relation to Article 8 ECHR at *para. 2.105* above).<sup>212</sup> The experience of our own interviews would also support such an approach and evidences the commonplace (mis)understanding of rights as being the preserve of lawyers. Finally, if an accommodation is reached, and the parties agree to publish its terms, this can inform the interpretative framework which will then be gradually refined and pieced together. This is one way of ensuring that the interpretation of rights remains a democratic project. The Working Group recommends that the Authorised Officers (or their equivalent in any new regime) should be given further training in drawing out the connections between interests, needs and human rights (building upon that delivered by Michelle Parlevliet in November 2002).

- 3.17 In terms of adjudication, the Working Group believes that the Parades Commission has failed to clarify how the rights claimed in the context of parades, protests and policing should be interpreted. There is an urgent need for such clarification which would explain the *key factors* considered to be relevant to the protection of each of the specific rights. In presenting evidence to the Quigley Review, members of the Working Group argued for an amended *Public Processions Act* in which “the criteria to be applied to parades should be exactly aligned with the ECHR.”<sup>213</sup> The Group therefore supports Sir George’s recommendation in this regard. The Group however disagrees with the proposal that the grounds of possible restriction be separated out with the determining body considering some and the police considering others (see further *para. 3.40* below).<sup>214</sup>
- 3.18 The Group further disagrees with the layout of revised Guidelines proposed in the *Quigley Report*.<sup>215</sup> The suggested headings do not easily correspond to specific aspects of interpreting and applying the various rights involved. Instead, the Group suggests that just as the legislative criteria should be exactly aligned with the ECHR, the Guidelines, too, should be so aligned. We also suggest that revised Guidelines should explicitly distinguish consistency in the application of rights principles from consistency of outcome in different locations, thereby partially pre-empting one of the criticisms frequently levelled at the Commission. We have attached possible skeleton Guidelines at *Appendix F*.
- 3.19 In addition, the Working Group is concerned that even with such clarification, the Commission’s boilerplated determinations will continue to be widely perceived as a ‘legal gloss’, bearing little relation to the situation on the ground. Determinations merely state that it is “*from the perspective of the parade organiser*” that “the Convention rights engaged are those protected by Articles 9, and 10 and, in particular, Article 11.” They also insipidly aver that “[t]hose who live, work and carry on business in the affected locality enjoy rights under Article 8 of the Convention and Article 1 of the First Protocol thereto.” No further attempt is made to enunciate the implications of those rights in the particular situation. The Group notes that para. 5.2 of the Commission’s Procedural Rules was amended in July 1999 following the case of *Re. Farrell*<sup>216</sup> (see further *Appendix C*). The first edition of the Procedural Rules stated that the Commission would aim to provide written notification of its decision “and the basis for it”, but this was changed to read: “where it is reasonably practical to do so, the Commission will provide a summary of the grounds for its decision.” Parlevliet states the imperative that “human rights actors convey the importance of upholding rights without resorting to bland and

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<sup>212</sup> Parlevliet, loc.cit., p.18, cites Osaghae as stating “human rights are...an instrument of individual and collective struggle to protect core interests.” Osaghae, E. E., “Human Rights and Ethnic Conflict Management: the Case of Nigeria”, *Journal of Peace Research*, Vol.33, No.2, pp.171-188 at p.172.

<sup>213</sup> Quigley, paras. 15.1 and 18.2.

<sup>214</sup> Quigley, para. 15.13.

<sup>215</sup> Quigley, para. 15.16.

<sup>216</sup> [1999] NIJB 143.

categorical statements along the lines that rights must be protected.”<sup>217</sup> The Group believes that it is damaging to the rubric of rights if specific rights provisions are cited in situations where no valid evidential basis exists for doing so. Such practice will inevitably lead to the language of rights being viewed as fraudulent, and rights will become a source of resentment. The Working Group thus recommends that evidence must be adduced in support of all rights claims, and that determinations themselves should clearly spell out:

- the *ratio decidendi* of the decision in terms of specific rights provisions,
- how, in the particular context, these rights might be infringed (outlining the specific factors considered), and
- how, precisely, the Commission’s decision mitigates against any such infringement (the necessity of the restrictions).

3.20 This should satisfy the *Quigley Report’s* recommendation (citing the example of the minutes of a Sub-Committee meeting of North Lanarkshire Council) that determinations be ‘crisp’.<sup>218</sup> It also draws upon the judgement of the European Court in the case of *Stankov and the United Macedonian Organisation Ilinden v Bulgaria (2001)*. While some have dismissed this case as not having relevance to the Parades Commission’s decision making process on the basis that it concerned the *banning* of a commemorative event (and the Parades Commission cannot *ban* public processions), the Working Group considers that the case is highly relevant to determinations involving pre-emptive, preventative restrictions.

3.21 One aspect of the interference by the Bulgarian government in the activities of Ilinden was that the Government prohibited the group’s supporters from bringing placards, banners or musical instruments and from making speeches at a commemorative event.<sup>219</sup> Furthermore, it is a moot point as to whether some of the Parades Commission’s determinations are, in effect, tantamount to a ban (a question not yet tested in our courts). Notwithstanding, the European Court held that the reasons adduced by national authorities to support any restrictions must be “relevant and sufficient” and based on “an acceptable assessment of the relevant facts” (see *paras. 2.50-2.51* above). The Working Group believes that the Parades Commission should amend their determinations accordingly without waiting for any legislative reforms to be enacted.

3.22 In addition, as we stress below (*para. 3.87*), the rights-based adjudicatory process should be user-friendly, informal and informed by conflict-resolution practices. To this end, we recommend that the members of the determining body should also receive training (similar to that recommended for the AOs) in building consensus around rights.

## **Interpreting the ECHR and the Margin of Appreciation**

3.23 The Working Group supports the sentiments expressed above at *paras. 2.16-2.17* that neither the domestic Courts nor the Parades Commission should feel constrained by European judgements which rely heavily upon the margin of appreciation. Whilst recognising the reluctance on the part of the Parades Commission to pre-empt judicial clarification of the rights involved, the Working Group believes that the Commission is best placed to take a lead in developing good law and practice in this area.

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<sup>217</sup> Parlevliet, loc.cit., p.32.

<sup>218</sup> Quigley, para. 16.35.

<sup>219</sup> See paras. 22 and 79 of the ECtHR’s judgement.



## ‘Peaceful Assembly’

- 3.24 All members of the Working Group agreed with the *Quigley Report* that the *Public Processions Act* should be amended so as to empower the determining body to take decisions concerning parade related protests (see *para. 2.24* above). This would likely entail a change in the Commission’s name – one suggestion being *The Commission for Peaceful Assembly* (CPA). Members also stressed the need to more clearly define what constitutes an ‘assembly’ or ‘parade’. In the past, parade participants have claimed not to have breached route restrictions by walking along the prohibited section of a route on the pavement, albeit not in formation. Questions have also arisen as to whether parade participants travelling by bus along the prohibited section of a route can be said to be taking part in a procession.<sup>220</sup>
- 3.25 The Working Group, however, was divided over whether the determining body should have responsibility for *all* public assemblies or whether it should merely have jurisdiction over those related to parades.<sup>221</sup> Those in favour of the body having jurisdiction over all public assemblies (which would require advance notification of *all* assemblies where reasonably practicable) believed that the test concerning the ‘necessity’ of restrictions should be the same for every public event, and that the same procedure should be followed in each case.<sup>222</sup> The contrary (minority) opinion was that in Northern Ireland, this would be to impose an unjustified regulatory burden. This view was based upon the fact that the *Public Order (NI) Order 1987* (as amended) does not require notification of open-air public meetings which are not related to a parade (similarly, the *Public Order Act 1986* in Great Britain). Open-air public assemblies can, though, be restricted by a senior police officer on the day if he or she believes that it may result in serious public disorder, serious damage to property, or serious disruption to the life of the community or that the purpose of the organisers is intimidatory. The minority opinion held that such a fall-back provision was entirely adequate, and that a widening of the regulatory framework was both unnecessary and would itself be contrary to the protection of the right to freedom of peaceful assembly.
- 3.26 There was also disagreement between members as to whether there should be any exemptions (other than funerals) to the requirement of providing advance notice of a public procession. The minority view was that while the existing specific exemption for the Salvation Army could be removed, any new legislation could also provide by order for any essentially faith based parading organisation (such as the Salvation Army) to apply for exemption. Exemption could then be granted either permanently, or for a period, or with such conditions as might be appropriate. There could also be provision to revoke the exemption should problems or complaints arise. The contrary (majority) opinion was that the notice requirement should apply equally to *all* groups wishing to use public space for the purposes of a parade, and no statutory exemptions should be granted. Three reasons were cited in support of this position:
- to treat *any* group differently from others could infringe Article 14 ECHR which provides that the rights contained therein shall be secured without discrimination on any ground;

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<sup>220</sup> See, for example, *Macartan Turkington Breen (a firm) v Times Newspapers Ltd* (2000) in which the House of Lords, reversing the decision of the Northern Ireland Court of Appeal, held that a press conference in a private home was a public meeting.

<sup>221</sup> For example, those which fall within the existing definitions of “protest meeting” and “public procession” in s.17 of the *Public Processions Act*.

<sup>222</sup> It is noteworthy that a ‘Choose Life’ parade in December 2001 – notified to take place in Belfast City centre – was considered by the Parades Commission to be contentious. This was the first time that a parade associated with neither the Nationalist or Loyalist tradition was classified as contentious (see the 4<sup>th</sup> Annual Report of the Parades Commission, 2001-2002, p.35). It therefore seems plausible to suggest that *an open-air public meeting unrelated to a parade* could equally give rise to concerns about the rights and freedoms of others (see also the Working Group’s conclusions in relation to classifying parades as ‘contentious’ at *paras. 2.42-2.44*, and *3.53-3.54*).

- many organisations other than the Salvation Army claim a religious *raison d'être*, and it would be difficult to devise a test which fairly and objectively assessed such claims;<sup>223</sup>
- the question of who is organising the procession is irrelevant – the primary reason that notification is required is to minimize the possible impact of a procession upon the rights and freedoms of others, including, for example, its potential to disrupt traffic.

- 3.27 Members, however, agreed that the Quigley Report is right to accord greater significance to this first stage of inquiry (see *para. 2.25* above).<sup>224</sup> The protection afforded by Article 11 should not extend to any parade or protest if the organiser cannot demonstrate its ‘peaceful’ nature. The factors to be taken into account when deciding whether or not an assembly is ‘peaceful’ should be clearly defined given the far reaching implications of it being deemed not so.
- 3.28 The Working Group accepts that all assemblies necessarily entail a degree of disruption and obstruction. In our opinion, however, it should be for the Commission to assess whether or not any such obstruction was reasonable in the circumstances. For the purposes of laying down some clear parameters, the Group echoes the European Court’s dicta in *Plattform Ärzte für das Leben v Austria* (1988) – that the right to counter-demonstrate should not extend to inhibiting the right to demonstrate. This means, for example, that a sit-down protest which *entirely* blocked a parade route would not be deemed peaceful, and therefore, would not attract the protection afforded by Article 11 ECHR.
- 3.29 To this end, the Working Group noted the divergence of opinion amongst interviewees as to whether the *context* in which a parade takes place should be a relevant factor at this stage of the inquiry (see *para. 2.19* above). As restrictions upon entirely ‘peaceful’ assemblies can be justified within the terms of Article 11(2), the Group considered that the context should not be the primary focus at this stage. The context, for example, should never automatically lead to an assembly being deemed ‘not peaceful’. It is in keeping with European jurisprudence that some behaviour which others may find ‘annoying’ or ‘offensive’ should still be recognised as being entirely ‘peaceful’ (see *para. 2.27* above). Nonetheless, the context *is* relevant to the extent that it would be an evidential factor under Art.9 and Art.19 *Public Order (NI) Order 1987* and Art.6 *Protection from Harassment (NI) Order 1997* (see further below at *paras. 3.36(c)-3.37 and Appendix E*).
- 3.30 Despite some reservations, the Working Group believes that further consideration should be given to the *Quigley Report’s* recommendation that event organisers be required to post a bond of up to a maximum of £500 where ‘gross breaches’ of the Code of Conduct have occurred (see above *para. 2.25*). While the Group notes that £500 will neither cover policing costs nor the financial consequences of disorderly behaviour (see *para. 2.121*), it may, on occasion, provide an appropriate incentive for participants to comply with the Code. In such instances, the willingness of the organiser to post a bond might also serve as a measure of their peaceful intent (see below). Essentially, the requirement to post a bond would merely be another possible condition which could be imposed by the determining body, and would not therefore require a separate hearings system. Appeals – as with any other aspect of a determination – would be by way of Judicial Review. Furthermore, the Group agrees with the *Quigley Report’s* suggestion that a résumé of any breaches “considered to be prima facie material”<sup>225</sup> should be copied to the event organiser. This would ensure that before being required to post a bond, an

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<sup>223</sup> The Memorandum submitted by the Independent Loyal Orange Institution to the Northern Ireland Affairs Select Committee, for example, recommends that “The Independent Loyal Orange Institution be recognised as a wholly religious body and be accorded the same position in legislation as the Salvation Army.” *Second Report from the Northern Ireland Committee: The Parades Commission: Session 2000-01, HC 120-II, p.191.*

<sup>224</sup> Quigley, para. 18.2.

<sup>225</sup> Quigley, para. 18.3.

organiser would have had an opportunity either to accept or challenge alleged breaches. The Group also suggests that any bond should be tied to compliance with a specific condition or conditions in the determination so as to obviate questions of partial forfeiture and ‘degrees’ of improved behaviour etc.

3.31 Members felt that the focus at this stage should be upon the *intentions* of the event organiser. Therefore, in determining whether or not the organiser has peaceful intentions, the Group concluded that the following factors should be taken into account (noting our reservations in *para. 3.30* in relation to the posting of bonds):

- (a) the declared purpose of the assembly to the extent that this might imply obstructive, intimidating or violent behaviour, or paramilitary connotations;
- (b) the past conduct of the notified participant bands, clubs, lodges or other groups (including their conduct in events in other areas and their compliance with previous determinations);
- (c) an assurance of peaceful conduct given by the organiser on behalf of all notified participants. Where this is called into question by implicative evidence in (b), and particularly where assurances were also given in those instances, corroborating factors *such as* those listed in (d) should be sought;
- (d) efforts made by the event organiser to ensure that it proceeds without causing violence or unreasonable obstruction, *possibly* including:
  - i) a preparedness to address legitimate concerns which have been raised (including those raised by the Commission’s monitors);
  - ii) the provision of an adequate number of suitably trained stewards/marshals;<sup>226</sup>
  - iii) the submission of an event specific risk assessment;
  - iv) a preparedness to co-operate with the police in relation to the planning of the event;
  - v) the provision of a named guarantor for the behaviour of those on parade;
  - vi) the willingness of the organiser to post a bond of up to a maximum of £500 where any participants in the notified event have previously been responsible for gross breaches of the Code of Conduct or Commission determinations (note the reservations in *para. 3.30* above).

3.32 The Group considers that the definition of ‘peaceful assembly’ should inform, and be informed by, any revised Code of Conduct. It concurs with the suggestion in the Quigley report that the seriousness of intent underlying the Code of Conduct “should be underlined by the inclusion within it of reference to the offences which may arise under the law for conduct which breaches the Code”<sup>227</sup> (current public order offences are listed in *Appendix E* of this report). Members also endorse Quigley’s recommendations in relation to marshals (para. 23.10 (iii), see *para. 2.30* above). In particular we welcome the proposal that sufficient funding should be provided to ensure that within 3 years, it can be made a requirement that all marshals have basic training, and that a proportion of those involved in the larger parades are trained to NVQ standard. Furthermore, the points distilled from the document prepared by West Midlands Police for those organising events were thought to provide constructive and appropriate guidance.

3.33 The Working Group also broadly supports Quigley’s contention that no public event should take place before the risks have been assessed (para. 23.10(ii), see *para. 2.29* above). We have had sight of a risk assessment conducted for a ‘Trade Justice Movement Mass Lobby of Parliament’ held in London in June 2002.<sup>228</sup> After considerable discussion, the Group

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<sup>226</sup> See Jarman, N. and Bryan, D., *Stewarding Crowds and Managing Public Safety: Developing a Co-ordinated Policy for Northern Ireland* (1998), Community Development Centre, North Belfast.

<sup>227</sup> Quigley, para. 23.9 and chapter 27 generally.

<sup>228</sup> This was based upon the format suggested by the Symonds Group Ltd. for the HSBC Millennium Bridge Walk in aid of Save the Children in 2000.

concluded that a less complicated risk assessment procedure and standardised form could be drafted for Northern Ireland. One view held by members was that the submission of a risk assessment should, at first, be voluntary so as to enable the requisite skills base to be built up. Furthermore, in the immediate future, it would be for the Parades Commission to offer advice on conducting risk assessments and to provide or fund relevant training. In the long term, though, district councils should provide such training through their community safety programmes. Within 3 years (in line with Quigley’s recommendation on trained marshals), the submission of a risk assessment should be made compulsory. A different view within the Group was that formalised risk assessment should only be part of the process where the nature of the parade reasonably requires it (with what is ‘reasonable’ ultimately being decided by the determining body). Notwithstanding, training should be *offered* to all event organisers, irrespective of the nature of event.

- 3.34 Some members of the Group believed that the requirement to submit a risk assessment should be commensurate with the number of participants in an event. One suggestion was that 50 participants might be an appropriate threshold. The majority believed that this requirement might best be introduced through an amended 11/1 notification form. If made obligatory, there should be a clearly worded caveat similar to that currently provided for the late submission of notice *i.e.* “if that is not reasonably practicable, as soon as it is reasonably practicable to do so,” so as not to inherently penalise spontaneous demonstrations. While it was noted that much of any risk assessment may be the same from year to year, the Group was of the opinion that it would serve as a useful learning document enabling event organisers to more easily identify where improvements could be made. It was also thought that it would incentivize parties to address issues which they might otherwise not have done. Furthermore, it very clearly emphasizes that entitlement and responsibility are two sides of the same coin.
- 3.35 In keeping with our recommendations for both revised legislation and amended Guidelines, we believe that a risk assessment should also be structured in accordance with Article 11(2). While we have attached a more complex (although similarly structured) draft assessment at **Appendix G**, an assessment form might simply ask the event organiser to catalogue any steps which they have taken to address public safety, public order, health issues, and the rights and freedoms of others. It might also refer the organiser to the Guidelines document which would further explain those same headings. Finally, the Working Group believes that risk assessments should ask how the organiser has taken account of any local community safety issues as identified by the local community safety audit (where this has been completed). To this end, it might be beneficial if Parades Commission monitors’ reports were also copied to the relevant Local Community Safety Partnership. While the *Quigley Report* mentions ‘community audits’ at para 16.19, they do not feature again in its recommendations.
- 3.36 The Group also discussed the question of whether some, technically illegal, assemblies might still reasonably be classified as ‘peaceful’ (see **para. 2.27** above). Members agreed that ‘peaceful’ need not necessarily connote ‘legal’ and that it is right to recognise categories of behaviour which, while ‘unlawful’, are neither violent nor obstructive. Again, members stressed the importance of clearly defining such categories given the implications of an assembly being deemed non-peaceful. We suggest that it would be for the determining body – taking into consideration the factors outlined in **para. 3.31** above – to weigh up the potential for the following categories of behaviour to occur at any notified event.

**Peaceful:**

- (a) ‘**Technical**’ breaches of the legislation (such as a parade or protest which has not fully complied with the current statutory notice requirements under s.6 and s.7 PPA);

- (b) **Low-level disorder which is neither violent nor explicitly sectarian** (for instance consumption of alcohol at a parade, s.13 *PPA*; disorderly behaviour under Art.18 *POO*);

**Not peaceful:**

- (c) **Behaviour which is obstructive, intimidating or violent** (such as the use of words or behaviour likely to stir up hatred or arouse fear, Art.9 *POO*; riotous behaviour in a public place, Art.18 *POO*; provocative conduct at a public meeting or procession, Art.19 *POO*; obstructive sitting under Art.20 *POO*; carrying an offensive weapon in a public place, Art.22 *POO*; putting people in fear of violence, Art.6 *Protection from Harassment (NI) Order 1997*; abusive behaviour towards a person taking part in a lawful public procession, s.14 *PPA*).

- (d) **Behaviour involving the display of paramilitary symbols or the wearing of paramilitary uniforms**, even in what is otherwise an entirely disciplined and apparently ‘peaceful’ parade (such as wearing a uniform in a public place or at public meeting, Art.21 *POO*; wearing an item of clothing, or wearing, carrying or displaying an article in such a way or in such circumstances as to arouse reasonable suspicion that he/she is a member or supporter of a proscribed organisation, s.13 *Terrorism Act 2000*).

3.37 These categories might be included in any revised Guidelines document (see the draft in *Appendix F*). Parades in the first category *may* be deemed ‘peaceful’, although the parade organiser would be subject to criminal prosecution for infringement of the statutory procedures. Similarly, in (b), a degree of drunken or rowdy conduct *may* be left to the police to pursue by way of subsequent prosecution, prior restrictions being disproportionate to the risk posed. The two final categories, however, raise an entirely different level of concern. In making a clear distinction between the potential for low-level disorder (where prior restraint is likely to be excessive) and medium to high-level disorder (where a degree of prior restraint will often be proportionate), a rights discourse serves to highlight the “democracy-enhancing capacities of public protest.” By imputing significance to this distinction, it also keeps in check the blurring of “the boundaries between public order transgression and straightforward criminality...”<sup>229</sup> Members felt that the latter two categories – (c) and (d) – would include the type of behaviour envisaged by both section 17 of the *Bill of Rights Chapter of the South African Constitution*<sup>230</sup> and Article 20(2) of the *International Covenant on Civil and Political Rights (ICCPR)*.<sup>231</sup>

3.38 The Group, however, questioned *who*, under the Quigley proposals, would decide whether a notified event should be deemed ‘peaceful’. Para. 18.2 of the *Quigley Report* only states that it would be quite distinct from the Secretary of State’s power to ban parades. If, as it seems it is intended, the determining body would take this decision on the advice of the ‘compliance branch’, how do they do so if they don’t take public order and public safety considerations into account (factors which Quigley suggests should only be considered by the police in *implementing* the rights based determination, see chapter 20)? Furthermore, the role of the police at the proposed informal hearing is unclear – if based exactly upon the model of North

<sup>229</sup> Whitty, N., Murphy, T., and Livingstone, S., *Civil Liberties Law: The Human Rights Act Era*, Butterworths (2001), p.95 and pp.57-58, citing Downes, D., and Morgan, R., ‘Dumping the “Hostages to Fortune”? The Politics of Law and Order in Post-War Britain’ in Maguire, M., Morgan, R., and Reiner, R. (eds.), *The Oxford Handbook of Criminology*, OUP (1997), pp.87-134 at p.88.

<sup>230</sup> This excludes from the definition of peaceful assembly (i) propaganda for war, (ii) incitement of imminent violence, and (iii) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

<sup>231</sup> This states that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

Lanarkshire Council<sup>232</sup> the police would present their case at the outset of proceedings and would again be consulted later in the hearing. This, though, appears to contrast with the statement in para. 20.17 of the *Quigley Report* (or para. 65 Exec. Summary) that the police would still have no part to play in the evaluation of essentially rights-based factors. The Working Group emphasizes that the success of the Scottish and South African models is largely attributable to the fact that the police (and others) *publicly* state their concerns (see also *paras. 3.61-3.62* below).

- 3.39 Conceivably, the question of whether or not an assembly is ‘peaceful’ is relevant not only at the prior-restraint stage of decision making, but also *after* an event has taken place – if (to adopt the words used by the *Quigley Report*) participants ‘reneged on their peaceful intentions’ or a ‘violent attempt was made to negate the outcome of the process.’<sup>233</sup> The Working Group believes that if disorder occurs at an event because *participants* have committed any of the offences in categories (c) and (d) above, they should forfeit their right to claim the protection afforded by Article 11 in any subsequent criminal prosecution (despite the event having initially been classified as ‘peaceful’ by the determining body).

### Necessary in a Democratic Society

...it is important to remember that societies differ widely as to the kinds of behaviour which are approved or tolerated and hence also in the amount of tension and quarrelling that will be felt acceptable.<sup>234</sup>

- 3.40 The Group understands the impact of the judgement of Carswell LCJ (Court of Appeal) in *Re Tweed’s Application for Judicial Review* (2001).<sup>235</sup> Carswell LCJ suggests that when deciding whether or not restrictions are necessary, the consideration of factors other than those specified in Article 11(2) would not necessarily invalidate a determination so long as they were prescribed by law. We have argued above (*para. 3.17*) that this anomaly should be removed by amending s.8(6) of the *Public Processions Act* so that the criteria in domestic law exactly mirror those in Article 11(2) ECHR.

- 3.41 The Working Group considers that, in the particular circumstances of Northern Ireland, one of the most important points raised in relation to the requirement of ‘necessity’ is the need to promote tolerance and its reciprocation in a democratic society. This was central to the Belfast Agreement:

An essential aspect of the reconciliation process is the promotion of tolerance at every level of society, including initiatives to facilitate and encourage integrated education and mixed housing.<sup>236</sup>

- 3.42 The Group understands that the concept of tolerance is also well established in international human rights law. Relevant provisions include:

- The International Covenant on Economic, Social and Cultural Rights, Article 11;
- The International Convention on the Elimination of All Forms of Racial Discrimination, Article 7;
- The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, para. 5.2;
- The European Framework Convention on the Protection of National Minorities, Article 6.

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<sup>232</sup> Quigley, para. 16.34.

<sup>233</sup> Quigley, para. 20.2.

<sup>234</sup> Roberts, S., *Order and Dispute* (1979) Penguin, Harmondsworth, p.33.

<sup>235</sup> [2001] NILR 165

<sup>236</sup> *The Belfast Agreement* (1998), ‘Rights, Safeguards and Equality of Opportunity’, para.13.

It is emphasized that because the latter two provisions are imposed on the UK as whole, they should apply with equal force in respect of both the protestant/unionist community and the catholic/nationalist community in Northern Ireland regardless of whether one or other might be regarded as a majority or minority at a regional level.

- 3.43 In addition, we noted an apparent shift in the focus of ECHR case law. While a number of early cases concentrate upon the possibility of disorder arising from the expression of offensive or controversial expressions or demonstrations, other decisions of the European Court, including *Plattform Ärzte für das Leben v Austria* (1988)<sup>237</sup> and most recently *Stankov* (2001),<sup>238</sup> suggest that members of the public should be expected to tolerate offensive displays and that the threat of violence from opponents should not in itself be taken to justify the banning of an otherwise peaceful assembly (see *paras. 2.37-2.41* above).
- 3.44 The Group considers, therefore, that in determining the ‘necessity’ of restrictions, the focus should again be upon the peaceful intentions and conduct of those involved on either side rather than any potential offence or tension. The factors listed in relation to the proposed test of ‘peaceful assembly’ are also pertinent to the test of ‘necessity’. We do, though, suggest that another factor in determining the necessity of restrictions should be whether parties can demonstrate their toleration of views and practices inimical to their own. The Working Group also believes that Article 17 ECHR should be taken into consideration when assessing the ‘necessity’ of any restrictions (see *paras. 2.28, 2.148* and *3.52(h)*, and *Appendix B*).
- 3.45 Whilst the Group did not agree with the *Quigley Report’s* proposal that a Chief Facilitation Officer should report on the parties’ good faith efforts before any determination process could begin (see further *para. 3.88* below), the Group considered that were such a procedure to be enacted, the nature of such a report might usefully be construed as an indicator of the level of tolerance being shown by the parties to one another. In addition, the Group considers that the *Quigley Report’s* suggested wording –
- [I]n the exercise of their right to freedom of peaceful assembly, all have a right to have their honour respected and their dignity recognised and must themselves respect the honour and recognise the dignity of others.<sup>239</sup>
- might appropriately be incorporated in a revised Guidelines document (just as the North principles are reproduced in the current Guidelines), following a statement emphasizing that tolerance is clearly recognised in international human rights law.
- 3.46 The Working Group was also of the opinion that the notion of shared space should feature prominently in the interpretation and application of ECHR principles. Noting, in particular, Article 3 of the *UN Convention on the elimination of all forms of racial discrimination*, members of the Group agree with the *Quigley Report* (paras. 11.13 – 11.14, see *para. 2.41* above) that to deny access to certain routes purely on the basis of demographics would “consolidate and strengthen the trend towards segregation and separation.”
- 3.47 The Working Group considers that the European Court’s dicta in the *Stankov* (2001) case – that retrospective prosecution of those involved in minor incidents of disorder is more appropriate than sweeping pre-emptive restrictions – ought to inform the interpretation of ‘proportionality’.
- 3.48 In some determinations issued prior to the now standardised format, the Parades Commission appeared to assess the proportionality of restrictions by a conducting a simple mathematical

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<sup>237</sup> [1988] 13 EHRR 204, at 210.

<sup>238</sup> Judgement of 2 October 2001, paras. 86 and 106-107.

<sup>239</sup> *Quigley*, para 15.31.

balancing exercise *e.g.* having regard to “the very small number of notified participants (50 in total), compared with the much greater number of potentially affected local residents and business persons...” The Working Group considers that this test, in isolation, betrays both the complexity of the rights issues at stake and the fundamental principle that human rights should protect minority as well as majority interests. It is not, therefore, a sufficient gauge of ‘necessity’. While the Commission should properly consider both the size of the parade and the importance of protecting the rights and freedoms of others, this must be balanced against other factors including the importance of the particular route and/or other aspects of the event in serving the purpose of the event, as well as any efforts made by the event organiser to ensure that it proceeds without causing unreasonable obstruction (see above, *para. 3.31*, under the test for ‘peaceful assembly’).

- 3.49 The question of whether the determining body should be empowered to impose restrictions upon a number of parades in a specific locality over a set period of time (as the Commission itself has urged)<sup>240</sup> is also relevant to the question of ‘necessity’. The *Quigley Report* argues that:

There could be reason for making rulings in respect of a particular route for a period ahead in, for example, two quite opposite circumstances. Where the Determining Body decides that a parade of a particular nature, size and frequency would not adversely affect the rights and freedoms of others, or, alternatively, would do so, it is unlikely that this situation would change significantly in the short term. But, if it could be shown to have done so, the review provision would allow for any material change to be fully taken into account. Notification to the police in respect of each parade would, of course, still be necessary.<sup>241</sup>

The Working Group agrees that the determining body *should* be empowered to make determinations upon a number of parades in a specific locality over a set period of time. Notwithstanding, the Group believes that if Quigley’s corresponding suggestion is implemented – that “a Determination could stand for a period of up to five years if the Panel deemed appropriate, subject to review if there was any material change of circumstances”<sup>242</sup> – this should be subject to a strict application of the ‘necessity’ test. Moreover, the factors which would determine if ‘a material change in circumstances’ had indeed occurred should be prescribed.

- 3.50 It is not entirely clear whether, in stating that scarce police resources raise an issue of proportionality (see above *para. 2.52*), Sir George intended police resources to be a factor in the assessment of the proportionality of restrictions. Certainly, if he did, this does not sit well with the main thrust of his recommendations that policing considerations should be extracted from consideration of the rights issues. In any case, the Working Group believes that questions of police resourcing should not influence the assessment of whether or not restrictions on an assembly are necessary. Instead, it is suggested that the demands on the police and/or military should only be considered by the Secretary of State – as is currently provided for under s.11 PPA (prohibition of public processions), or perhaps on an application made by the Chief Constable – similar to the provision in s.9 PPA (review of a determination by the Secretary of State) – when considering the national security (as opposed to ‘public interest’, s.11 PPA) implications of a parade (see below, *paras. 3.67-3.69*).
- 3.51 The Working Group has also considered the procedure by which a parade comes to be designated ‘contentious’ and the question of whether this should properly be a factor in determining the necessity of restrictions. The Group was concerned by the weight seemingly

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<sup>240</sup> See Quigley, para. 11.3.

<sup>241</sup> Quigley, para. 15.27.

<sup>242</sup> Quigley, paras. 15.25-15.27 and para. 22.1.



accorded to police evidence in this regard (see *para. 2.42* above). Moreover, we believe that without there being a clear baseline and rigidly applied criteria, the category of ‘contentious parades’ furnishes little useful information. Worse than that, it obscures what should be a transparent and clear process. Consequently, we recommend that the vocabulary of ‘contentious parades’ be dropped altogether. Instead, the various stages of assessment under Article 11 ECHR should be applied to *all* notified parades and protests. This means, for example, that the factors outlined above in relation to whether or not the organiser has peaceful intentions should be applied to all notified events. There is no justification under the ECHR for any secondary filtering process.

3.52 Providing the event has been deemed ‘peaceful’, we believe that the test of necessity should include the following *additional* criteria (*i.e.* those considered under ‘peaceful assembly’ would also be pertinent to the question of ‘necessity’). It is noteworthy that apart from the factors relating to tolerance, shared space and independent research, these criteria are expressed in general terms of limitations and their purpose. Specific criteria in relation to each of the legitimate aims are instead outlined in the respective sections below. We would emphasize again that in all determinations, the particular facts of the case should be explicitly related to each relevant criteria (noting that the Commission could be judicially reviewed for failing to take a relevant factor into account). We believe that consideration of the following factors will help ensure that the reasons adduced for the imposition of restrictions are both ‘relevant’ and ‘sufficient’:

- (a) The importance of the particular route and/or other aspects of the event in serving the purpose of the event;
- (b) The importance of the purpose of the limitation;
- (c) The nature and extent of the limitation;
- (d) The relation between the limitation and its purpose (for example, route restrictions might be deemed proportionate where a significant section of the parade route was left unaffected, yet the impact on the rights and freedoms of others is greatly reduced);
- (e) The availability and effectiveness of less restrictive means to achieve the purpose of the limitation (for example, the risk of minor incidents of disorder being more appropriately dealt with by way of subsequent prosecution);
- (f) The impact of any restrictions on the potential for increased communal separation;
- (g) The degree of *mutual tolerance* demonstrated by parties to the dispute (perhaps as evidenced by any report submitted by the ‘Chief Facilitation Officer’, although note the contrary arguments in *para. 3.88* below);
- (h) Whether the event is aimed at the destruction or limitation of the rights and freedoms of others to a greater extent than is provided for in the Convention (see *para. 3.44*);
- (i) Further factors identified through independent research on the parades issue.

3.53 In conducting this ‘necessity test’ we recommend that a broader survey be conducted than that currently *visibly* undertaken to determine the degree of ‘contention’ surrounding a parade (cf. Quigley, para. 18.8). As noted by interviewees, such consultation might (on occasion) usefully include the chairpersons of District Police Partnerships, local Chambers of Commerce, Local Strategic Partnerships, the DoE, the Northern Ireland Housing Executive, Council Community Relations Officers, and Local Community Safety Partnerships. The Working Group felt that the Commission’s duty to keep itself generally informed as to the conduct of public processions and protest meetings (s.2(c) PPA) would likely cover such a test, and should be retained in any amended legislation. Furthermore, leaving this duty in general terms was thought to be more helpful than prescribing specific consultees.

- 3.54 The above recommendation also has implications for the existing police report forms. We have noted the doubts expressed (see *para. 2.43* above) about the utility of a local police commander conducting such a prescriptive rights assessment as that required by the current 11/9 form. Furthermore, we believe that it is for the determining body, and not the police, to assess the impact of any parade on the rights and freedoms of others. The 11/9 form is therefore an unnecessary and cumbersome document which obscures the police perspective. We recommend that the 11/9 form should simply ask the police whether or not they consider restrictions on the parade or protest to be *necessary*, and to give reasons. It would be for the determining body to match these reasons with the relevant criteria and to filter out any irrelevant information.

### *The Statutory Notice Requirement*

- 3.55 Discussion of this issue is only included under the heading ‘necessary in a democratic society’, because the limited attention given to advance notice requirements by the European Commission and Court of Human Rights has been simply to state that notice requirements will usually pass the ‘necessity’ test. The Working Group however believes that the increased notice requirement proposed in the Quigley Report is *unnecessary*, even to give both mediation and adjudication processes the best chance of success. As stated in the report of the South African Goldstone Commission (which proposed a six day notice requirement, not a six month requirement):<sup>243</sup>

There is no reason why the police or the municipality should not take the initiative and contact the organiser to initiate negotiations as soon as they hear of the event. It is not necessary for them to wait until six days before to begin preparations just because the sponsors wait until the last moment. In Australia, Britain and Holland the police initiate contact and get negotiations going as soon as they are aware that an event is being planned.

- 3.56 The Working Group believes that Quigley overstates the quiescence of the Parades Commission and its Authorised Officers in the period between the annual marching seasons. In practice, the Authorised Officers, more often than not, do take the initiative and initiate discussions long before the formal notification is received 28 days in advance of the parade.

### **The Legitimate Aims**

- 3.57 The Working Group welcomes the *Quigley Report’s* focus on ‘*peaceful* assembly’ on the one hand, and ‘the rights and freedoms of others’ on the other. The Group understands that by enabling the determining body to consider only ‘the rights and freedoms of others’ and ‘the protection of health or morals’, the aim is to maintain a focus upon these issues and not allow the imperatives of public order to dictate decisions. This proposal, therefore, squarely addresses the allegation that the legislation has been ‘a law-breaker’s charter’. Ignoring, for a second, that two separate agencies would be performing the task, the proposed procedure is tantamount to a tiered, and unidirectional, application of the criteria – rights and freedoms of others first, and public order second (without the latter being able to overrule the former).
- 3.58 The Working Group believes that in order to assess the merits of this proposal, it should be separated into two related questions. First, can a tiered application of the criteria in Article

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<sup>243</sup> Heyman, P.B. (ed.) *Towards Peaceful Protest in South Africa: Testimony of multinational panel regarding lawful control of demonstrations in the Republic of South Africa before the Commission of Inquiry regarding the prevention of public violence and intimidation*, HRSC Publishers (1992), note 7, p.64.

<sup>245</sup> Quigley, para. 20.13(ii).

11(2) be justified? And second, if the criteria can indeed be separated in this way, should the police and determining body share responsibility accordingly? Our views are set out below.

*Is a tiered application of the criteria in Article 11(2) justified?*

3.59 The Working Group believes that neither public safety nor public order considerations are merely concerned with the *implementation* of a determination. Rather, as we argue later, such factors do properly have a role in the adjudication process itself. The argument put forward by Quigley (see *para. 2.56* above) might be seen as pursuing a commendable ideal. In reality, however, public safety and public order considerations do clearly affect the assessment of the impact of an event on the rights and freedoms of others. Public order and public safety, therefore, cannot be isolated from that assessment. The ‘trickle-down’ effect of public order is inescapable, and a rigid two-stage application of the criteria must be ruled out. That said, it might be useful for the determining body to prioritize ‘the rights and freedoms of others’ by placing this issue first on the agenda of any informal hearing, with public order etc. being considered later. Doing so would serve to keep the rights issue to the fore, while not eliminating public order and public safety from the inquiry altogether.

*If the criteria can indeed be separated in this way, should the police and the determining body share responsibility accordingly?*

3.60 Having answered the first question in the negative, it should be clear that the Working Group does not believe that there should be a separation of powers between the police and Parades Commission along the lines proposed by Quigley. However, we believe that the argument against such a division of labour is even stronger than that against a tiered application of the criteria. The thrust of *North’s* argument for placing decisions about parades in the hands of an independent body was to de-politicize policing and save the police from having to make a decision which they, in turn, would have to uphold. The *Quigley Report* – whilst not recommending a return to the pre-1998 position – does nothing to alter the fact that for the police to have any decision making role could jeopardize their perceived impartiality. Even if the police decision making role was limited to the possible imposition of *further restrictions* on public order grounds (as Quigley proposes), and even though (as Quigley points out) the police too must have regard to the ECHR and can be held accountable through the Ombudsman and Policing Board, it is unlikely that the police would wish to again be cast so obviously as public order pariahs. Indeed, a possible upshot of such a separation of powers would be that, for political reasons, the police would always wish to be seen to be implementing the rights based determination as it stood. While this could be beneficial (some interviewees alleged differential policing of determinations in different areas), public order and public safety considerations would effectively have no voice in the determination process or in its implementation at all.

3.61 The Working Group has acknowledged the concerns expressed to us that too much weight may be being accorded to confidential police evidence under current procedures. In our view, Quigley is correct to argue that if the determining body were simply to act as a rubber stamp on the police evidence, there is no particular reason why it should have any responsibility at all in relation to public safety. Where the Working Group, though, departs from Quigley is in his surprising assertion that the Commission *ought to* rubber stamp police advice (and therefore should have no responsibility for doing so). Quigley poses the question:

If, on the other hand, [the determining body] were free to modify the [police] advice, it has to be asked on what basis they would do so. Would they be substituting their judgment that a procession can or cannot be policed by the choice of reasonable and appropriate means and in accordance with the ECHR for that of the police?

- 3.62 The Group strongly contends that the police should not be regarded as the public safety experts. As suggested above under our proposed ‘necessity’ test (*para. 3.53*), a broader and more transparent survey could be undertaken which, whilst including the police, *might* also include Local Strategic Partnerships, the DoE, the Northern Ireland Housing Executive, Council Community Relations Officers, and Local Community Safety Partnerships. Indeed, it is unclear in the *Quigley Report* what status would be accorded to monitors’ reports if the adjudicatory body were not able to consider the public order and public safety implications of an event. It would be anomalous if the monitors’ reports were not considered by the determining body *alongside* the police and any other evidence concerning public order and public safety.
- 3.63 The Group also has grave concerns that if Quigley’s recommendation in this regard is fully implemented, decisions could ultimately be determined by issues of police resources. Examples spring quickly to mind of where this might have profound consequences – and at the expense of the principles enunciated in this paper.
- 3.64 Finally (as Quigley himself actually highlights),<sup>245</sup> under the current arrangements the police can – relying on their common law powers to take action to deal with or prevent a breach of the peace – already implement a determination as the situation dictates. The Working Group believes that Quigley is also unduly dismissive of the possibility that the Chief Constable can apply to the Secretary of State for a review of the decision.<sup>246</sup>
- 3.65 Rather, the Group believes that the most appropriate and effective way of ensuring a focus on the rights and freedoms of others is to explicate these rights more clearly, and to rigorously evidence infractions of them in the manner suggested by this report. As argued later in this chapter, the Group largely supports Quigley’s proposals in relation to procedural transparency. Perhaps more than any other single factor, the openness of the adjudication process can ensure that public order concerns do not improperly trump the rights of those affected by parades. In this light, parties to any dispute, and the event organiser in particular, should be furnished with a summary of any objections or concerns raised about the event. This should be made available at the hearing stage as well as being included in any subsequent determination.
- 3.66 We turn now to a brief examination of each of the legitimate aims in Article 11(2). It should be heavily underscored that irrespective of *who* interprets these aims, they must be interpreted narrowly (see *para. 2.57* above).

**(a) In the interests of ‘national security’ or public safety**

*‘National Security’*

- 3.67 Only the Secretary of State should be empowered to take decisions in the interests of ‘national security’. This is already the position (albeit indirectly) given that Section 11(1)(d) of the *Public Processions Act* enables the Secretary of State to have regard to the demands on the police or military forces. The Working Group considers that this is a suitable fall-back arrangement which allows for pragmatic decisions in extreme circumstances to be taken. If any decision is to be reversed for political reasons, then that decision should be taken by a political actor so as not to impugn the credibility and impartiality of the determining body. The Working Group also agrees with the CAJ submission (see *para. 2.72* above) that where there is a serious threat to life, this too might be the type of situation in which intervention by the Secretary of State should occur.

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<sup>246</sup> Quigley, para. 20.15.

- 3.68 When considering the interests of ‘national security’, the Secretary of State (or Justice Minister) should be entitled to consider:
- the potential for widespread disorder (see further *paras. 3.74-3.75* below);
  - the existence of a serious threat to life; and
  - the demands of policing a determination on police and military resources.
- 3.69 The Working Group believes that if the criteria upon which the Secretary of State can intervene are clearly laid out, such intervention need not undermine the Parades Commission, especially if those criteria are different, or extend beyond, those taken into account by the Commission.

*‘Public Safety’*

- 3.70 The Working Group believes that the following factors are relevant to the assessment of the ‘public safety’ implications of a parade or protest:
- The size of the notified event and the suitability of the proposed route in accommodating this;
  - The presence of any roadworks or similar obstructions (including crowd control barriers);
  - The proximity of the event to moving vehicular traffic, particularly at busy road junctions;
  - The availability of suitable drop-off and parking areas for coaches;
  - The provision of adequate First Aid facilities;
  - The provision of adequate toilet facilities to cater for event participants and followers;
  - Access and egress for emergency services during the event;
  - Arrangements for pedestrian crossing points in parades;
  - The adequate provision of trained marshals;
  - Evidence of a risk assessment having been conducted by the event organiser;
  - Evidence of contingency planning by the event organiser;
  - Liaison between the event organiser and the police;<sup>247</sup>
  - Any additional factors identified by the local community safety audit.

**(b) The Prevention of Disorder**

*i) The anticipated source of disorder*

- 3.71 The Working Group concurs with the statement in para. 15.15 of the *Quigley Report* – the accusation that the fundamental reason for imposing conditions on processions is the threat of violence on the part of objectors can be perceived as misinterpreting the position of those opposed to parades. The Group acknowledges that the term ‘law-breakers’, for example, has become a pejorative term often used unjustifiably by supporters of parades as a blanket description of residents’ groups. The Group notes that individuals on ‘both’ sides of parade disputes have on occasion broken the law in furtherance of their particular objective.
- 3.72 The Working Group discussed whether the Parades Commission and courts ought to be concerned with the anticipated source of disorder (*e.g.* parade participants including bands, supporters and ‘hangers-on’, participants in a related protest, or the policing operation), and if so, how their decisions should reflect this anticipated source. As stated in *The Legal Control of*

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<sup>247</sup> On this point, the Group was encouraged to note that the Northern Ireland Policing Board’s Policing Plan 2002-2005 set as one of its targets “Parades co-operation: developing the policy under which the organisation will work with parade organisers and neighbourhood representatives in planning the policing of parades, *Policing Plan 2002-2005*, p.11.

*Marches in Northern Ireland*, and as implicit in both Quigley's and our own recommendations, one of the basic requirements for any new regime ought to be that:

The claims of those who are committed to peaceful demonstration or protest should be given greater weight than the claims of those who resort to or threaten violence of any kind.<sup>248</sup>

3.73 At present, it is rare for the Commission to state where the threat of disorder is coming from. However, following the European Court's decision in *Stankov* (2001), the Working Group believes that unless fears of disorder are substantiated, determinations may no longer satisfy the test of 'necessity' (see above). Furthermore, the Working Group believes that the Parades Commission and courts in Northern Ireland must decide which strand of European jurisprudence to follow in assessing the potential for disorder – to focus solely upon the event participants and followers, or rather, to focus on the totality of the situation, including any related protest and the policing operation. The Group believes that the former test is infinitely preferable (and that this should be stated in any revised Guidelines), so long as certain qualifications to its practical outworking are recognised:

- As argued by contemporary public order theorists such as Stephen Reicher and David Waddington, the potential for disorder can arise from *interaction* between groups. In such circumstances, the Working Group believes that it would be tenuous to attempt to identify the source of disorder (see *para. 2.69* above). The Group concurs with those interviewees who argued that in situations where fears of disorder were hypothetically grounded in the potential for interaction between opposing groups (rather than in any specific pre-determined risk) the public order evidence *of itself* should not be 'sufficient' to justify interference with a fundamental right. Evidence of substantial and material breaches of the Commission's Code of Conduct could, however, properly constitute a pre-determined risk.
- The determining body should be cautious about 'finger-pointing', as this might compromise ongoing mediation efforts. Monitors' reports (particularly if copied to all parties) and any risk assessment should speak for themselves.
- It is clear that this issue is connected with that of the transparency of the Parades Commission's procedures (see further below). An informal and open hearing (which we support) should inevitably lead to greater reliance being placed upon the intentions and conduct of those on parade and their followers as the test for the potential for disorder. The Working Group believes that increasing the transparency of the Parades Commission's procedures will also serve to mitigate claims of capitulation, and will actually help create a de-escalatory spiral in which parties are keen to demonstrate their bona fides.

(ii) *The political climate and the potential for widespread disorder*

3.74 The Working Group suggests that the specific rights issues and the potential for disorder arising from individual parades can be distinguished and separated out from wider or pre-existing public order imperatives. Recognising that the wider political climate can, and does, affect the potential for disorder at parades does not necessarily imply that it should be a factor which the Parades Commission takes into account when balancing the protection to be afforded to Convention rights. Rather, it is for others in civic society to work to prevent the escalation of disorder due to the prevailing political climate. It is for the Parades Commission – which is but one part of a bigger jigsaw – to, very specifically, make a judgement as to whether those seeking to exercise their rights themselves pose a threat of disorder by so exercising their rights. In effect, this separation should enable a more principled approach to be taken towards

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<sup>248</sup> Hadden, T., and Donnelly, A., *The Legal Control of Marches in Northern Ireland*, CRC (1997), p.50.

public order decisions. It may also serve to help stabilize political and community tensions, for if these are not seen to have an effect on whether a parade is either restricted or allowed to pass through an area, then the exacerbation of community tensions may become less attractive.

- 3.75 It was the consensus of the Working Group that, contrary to the wide definition of ‘community’ supported by the Lord Chief Justice in *Re Pelan’s Application for Judicial Review* (1998), the balancing of rights in relation to freedom of peaceful assembly should be confined (adapting the definition of ‘related protest meeting’ in s.17 PPA) to the rights affected “at a place which is in the vicinity of the particular assembly at, or about, the same time as that assembly is being held.” Consideration of the rights of the wider community, possibly over an extended time frame, should only properly fall within the review jurisdiction of the Secretary of State (see ‘national security’ above at *paras. 3.67-3.69*). Notwithstanding, members supported the general proposal to enable the Parades Commission to link decisions in relation to a number of parades in a particular area (see *paras. 2.90 and 3.49* above).

### **(c) The Protection of the Rights and Freedoms of Others**

#### *i) The frequency of parades in any particular location over a specified period of time*

- 3.76 The question was raised as to whether the frequency of parades in some areas could be a legitimate consideration when assessing the impact of a single parade upon the rights and freedoms of others. The *Quigley Report* considered that:

One parade along a route in a season might be deemed to have insignificant impact on the rights and freedoms of others. One a night – to take the case to the other (unlikely) extreme – might be regarded as intolerable intrusion. In between the extremes there is, in principal, a point of balance which most reasonable people would accept as reasonable.<sup>249</sup>

- 3.77 The Working Group agrees that the frequency of parades in a given location *should* be a factor in determining the ‘necessity’ of restrictions for the purposes of protecting both Article 8 and Article 1 Protocol 1 ECHR. We note that this *is* already a factor which the Commission takes into account in relation to ‘the Impact of the procession on Relationships within the Community.’<sup>250</sup> Quigley, though, also comments that:

The Determining Body, if it deemed frequency of parades to be a factor in its decision-making, would indicate accordingly so that all the parading interests in an area had opportunity to arrange their own priorities rather than leave it to the body to do it for them. The Facilitation function should be at their disposal if the interests were minded to work out a priority scheme on a voluntary basis...If frequency is likely to become an issue, it seems better to pre-empt what could be a difficult situation rather than be taken by surprise.<sup>251</sup>

- 3.78 Members of the Working Group, while agreeing in spirit with this proposal, were unsure about how it would work in practice. At what stage would the Determining Body pre-empt the situation and indicate that frequency was likely to be a factor? The Group considers that so long as it is clear in the Guidelines that the frequency of parades will be something which the Commission will take into account when considering ‘the rights and freedoms of others’, that this of itself gives ample notice to ‘the parading interests’ to arrange their own priorities. Notwithstanding, it might be beneficial for an amended *Public Processions Act* to allow for a parade organiser to formally rescind notice of other parades which he/she has organised during the hearing stage of adjudication.

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<sup>249</sup> Quigley, para. 15.21.

<sup>250</sup> Parades Commission Guidelines, para. 4.3.

<sup>251</sup> Quigley, paras. 15.23-15.24.

ii) *The Right to Private and Family Life (Article 8)*

3.79 Having taken into account the discussion of the concept of ‘privacy’ (paras. 2.105 above), and given the recommendations which we make below in relation to a right to freedom from harassment, the Working Group believes that David Feldman’s three-stage test should be applied by the Parades Commission in order to assess the validity of any claim that one’s Article 8 rights are being infringed:<sup>252</sup>

- 1) Is the interest really related to privacy?
- 2) How significant is the interest to the maintenance of a justifiable claim to privacy, both generally and in the particular circumstances of the case? And
- 3) How serious is the infringement of the interest?

3.80 Feldman emphasizes that ‘[t]he first question must be capable of being answered “yes” before the other two questions can arise’. The Working Group is of the opinion that the Parades Commission too often cites the protection of Article 8, when privacy is not actually the issue. In *some* of these cases, for example, the issue can more easily be aligned with the need to protect residents and business owners from harassment or fearing violence. In such instances, to persist in identifying an Article 8 issue will cause resentment on the part of those who may rightly argue that they are not infringing anyone’s privacy. It will also let those parties ‘off the hook’ on the charge of sectarianism, thereby fuelling resentment on the other side. Such spiralling resentment both damages the language of rights and diminishes the potential for resolution. The Working Group emphasizes that rights should be a gateway, not a drawbridge.

3.81 In contrast, Feldman states that questions two and three ‘are matters of degree, requiring courts and legislators to balance the weight of privacy interests against, other, competing, claims of a private- or public-interest nature.’ In relation to these latter two questions then, the Working Group believes that the following factors (many of which are drawn from the current Guidelines) would be relevant. The Working Group also asserts that given the need for tolerance in a democratic society (see *paras. 3.41-3.44* above), a high threshold would need to be overcome before it could be established that a parade had infringed Article 8 rights:

- The notified time of day or night;
- The numbers notified to take part and the anticipated number of followers;
- Past experience of the manner in which previous parades have been conducted;
- The estimated duration of the parade;
- The anticipated level of noise caused by bands;
- The date of the particular event, and whether, for example, this is a public holiday;
- The extent to which the route comprises mainly residential or commercial property;
- The cumulative impact of parades on the private lives of residents (see, for example, *Hatton and Others v the United Kingdom* (2001) at *para. 2.108* above);
- Any steps taken by the parade organiser to address valid privacy interests.

iii) *Peaceful enjoyment of one’s possessions (Article 1, Protocol 1)*

3.82 The difficulty of making a direct causal connection between parades (let alone any individual parade) and, for example, the loss of revenue from tourism is clear. So too, are the difficulties of penalising event organisers because the prevailing political climate might discourage outside investment or tourism. It is also notable that ‘the economic well-being of the country’ is not one of the legitimate aims contained in Article 11(2), while it is enshrined in Article 8(2).

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<sup>252</sup> Feldman, D., ‘Secrecy, Dignity or Autonomy? Views of Privacy as Civil Liberty’ (1994) CLP 41, at pp.50-51, cited by Whitty, Murphy and Livingstone, loc.cit., at p.309, n.222.



- 3.83 The Working Group again notes the trickle-down effect of public order considerations. Members are of the opinion that if, as we hope, the legislative and human rights framework *can* succeed in creating a de-escalatory spiral with regard to the potential for disorder, this in itself should mitigate against any negative impact of parades and protests on retail or service industry.
- 3.84 As we recommended above in our discussion of the test of ‘necessity’ (*para. 3.53*), in order to ensure that business interests are fully represented in the consideration of the impact of a parade or protest, a transparent and broad consultation should be undertaken which might include the chairpersons of local Chambers of Commerce and Local Strategic Partnerships.
- 3.85 While the Working Group leaves open the question of whether there might be other more proactive ways of framing the rights of the business community, we suggest that the factors which might be taken into account when considering Article 1 Protocol 1 rights should include:
- The notified time of the event;
  - Its estimated duration;
  - The numbers notified to take part and the anticipated number of followers;
  - The extent to which the route comprises mainly residential or commercial property;
  - The nature and purpose of the parade;
  - The date of the particular event, and whether, for example, this is a public holiday;
  - The anticipated restriction of normal commercial activity caused by the notified event;
  - Whether the location of the event is a village, town or city;
  - The estimated cumulative impact of parades on the commercial life of area;
  - The estimated cumulative impact of parades on property prices in the area.

## Procedural issues

### a) Transparency

- 3.86 As noted above in our argument against the proposed separation of powers between the police and Parades Commission, the Working Group believes that an open and transparent process, possibly more than any other factor, can enhance the protection afforded by the Parades Commission to Convention rights and thereby lead to “a considerable acceleration” towards local accommodations with a “speedily diminishing number of cases requiring formal determination. As Iris Marion Young argues:

Plurality of perspectives motivates claimants to express their proposals as appeals to justice rather than expressions of mere self-interest or preference.<sup>253</sup>

- 3.87 Furthermore, as the *Quigley Report* itself argues, “greater transparency in the process and in the explanations of decisions would lead to fewer of the charges of inconsistency which at present come from both sides of the parades debate.”<sup>254</sup> The Working Group believes that Quigley correctly identifies the lack of transparency and the need for natural justice, and we therefore support his suggestions in paras. 16.27 – 16.30 (although there was some disagreement amongst members about the merits of having formal period for making objections). In

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<sup>253</sup> Marion Young, Iris, “Difference as a Resource for Democratic Communication” in Bohman, J. and Rehg, W. (eds.) *Deliberative Democracy: Essays on Reason and Politics*, Massachusetts Institute of Technology Press, (1997), pp.383-406 at p.402.

<sup>254</sup> Quigley, para. 16.30.

particular, we again emphasize the need for as much informality as possible and urge that rights language should not become the esoteric preserve of lawyers and civil servants.

## b) Adjudication and Mediation

[P]rocess and product are so intertwined that they impact on one another, both negatively and positively, and should therefore both be given careful consideration.<sup>255</sup>

- 3.88 The Working Group welcomes the clarification given by the *Quigley Report* that ‘engagement’ is not “a matter of inducing the organisers of parades and the objectors to talk to each other for the sake of it but to use local dialogue as a means of easing local tensions and trying to see if it is possible to create the climate in which peaceful parades can go ahead in a peaceful environment.”<sup>256</sup>
- 3.89 There was a split in opinion, however, concerning Sir George’s general argument regarding the relationship between mediation and adjudication (see *paras. 2.168-2.170*). Most members of the Group felt that these proposals would lead to precisely the type of system which Sir George had avowedly sought to avoid – *i.e.* “a sophisticated arrangement which contained within it the seeds of such misconceptions” (see above, *para. 2.161*). That said, while uncomfortable with the term ‘whistle-blowing’ used by Sir George in para. 13.20(vi), some members believed that the proposed procedure could render the parties more accountable for their actions, and that it emphasizes that responsibilities attach to the rights claimed. Others, though, felt that the wall between the mediative and adjudicatory functions should be completely non-permeable so as to remove such seeds of misconception. This would mean that no report from the mediation function would be made to the determining body (see the arguments in *paras. 2.171-2.175*). Still other members of the Working Group felt that the present relationship between the Authorised Officers and Parades Commission represented the best possible compromise, albeit with some improvements possible (see the views documented in *paras. 2.163-2.167*). It was considered to be vitally important that any new arrangements provide parties with an incentive to enter into a mediative process, as this should be the primary mechanism for resolving disputes.
- 3.90 In any case, it is unclear from the *Quigley proposals* how precisely *the failure* of a party to participate in any facilitation process and (a) act in good faith towards each other and (b) participate in a manner designed to resolve the issues involved (para. 14.22(v)) would be factored into the determining process. There are two possible alternatives depending upon how para. 14.22(vi) is interpreted. That paragraph reads:

Before Determination proceedings could commence, the Determining body would have to have a Report from the Chief Facilitation Officer certifying that the organiser of the parade had satisfied the requirements at (v).

- 3.91 If this means that no determination process will occur unless the Chief Facilitation Officer’s report is favourable and finds that the parade organiser has participated in good faith etc., then participation in the facilitation process is compulsory and effectively becomes tied to the definition of ‘peaceful’ assembly. It seems that this is the interpretation intended by Sir George, given his description of the report in para. 14.22(vii) as “a recognition of *honourable* failure (*despite good faith efforts*)” [emphasis added]. The Working Group, however, considers such a procedure to be unworkable. The Chief Facilitation Officer’s judgement as to what constitutes good faith is unlikely to be cast in black and white terms. It is therefore unclear precisely ‘to

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<sup>255</sup> Parlevliet, p.22.

<sup>256</sup> Quigley, para. 13.20(iii).

<sup>258</sup> Quigley, para. 21.21.

what extent' (using the phraseology of para. 14.22(v)) good faith participation would need to be made out before the Determining process could begin. Even if this were to be clarified, litigation would likely result between the parade organiser and the facilitator over whether or not a favourable report should issue.

- 3.92 If, alternatively, para. 14.22(vi) were to mean that irrespective of its findings, the Chief Facilitation Officer's report must simply be filed with the determining body before determination proceedings could commence, it could still be that the report is no more than a recognition of failure, but – as para. 14.22(v) suggests – the report's value is in noting "the extent to which" parties had acted in good faith etc. Whilst not favouring this arrangement, the Working Group considers this to be a more plausible interpretation, particularly as the minimalistic nature of the report might serve to allay concerns that the mediators were reporting to the adjudicator on the substance of local discussions, thereby (as para. 14.21 makes clear) possibly jeopardising the trust that should exist between the parties and the mediator. Notwithstanding, this option still leaves unanswered the question of how an unfavourable report (or indeed, a favourable report) would be factored into the determination proceedings dealing with the rights issues. As suggested at *para. 3.45* above, if this proposal were implemented, the Working Group believes that such a report could be factored into any consideration of the *necessity of restrictions in a democratic society*, particularly, in assessing the degree of reciprocal tolerance demonstrated by the parties.
- 3.93 In relation to the proposal in the *Quigley Report* at para. 14.24 that any agreements reached under the auspices of the Facilitation function should be committed to paper to avoid misunderstanding, the Working Group understands that this draws on the South African experience. It considers that this should not be a requirement but, instead, should be pursued as an ideal. In some cases, arrangements may come about without either side wishing to concede that they have agreed with 'the other'. In such cases, to require a written and registered agreement may in effect drive everyone into the determination process when something more informal may have had a chance of working on the ground. Parties may well feel that they are being painted into a corner and that any such written accord would be used against them on future occasions.
- 3.94 Finally, the Working Group believes that the proposed name of the mediative body – the 'Parades Facilitation Agency – is open to misinterpretation. If, indeed, the argument for an entirely separate agency is felt to be compelling, we suggest that further thought should be given to a name which would recognise the panoply of conflict resolution techniques – as Quigley perhaps intended by using the term 'facilitation' – as well as encompassing both parades *and* protests. In addition, the *Quigley Report* fails to explain why this 'Facilitation Agency' would have responsibility for drafting the Guidelines, Procedural Rules and Codes of Conduct, and for recruiting monitors,<sup>258</sup> especially as it is to "have no responsibility for Determinations or for securing compliance with them."<sup>259</sup> The Working Group believes that both the Guidelines and the Code of Conduct should be drafted by the determining body (possibly following a time-limited public consultation). Responsibility for recruiting monitors should fall to the secretariat of the determining body (as is currently the case).

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<sup>259</sup> Quigley, para. 20.20.

## 4. Recommendations

4.1 The Working Group has considered how its conclusions might best be implemented. Our recommendations are therefore structured around the current regulatory framework. Where these dovetail with the ‘Main Recommendations’ of the *Quigley Report* (Chapter 30), the paragraph number(s) of the relevant Quigley recommendation(s) are cited in the margin. Furthermore, as explained in the *Preface and Acknowledgements* to this report, and again in *paras. 3.2* and *3.7*, this paper does *not* include the Working Group’s conclusions relating to the Northern Ireland Human Rights Commission’s Bill of Rights consultation.

### A) The Public Processions (NI) Act 1998

4.2 The complete implementation of our recommendations will require amendments to primary legislation, and could not be achieved merely by amending the Commission’s Guidelines and Procedural Rules. The Working Group, however, did not consider the question of whether, in general, the *Public Processions Act* should be amended, or instead repealed (by, for example, a *Peaceful Assemblies (NI) Act*) or, indeed, whether public order law in Northern Ireland should be consolidated.

4.3 The Working Group recommends that the legislation be amended so as to give the Commission the power to issue determinations in relation to protests as well as parades (*para. 3.24*). The Group, however, was divided both on the question of whether the jurisdiction of the determining body should extend to all public assemblies, or rather be limited to parades and parade related protests (*para. 3.25*), and on the question of whether any exemptions should be granted to the requirement of providing advance notification (*para. 3.26*). The minority view in relation to the former question was that the adjudicatory bodies’ jurisdiction should extend only to parades and parade related protests, and this would not require a change to the name of the Parades Commission. The majority view, though, was that all public assemblies should fall within the body’s remit, and this would likely require the Commission’s name to be changed, one possibility being ‘*The Commission for Peaceful Assembly*’ (CPA). The majority view is reflected in the suggested title for new legislation (the *Public Assemblies (NI) Act*) in *para. 4.2* above, and in *paras. 1.1-1.2* of the draft revised Guidelines in *Appendix F*. The majority also considered that no statutory exemptions should be granted to the notice requirement.

Quigley:  
20.

Quigley:

4.4 The criteria to be applied to parades should be exactly aligned with the ECHR (*para. 3.17*). We recommend that the Secretary of State alone should have the power to review the determinations of the determining body, or prohibit assemblies, on national security grounds (*paras. 3.67-3.69*). The criteria to be considered by the determining body (currently in section 8(6) of the *Public Processions Act*) should be amended so as to mirror the remaining criteria in Article 11(2) ECHR:

Quigley:  
7, 8, 20.

The guidelines shall in particular (but without prejudice to the generality of section 5(1) provide for the Commission to have regard to the necessity, in a democratic society, of any restrictions in the interests of:

- a) public safety
- b) the prevention of public disorder or crime;
- c) the protection of health or morals;
- d) the protection of the rights and freedoms of others.

- 4.5 The Group strongly disagrees with the Quigley proposal that the grounds of possible restriction be separated out with the determining body considering the rights and freedoms of others and the police considering public safety and public order factors. (*paras. 3.38 and 3.58-3.65*).
- Quigley:**  
31.
- 4.6 The Working Group agrees with the Quigley proposal that the determining body *should* be empowered to make determinations upon a number of parades in a specific locality over a set period of time. Notwithstanding, the Group believes that if Quigley’s corresponding suggestion is implemented – that “a Determination could stand for a period of up to five years if the Panel deemed appropriate, subject to review if there was any material change of circumstances” – this should be subject to a strict application of the ‘necessity’ test. Moreover, the factors which would determine if ‘a material change in circumstances’ had indeed occurred should be prescribed (*para. 3.49*).
- Quigley:**  
13, 14.
- 4.7 The Working Group does not agree with the Quigley proposal to extend the notification period from 28 days to 6 months. We believe that Quigley overstates the quiescence of the Parades Commission and its Authorised Officers in the period between the annual marching seasons. In practice, the Authorised Officers, more often than not, do take the initiative and initiate discussions long before the formal notification is received 28 days in advance of the parade (*paras. 3.55-3.56*). We therefore recommend that the current time frame in relation to notification and the issuing of determinations be retained.
- Quigley:**  
16, 17, 22.
- 4.8 The Group was again divided over the *Quigley Report’s* general argument regarding the relationship between mediation and adjudication. This question is relevant to the statutory duties which might be placed upon any new determining body. Most members of the Group felt that the Quigley proposals would lead to precisely the type of system which Sir George had avowedly sought to avoid – *i.e.* “a sophisticated arrangement which contained within it the seeds of such misconceptions”. That said, some members believed that the proposed procedure could render the parties more accountable for their actions, by emphasizing that responsibilities attach to the rights claimed. Others, though, felt that the wall between the mediative and adjudicatory functions should be completely non-permeable so as to remove such seeds of misconception. This would mean that no report from the mediation function would be made to the determining body. Moreover, it would also mean that the determining body should not be placed under a statutory duty ‘to facilitate mediation’. Still other members of the Working Group felt that the present relationship between the Authorised Officers and Parades Commission represented the best possible compromise, and that Section 2(1)(b) of the *Public Processions Act* was therefore adequate in this regard (*paras. 3.89-3.94*). It was considered to be vitally important that any new arrangements provide parties with an incentive to enter into a mediative process, as this should be the primary mechanism for resolving disputes.
- Quigley:**  
2, 4, 5, 10,  
28, 29, 30.
- 4.9 In addition, the Group felt that there was a need to mention in the legislation a broader range of conflict resolution techniques such as conciliation and negotiation rather than focusing exclusively on mediation (*para. 3.15*).
- Quigley:**  
3.

## **B) The Guidelines**

- 4.10 The majority of the Working Group’s conclusions relate to the interpretation of the ECHR and can most simply be implemented through a revised Commission Guidelines document. The Working Group notes that while Section 8(6) of the existing *Public Processions Act* provides that the guidelines should in particular have regard to the five statutory factors contained therein, it also notes “the generality of section 5(1)” which states that “[t]he Commission shall issue a set of guidelines ... as to the exercise by the Commission of its functions under section

8". Therefore, even should the legislative amendments to section 8(6) (proposed in *para. 4.4* above) not be implemented, the Parades Commission would not be precluded from further explaining in its Guidelines how it will interpret the relevant ECHR articles.

4.11 The Group disagrees with the layout of revised Guidelines proposed in the *Quigley Report* (at para. 15.16). The Group suggests that just as the legislative criteria should be exactly aligned with the ECHR, the Guidelines, too, should be so aligned (*para. 3.18*). Guidelines should lay down clearly defined interpretive parameters so as to ensure that a rights framework has utility in determining the validity of rights claims (*para. 3.13*). Furthermore, neither the domestic Courts nor the determining body should feel constrained by European judgements which rely heavily upon the margin of appreciation (*para. 3.23*). Possible draft Guidelines, which incorporate our conclusions, are attached in *Appendix F*. The key features of the proposed guidelines are outlined below:

Quigley:  
9, 21.

Quigley:  
25 (b)

Quigley:  
24

- greater significance should be accorded to the fact that Article 11 protects only ‘peaceful assembly’. The factors to be taken into account when deciding whether or not an assembly is ‘peaceful’ should be clearly defined given the far reaching implications of an assembly being deemed not peaceful. New considerations might include the completion of a risk assessment where such can reasonably be required (*paras. 3.27-3.39; Appendix F, para. 2; and Appendix G*).
- in determining the necessity of restrictions in Northern Ireland (*paras. 3.40-3.54*) the need to promote tolerance and its reciprocation, as well as the concept of shared space, should be paramount. Article 17 ECHR is also relevant at this stage. However, the perceived ‘contention’ surrounding a parade is not an appropriate basis for determining which events may require restriction. Moreover, it serves no useful purpose under the HRA to label some events ‘contentious’ and others not so. In particular, ‘contention’ should not be equated with ‘necessity’. Questions of police resourcing should *not* influence the assessment of whether restrictions are ‘necessary’. (*Appendix F, para. 3*).
- The legitimate aims in Article 11(2) (see *para. 4.4* above) must be narrowly interpreted (*para. 3.66*):
  - a) The determining body should consider the preparedness of the parade or protest organiser to address public safety issues arising as a result of their event (*para. 3.70; Appendix F, para. 4*);
  - b) In assessing the potential for disorder, the determining body should focus primarily upon the intentions and past behaviour of the event participants and its followers, rather than on the surrounding circumstances. Moreover, it should not take into account the potential for widespread disorder across Northern Ireland, as this ought to be a matter of national security which falls within the exclusive jurisdiction of the Secretary of State (or Minister for Justice). The claims of those who are committed to peaceful demonstration or protest should be given greater weight than the claims of those who resort to or threaten violence of any kind (*paras. 3.71-3.75; Appendix F, para. 5*).
  - c) The determining body should consider the cumulative impact of a number of events in any given area when deciding whether or not to impose restrictions for the purpose of protecting health. While a high threshold should be set, the Working Group believes that no individual should have to tolerate or be forced to endure public assemblies which are intentionally intimidatory. In any case, such events are

already likely to have been disqualified from protection under Article 11 on the basis that they are not ‘peaceful’. (*Appendix F, para. 6*).

- d) Similarly, the Working Group recommends that, given the need to promote tolerance, a high threshold will need to be overcome before it can be established that a public assembly will unreasonably infringe upon the rights and freedoms of others. Nonetheless, the frequency and cumulative impact of parades should be a factor in assessing the impact on the rights of others. The determining body should seek to ensure that, where the protection of other rights is cited as the reason for restricting the right to freedom of peaceful assembly, those other rights accurately reflect the true needs and interests of the parties concerned (*paras. 3.76-3.85; Appendix F, para. 7*).

### C) The Procedural Rules

- 4.12 The Working Group’s conclusions in relation to greater transparency could be implemented by revised procedural rules and would not require the amendment of primary legislation. The Working Group believes that Quigley correctly identifies the lack of transparency and the need for natural justice, and we therefore support his suggestions in paras. 16.27-16.30 (although there was some disagreement amongst members about the merits of having a formal period for making objections). In particular, we again emphasize the need for as much informality as possible and urge that rights language should not become the preserve of lawyers and civil servants (*paras. 3.86-3.87*).
- 4.13 The Group believes that the most appropriate and effective way of ensuring a focus on the rights and freedoms of others is to explicate these rights more clearly, and to rigorously evidence infractions of them in the Commission’s determinations. Perhaps more than any other single factor, the openness of the adjudication process can ensure that public order concerns do not improperly trump the rights of those affected by parades (*para. 3.65*). We therefore recommend that parties to any dispute, and the event organiser in particular, should be furnished with a full summary of any objections or concerns raised about the event. This should be made available at the hearing stage as well as being included in any subsequent determination (see also the proposed Guidelines document, *Appendix F, para. 5.1*). Para. 5.2 of the Procedural Rules should be amended accordingly (*paras. 3.19 and 4.19*).

### D) The Notification and Police Report Forms

- 4.14 Some members believed that the requirement to submit a risk assessment should be commensurate with the number of participants in an event. One suggestion was that 50 participants might be an appropriate threshold. The majority believed that this requirement might best be introduced through an amended 11/1 notification form. If made obligatory, there should be a clearly worded caveat similar to that currently provided for the late submission of notice *i.e.* “if that is not reasonably practicable, as soon as it is reasonably practicable to do so,” so as not to inherently penalise spontaneous demonstrations (*para. 3.34*).
- 4.15 We noted the doubts expressed about the utility of a local police commander conducting such a prescriptive rights assessment as that required by the current 11/9 form. While it is imperative that the police are fully aware of the rights issues at stake, the Group considers the 11/9 form to be an unnecessary and cumbersome document which obscures the police perspective. We recommend that the 11/9 form should simply ask the police whether or not they consider

restrictions on the parade or protest to be *necessary*, and to give reasons. It would be for the determining body to match these reasons with the relevant criteria and to filter out any irrelevant information (*para. 3.54*).

## E) General Practice and Training

- 4.16 The Group recommends that the Parades Commission, in partnership with other bodies (including the Human Rights Commission, Community Relations Council and Community Safety Unit), should examine the possibility of developing appropriate indicators for evaluating progress on the parades issue (*para. 3.6*).
- 4.17 Interventions by the Commission’s Authorised Officers should seek to build an understanding of the value and meaning of rights. This would include exploring the ‘rights and freedoms of others’ – how, in the particular context, are these rights being infringed, and what could be done to prevent such infringement? Moreover, this can be achieved by discussing the parties’ needs and interests and working towards identifying the congruent rights. The Authorised Officers should be given further training in drawing out the connections between interests, needs and human rights (*para. 3.16*).
- 4.18 The rights-based adjudicatory process should be user-friendly, informal and informed by conflict-resolution practices. To this end, we recommend that the members of the determining body should also receive training (similar to that recommended for the AOs) in building consensus around rights (*paras. 3.22 and 3.87*).
- 4.19 The reasons adduced by the Commission in support of any restrictions must be “relevant and sufficient” and based on “an acceptable assessment of the relevant facts” (*para. 3.21*). Thus, in all determinations, the particular facts of the case should be explicitly related to each relevant criterion (*para. 3.52*). The Working Group recommends (*para. 3.19*) that evidence must be adduced in support of all rights claims, and not merely where the Commission deems it ‘reasonably practicable to do so’ as stipulated in para. 5.2 of its current Procedural Rules (see *para. 4.13* above). Determinations themselves should clearly spell out:
- the *ratio decidendi* of the decision in terms of specific rights provisions,
  - how, in the particular context, these rights might be infringed (outlining the specific factors considered), and
  - how, precisely, the Commission’s decision mitigates against any such infringement (the necessity of the restrictions).
- 4.20 Despite some reservations, the Working Group believes that further consideration should be given to the *Quigley Report’s* recommendation that event organisers be required to post a bond of up to a maximum of £500 where ‘gross breaches’ of the Code of Conduct have occurred (*para. 3.30*).
- 4.21 The Group welcomes Quigley’s emphasis on compliance (see *paras. 2.29-2.32*). However, contrary to Quigley, we recommend that the Guidelines and the Code of Conduct should be drafted by the determining body (possibly following a time-limited public consultation), and that responsibility for recruiting monitors should fall to the secretariat of the determining body (*para. 3.94*).

Quigley:  
15, 23, 25,  
32, 33.



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# Appendix A

## Interview Questions: Facilitator's notes

The working group is examining how the text of the European Convention on Human Rights should be interpreted and/or supplemented to reflect the particular circumstances surrounding the exercise of the right to freedom of peaceful assembly in Northern Ireland.

### 1. Is it always legitimate to restrict the right to freedom of peaceful assembly if the exercise of that right gives rise to the potential for public disorder or damage to property?

- What constitutes 'peaceful' assembly?
- In what circumstances would it be appropriate/inappropriate for peaceful assembly to be restricted on public order grounds?

For example:

- a) If the potential for disorder is confined to a particular locality
  - b) If the potential for disorder is more widely across Northern Ireland
- 
- Should the police, Parades Commission or courts be concerned with the anticipated source of disorder, and if so, *how* should their decisions reflect the anticipated source of disorder?
    - a) parade participants (inc. bands)
    - b) supporters and 'hangers-on'
    - c) protest
    - d) policing operation
  - How should the potential for disorder be assessed or measured?
    - a) Would the declared intention of the organiser, or stated purpose of the assembly, be a relevant consideration in assessing the potential for disorder?
    - b) What other factors should be taken into account?

### 2. What, in your eyes, ought to be the limits of peaceful protest against a parade?

- Is it ever justifiable to go beyond these limits, and if so, in what circumstances?
  - a) sensitive locations, memorials etc?
  - b) certain types of parade?
  - c) how much does this depend on local circumstances, political climate etc.?

### 3. In the context of parades, what are the rights of non-participants (including those living or working in an area through which a parade passes), and how might these rights be affected by the exercise of the right to freedom of peaceful assembly?

- In what circumstances do you think that a parade might infringe on:
  - a) the Article 8 rights of residents to respect for their private and family life?
  - b) the Article 1 protocol 1 rights of business persons in an area to peaceful enjoyment of their possessions?
  - c) the right to life as protected by Article 2
  - d) Are there any additional rights, not contained in the European Convention on Human Rights, which you consider to be affected by parades?
  - e) The Belfast (Good Friday) Agreement cited the right to freedom from sectarian harassment, and it may be that such a right could be included in a Bill of Rights for Northern Ireland. What do you consider 'sectarian harassment' to be, and are there any circumstances in which you feel parades could/could not amount to sectarian harassment?

4. **Is it always legitimate to restrict the right to freedom of peaceful assembly if the exercise of that right might infringe upon the rights of others?**
- Might a protest against a parade or a policing operation infringe on those rights in the same way as a parade itself? And should the Parades Commission or courts be concerned with the anticipated source of any infringement of the rights of others?
    - a) parade participants (inc. bands)
    - b) supporters and ‘hangers-on’
    - c) protest against a parade
    - d) policing operation
  - If so, how might the decisions of the Parades Commission reflect the anticipated source of any infringement of the rights of others?
  - How should the likely impact of a parade on the rights of others be measured?
  - What, if any, infringements of their rights should people be prepared to ‘tolerate’ in a democratic society?
5. **What are the implications of your answers in (1) – (4) for the *procedures* involved in taking decisions restricting the exercise of the right to freedom of peaceful assembly?**
- Consultation
  - The opportunity to have knowledge of, and comment on, the submissions made by other parties (inc. police)
  - Would it be helpful in balancing the Art 10 & 11 rights of those parading and those protesting if the PC were to take the decisions in relation to protest meetings as well as parades?
6. **How might the right to freedom of peaceful assembly, or the European Convention generally, be supplemented in any Bill of Rights designed to reflect the particular circumstances of Northern Ireland in so far as these relate to parades and protests?**

# Appendix B

## Relevant ECHR Articles

### Article 1 – Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

### Article 2 – Right to life

- 1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
- 2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
  - a in defence of any person from unlawful violence;
  - b in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - c in action lawfully taken for the purpose of quelling a riot or insurrection.

### Article 3 – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

### Article 5 – Right to liberty and security

- 1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - a the lawful detention of a person after conviction by a competent court;
  - b the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - c the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - d the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - e the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
  - f the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- 2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
- 3 Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

- 4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
- 5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

#### **Article 6 – Right to a fair trial**

- 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
- 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- 3 Everyone charged with a criminal offence has the following minimum rights:
  - a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - b to have adequate time and facilities for the preparation of his defence;
  - c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
  - d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

#### **Article 8 – Right to respect for private and family life**

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

#### **Article 9 – Freedom of thought, conscience and religion**

- 1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- 2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

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

- 1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

- 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

#### **Article 11 – Freedom of assembly and association**

- 1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
- 2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

#### **Article 14 – Prohibition of discrimination**

The enjoyment of the rights and freedoms set forth in this Convention 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.

#### **Article 17 – Prohibition of abuse of rights**

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

#### **Article 1, Protocol 1 – Protection of property and the peaceful enjoyment of one's possessions**

- 1 Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
- 2 The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.



## Appendix C

### Summary of relevant Judicial Review proceedings involving decisions of the Parades Commission

#### *Re Pelan's Application for Judicial Review (1998)*<sup>260</sup>

Carswell LCJ (Court of Appeal) held that:

- "...in paragraph (b) of s8(6) the disruption referred to appears to be primarily (though not perhaps exclusively) that which may occur in the life of those members of the community who live in the area through which the procession is to pass. When one turns to paragraph (c), however, it seems to us quite possible to interpret the word 'community' as referring to a wider group."
- "The word 'procession' in paragraphs (a) to (c) of s 8(6) must be a compendious term. The actual procession could not physically cause disorder, damage or disruption to people's lives. The term must mean at its narrowest the holding of the procession, which gives rise to such consequences. It seems to us at least possible that it is capable of including also the decision to hold the procession, so that the Commission can have regard to the possibility of disorder, damage or disruption occurring as a reaction to its decision before the procession takes place. It is not necessary, however, to decide this point in the present appeal."
- s8(6) "merely requires the Commission to 'have regard to' the factors specified. It does not follow that it is confined to consideration of those factors."

#### *Re Farrell's Application for Judicial Review (1999)*<sup>261</sup>

Nicholson LJ held:

- "We consider that the Commission should give the basis for its decisions in accordance with the Procedural Rules. The extent of reasoning will vary from parade to parade and it is inappropriate for this court to set out guide lines as to the form which any decision may take. There may be occasions when time does not enable the Commission to give the basis for a decision as events leading up to a parade may alter from hour to hour and the advice of the police upon which the Commission must heavily rely may change as events unfold..."

...Lord Clyde in *Stefan v GMC (1999)*, Times, 11 March, said:

'The extent and substance of the reasons has to depend upon the circumstances. They need not be elaborate or lengthy. But they should be such as to tell the parties in broad terms why the decision was reached. In many cases very few sentences should suffice to give such explanation as was appropriate to the particular situation'

We were somewhat concerned with the blandness of the statement as to 'the basis' of the decision.

A mere recital of the factors involved in the decision may not enable one to determine the basis of the decision. We took into account that the parade was small, composed mainly of children, was using a traditional route and that trouble would be caused by older persons on the return journey who were not members of the parade. The statement was silent as to whether the Commission considered re-routing the return so as to stop short of Castle Island Bridge. But as

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<sup>260</sup> [1998] NIJB 260

<sup>261</sup> [1999] NIJB 143

inferred that they must have concluded that this might cause as much or more trouble than allowing the traditional route to be followed.

Ultimately we took the view that the statement complied with para. 5.2 of the Procedural Rules...

- The Commission has a duty to review its Rules of Procedure and has power to propose an alteration to these rules: see s 4(4) of the 1998 Act and Sch 2 thereof. So long as the rules are unamended they should be adhered to. However, the situation in Portadown is volatile and a decision to give a preliminary view may inflame the situation. Accordingly we regard this as a technical breach and consider that the rules should be amended so as to give the Commission a discretion as to whether or not a preliminary view is expressed.

### ***Re Tweed's Application for Judicial Review (2001)***<sup>262</sup>

Carswell LCJ (Court of Appeal) held that:

- "...even if it can be said that the Commission in reaching its decision had regard to factors other than those specified in art 11(2) of the Convention, that does not necessarily invalidate it. In domestic law the decision must be made by reference to the correct factors, and this requirement was satisfied in the present case. When one has to consider the impact of the Convention, however, the focus is not on the process of decision-making, but on the substance of the decision itself. The issue then is whether the restriction imposed on the parade can properly be said to be justified on one of the grounds specified in art 11(2), whatever factors the Commission may have taken into account in reaching its decision."
- In relation to s8(6)(b)–(e) PPA, it appears that these factors cannot form the grounds for any decision of the Commission to impose restrictions on a parade. Instead, the "other considerations came into play in that part of the Commission's decision which was concerned with the issue of whether those restrictions were necessary in a democratic society and proportionate."
- "We feel some doubt whether it can be said that there is a right not to be offended... We do not find it necessary to decide the question, however..."

### ***Re Pelan's Application for Judicial Review (2001)***<sup>263</sup>

- **The Commission's discretion under the Human Rights Act 1998**

Girvan J:

"The parties called in aid the Convention in respect of a number of aspects of the case. The appellant in her statement of the case had argued that the Commission had not properly applied the Convention and the relevant Articles, 8, 10, 11 and Article 1 Protocol 1. In addition the appellant argued that Article 2 was engaged.

Kerr J [in the High Court] rejected the argument that the Commission failed to have regard to the legitimate Convention rights of the residents. He considered that the Commission must be afforded a margin of appreciation in considering a proper balance between the Convention rights of the appellant and the residents of the Lower Ormeau community and the asserted rights under Article 11 of the Apprentice Boys. The Commission was the body charged with the specific responsibility for researching, assembling material, taking and

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<sup>262</sup> [2001] NILR 165

<sup>263</sup> CA Unreported.

evaluating representations on the topic of disputed margins. He concluded that the court should be slow to intervene in the resolution by the Commission of the tension that arises in relation to the human rights asserted by the appellant and the residents of the Lower Ormeau Road in competition with those of the Apprentice Boys...For my own part I am content to accept Kerr J's approach as correct recognising that the question of the margin of appreciation in matters such as this and who is entitled to exercise that margin is a difficult one which may require to be analysed more fully in an appropriate case"

Nicholson LJ:

"...unless and until I hear a convincing argument to the contrary, the Parades Commission must be afforded a discretion in regard to balancing the rights of the applicant and the residents of the Lower Ormeau Community on the one hand and the rights of the Walker Club on the other hand. It is desirable that such a discretion should be afforded to the Commission having regard to the fact that they are in a very much better position than the court to reach a balanced decision on competing human rights and that the court should be slow to intervene in the resolution by the Commission of those rights. But I am reluctant to identify this with 'margin of appreciation' or 'proportionality' or other phrases to be found in judgements of the European Court of Human Rights in the absence of argument."

Coghlin J:

"Mr MacDonald QC abandoned any reliance upon the provisions of Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and did not develop in detail any argument in relation to Article 11. In such circumstances, I would prefer to reserve my views as to the implications of Article 11 or the relevance of the Strasbourg concept of "margin of appreciation" for domestic bodies until I have received the benefit of full adversarial argument."

- **Interpretation of Article 11**

The following passage from the judgement of the European Court of Human Rights in *Plattform Ärzte für das Leben v Austria* was considered:

A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must however be able to hold a demonstration without having to fear that they will be subjected to physical violence by their opponents. Such a fear would be liable to deter associations from openly expressing their opinions. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate."

Girvan J:

"A number of points emerged from that decision. Firstly, there is clearly a Convention right to peacefully demonstrate which the state must uphold. Secondly, there is no right to be offended or annoyed by the manifested views of others who in a free society have a right to express their views and exercise their right to assemble and demonstrate. Thirdly, those opposing a demonstration are not entitled by threats or acts of violence to frustrate the right of those seeking to exercise the right to demonstrate and manifest views."

Nicholson LJ:

"But this does not absolve the Commission from its statutory obligations and adds little, if anything, to the overall impact of Article 11(1) and (2) of the Convention...The decision in *Plattform Ärzte für das Leben v Austria* does not inhibit the Commission from giving effect to Article 11(2) and I do not propose to say anything more on this topic, as it was not fully argued before the court."

# Appendix D

## Definitions of Sectarianism, harassment, intimidation and incitement to racial and religious hatred

### EU Code of Practice on Sexual Harassment<sup>264</sup>

In this document, “harassment” is defined as conduct which is “unwanted, unreasonable and offensive to the recipient”. It may also create “an intimidating, hostile or humiliating...environment for the recipient.” Such conduct affects the dignity of the recipient, and moreover, it is for each individual to determine what behaviour is acceptable to them and what they regard as offensive. Conduct becomes harassment if it is persisted in once it has been made clear that it is regarded by the recipient as offensive.

### UN Convention on the elimination of all forms of racial discrimination...

#### Article 4

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

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

#### Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution;
- (c) Political rights, in particular the rights to participate in elections--to vote and to stand for election--on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) Other civil rights, in particular:
  - (i) The right to freedom of movement and residence within the border of the State;
  - (ii) The right to leave any country, including one's own, and to return to one's country;
  - (iii) The right to nationality;
  - (iv) The right to marriage and choice of spouse;
  - (v) The right to own property alone as well as in association with others;
  - (vi) The right to inherit;
  - (vii) The right to freedom of thought, conscience and religion;
  - (viii) The right to freedom of opinion and expression;
  - (ix) The right to freedom of peaceful assembly and association;

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<sup>264</sup> Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work (92/131/EEC).

- (e) Economic, social and cultural rights, in particular:
  - (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
  - (ii) The right to form and join trade unions;
  - (iii) The right to housing;
  - (iv) The right to public health, medical care, social security and social services;
  - (v) The right to education and training;
  - (vi) The right to equal participation in cultural activities;
- (f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks.

## **Public Order (NI) 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 or a group of persons defined by reference to religious belief, colour, race, nationality (including citizenship) or ethnic or national origins;

“hatred means hatred against a group of persons 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

### **PART IV**

#### **MISCELLANEOUS PUBLIC ORDER OFFENCES**

#### **Provocative conduct in public place or at public meeting or procession**

19. —

(1) A person who in any public place or at or in relation to any public meeting or public procession—

(a) uses threatening, abusive or insulting words or behaviour; or

(b) displays anything or does any act; or

(c) being the owner or occupier of any land or premises, causes or permits anything to be displayed or any act to be done thereon,

with intent to provoke a breach of the peace or by which a breach of the peace or public disorder is likely to be occasioned (whether immediately or at any time afterwards) shall be guilty of an offence.

(2) A person guilty of an offence under paragraph (1) shall be liable on summary conviction to imprisonment for a term not exceeding 6 months or to a fine not exceeding level 5 on the standard scale, or to both.

### **Wearing of uniform in public place or at public meeting**

21. —

(1) Subject to paragraph (2), a person who in any public place or at any public meeting wears uniform signifying his association with any political organisation or with the promotion of any political object shall be guilty of an offence.

(2) The Chief Constable, if satisfied that the wearing thereof on any ceremonial, anniversary, or other special occasion, will not be likely to involve risk of public disorder, may, with the consent of the Secretary of State, by order permit the wearing of the uniform on that occasion either absolutely or subject to any conditions specified in the order.

(3) A person guilty of an offence under paragraph (1) shall be liable on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding level 4 on the standard scale, or to both.

## **Crime and Disorder Act 1998**

*Racially-aggravated offences: England and Wales*

*Meaning of "racially aggravated".*

28. - (1) An offence is racially aggravated for the purposes of sections 29 to 32 below 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 the victim's membership (or presumed membership) of a racial group; or
- (b) the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group.

(2) In subsection (1)(a) above-

"membership", in relation to a racial group, includes association with members of that group;  
"presumed" means presumed by the offender.

(3) It is immaterial for the purposes of paragraph (a) or (b) of subsection (1) above whether or not the offender's hostility is also based, to any extent, on-

- (a) the fact or presumption that any person or group of persons belongs to any religious group; or
- (b) any other factor not mentioned in that paragraph.

(4) In this section "racial group" means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.

*Increase in sentences for racial aggravation.*

82. - (1) This section applies where a court is considering the seriousness of an offence other than one under sections 29 to 32 above.

(2) If the offence was racially aggravated, 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) Section 28 above applies for the purposes of this section as it applies for the purposes of sections 29 to 32 above.

## **Protection from Harassment (NI) Order 1997**

**Interpretation**

2. —

(1) The 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.

### **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.

## **Religious Offences Bill**

### **17A Meaning of “religious hatred”**

In this Part “religious hatred” means hatred against a group of persons defined by reference to religious belief or lack of religious belief.

### **In relation to this Bill, the Joint Committee on Human Rights noted:<sup>265</sup>**

12. In relation to the Religious Offences Bill, we note that the provisions of Clause 2 are identical to those introduced as Clause 38 of the Anti-Terrorism, Crime and Security Bill, but which were later deleted by the House of Lords.

13. When reporting on the Anti-terrorism, Crime and Security Bill, we observed that the provisions of clause 38 could interfere with the right to freedom of expression under ECHR Article 10, but would be likely to satisfy the requirements of Article 10(2) for justifying such an interference. The debate in the House of Lords suggested that many members of that House took a different view.

14. In reaching our previous conclusion, we noted that the Human Rights Committee under the International Covenant on Civil and Political Rights, in its concluding observations on the United Kingdom's latest periodic report under the ICCPR, had remarked on the recent upsurge in religious harassment and attack, and urged the United Kingdom to 'extend its criminal legislation to cover offences motivated by religious hatred, and take other steps to ensure that all persons are protected from discrimination on account of their religious beliefs.' We concluded that the measures would be likely to be compatible with Convention and other human rights as long as they were applied 'in a way that focuses closely on the prohibited purpose and outcome of speech, that is the incitement of hatred on religious grounds'.

## **Religious Discrimination and Remedies Bill**

Part 6 of the Bill provides for the offence of incitement to religious hatred:

27: Use of words or behaviour or display of written material

- (1) A person who uses threatening, abusive or insulting words or behaviour or who displays any written material which is threatening, abusive or insulting is guilty of an offence if –
- (a) he intends thereby to stir up hatred against a group of persons in Great Britain defined by reference to religious belief, or
  - (b) having regard to all the circumstances such hatred is likely to be stirred up thereby.

An offence under this section may be committed in a public or in 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...

29. Procedure and Penalties

- (1) No proceedings for an offence under this Part may be instituted in England or Wales except by or with the consent of the Attorney General.

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<sup>265</sup> Fourteenth Report.

## **In relation to this Bill, the Joint Committee on Human Rights noted:<sup>266</sup>**

31. incitement to religious hatred would be made a statutory offence in the same terms as those used in the provision dropped from the Anti-terrorism, Crime and Security Bill in December 2001, and re-introduced in Lord Avebury's Religious Offences Bill in 2002...

33. The Bill would contribute to protecting people against discrimination on the ground of religion as required by Articles 20 and 26 of the International Covenant on Civil and Political Rights, which binds the United Kingdom in international law. It is our view that this Bill would serve to enhance human rights in the United Kingdom and would not give rise to a significant risk of incompatibility with Convention or other human rights.

## **The Stephen Lawrence Inquiry**

“Racism in general terms consists of conduct or words or practices which disadvantage or advantage people because of their colour, culture, or ethnic origin. In its more subtle form it is as damaging as in its overt form.” (para. 6.4)

## **Clegg, C. and Leichty, J., ‘Moving Beyond Sectarianism’ project**

“Sectarianism” is defined as:

a complex of attitudes, actions, beliefs and structures at personal, communal and institutional levels

- which typically involve a negative mixing of religion and politics
- which arises as a distortion of natural, positive human needs for belonging, identity and the free expression of difference and is expressed in destructive patterns of relating
  - negatively re-enforcing the boundaries between communities
  - overlooking others
  - belittling or demonising others
  - justifying or collaborating in the domination of others
  - physically intimidating or attacking others.<sup>267</sup>

## **McVeigh, R. (from Irish Society: Sociological Perspectives<sup>268</sup>)**

Sectarianism in Ireland is that changing set of ideas and practices, including, crucially, acts of violence, which serves to construct and reproduce the difference between, and unequal status of, Irish Protestants and Catholics.

## **Commission for Racial Equality**

Racial harassment is violence which may be verbal or physical and which includes attacks on property as well as the person, suffered by individuals or groups because of their colour, race, nationality or

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<sup>266</sup> Sixteenth Report.

<sup>267</sup> This definition has been adopted by, amongst others, the Church of Ireland General Synod, Standing Committee, Sub Committee on Sectarianism Report April 1999;

<sup>268</sup> McVeigh, R., “Cherishing the Children of the Nation Unequally” in Clancy, P. et al (eds.), *Irish Society: Sociological Perspectives*, Institute of Public Administration (1995), pp.620-652 at p.643.



ethnic or national origins, when the victim believes that the perpetrator was acting on racial grounds and/or there is evidence of racism.<sup>269</sup>

**Derby, J. (from *Intimidation and the Control of Conflict in Northern Ireland*)<sup>270</sup>**

Intimidation is defined as the process by which, through the exercise of force or threat, or from a perception of threat, a person feels under pressure to leave home or workplace against his or her will. It can be considered within a framework of three categories, acknowledging that they are not initially exclusive, or discrete:

- (1) actual physical harm;
- (2) actual threat;
- (3) perceived environmental threat.

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<sup>269</sup> Commission for Racial Equality, *Living in Terror: A Report on racial violence and harassment in housing*, London: CRE (1987). Cited in McVeigh, R., "It's part of life here...": *The Security Forces and Harassment in Northern Ireland*, CAJ (November 1994), pp.45-46.

<sup>270</sup> Gill & MacMillan, (1986), p.53. Cited in McVeigh, R., "It's part of life here...": *The Security Forces and Harassment in Northern Ireland*, CAJ (November 1994), p.46.

# Appendix E

## Offences Connected with Public Assembly

### General Public Order Offences:

- Stirring up Hatred or Arousing Fear through the use of words or behaviour or display or written material (Article 9, Public Order (NI) Order 1987)
- Riotous or disorderly behaviour in a public place (Art. 18 POO)
- Provocative Conduct in a public place or at a public meeting or procession (Art. 19 POO)
- Obstructive sitting etc. in a public place (Art. 20 POO)
- Wearing of uniform in public place or at public meeting which signifies an association with any political organisation or with the promotion of any political object (Art. 21 POO) See also s.13 Terrorism Act 2000. There is no definition of “uniform” in the 1987 Order, so the courts will have to decide whether, for instance, wearing a beret or some kind of sash is enough to constitute a uniform. In the English case of *O'Moran v DPP* (1975) it was held that the wearing of dark berets, dark glasses, dark pullovers and other dark clothing, when escorting the coffin of an IRA supporter through London streets, could be regarded as a uniform.
- Carrying of an offensive weapon in a public place (Art. 22 POO)

### The Protection from Harassment (NI) Order 1997

#### 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.

#### 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.

### The Terrorism Act 2000 – Section 13:

A person commits an offence if he/she wears an item of clothing, or wears, carries or displays an article in such a way or in such circumstances as to arouse reasonable suspicion that he/she is a member or supporter of a proscribed organisation. See also the Parades Commission Code of Conduct, Appendix A, paras. B and G, and Appendix C, paras. B and E. The proscribed organisations in Northern Ireland are:

The Irish Republican Army  
Cumann na mBan  
Fianna na hEireann  
The Red Hand Commando  
Saor Eire  
The Ulster Freedom Fighters  
The Ulster Volunteer Force  
The Irish National Liberation Army  
The Irish People's Liberation Organisation  
The Ulster Defence Association  
The Loyalist Volunteer Force  
The Continuity Army Council

### **Offences in relation to parades:**

- A person who knowingly fails to comply with a condition imposed under section 8 PPA is guilty of an offence, but it is a defence for him to prove that the failure arose:
  - (a) from circumstances beyond his control; or
  - (b) from something done by direction of a member of the Royal Ulster Constabulary not below the rank of inspector.
- A person who incites another to commit an offence under section 8 PPA is also be guilty of an offence.

### **Offences in relation to parade related protests:**

- A person who for the purpose of preventing or hindering any lawful public procession or of annoying persons taking part in or endeavouring to take part in any such procession-
  - (a) hinders, molests or obstructs those persons or any of them;
  - (b) acts in a disorderly way towards those persons or any of them; or
  - (c) behaves offensively and abusively towards those persons or any of them,shall be guilty of an offence (Section 14 PPA)
- A person who knowingly fails to comply with a condition imposed on a public meeting by the police under Art.4 POO is guilty of an offence.
- A person who, by sitting, standing, kneeling, lying down or otherwise conducting himself in a public place, wilfully obstructs or seeks to obstruct traffic or wilfully hinders, or seeks to hinder, any lawful activity shall be guilty of an offence. (Art.20 POO)

### **Offences in relation to consumption of alcohol at a parade – PPA Section 13:**

- (1) Where a constable in uniform reasonably suspects that a person is consuming intoxicating liquor, the constable may require that person-
  - (a) to surrender anything in his possession which is, or which the constable reasonably believes to be, intoxicating liquor...
- (2) Subsection (1) applies to a person-
  - (a) who is taking part in a public procession; or
  - (b) who is among those who have assembled with a view to taking part in a public procession;or
  - (c) who-
    - (i) is otherwise present at, or is in the vicinity of, a place on the route or proposed route of a public procession; and
    - (ii) is in a public place, other than licensed premises. (Section 13 PPA)

### **Police Powers**

A constable in uniform may arrest without warrant anyone he reasonably suspects is committing any of the offences listed above. He/she may also take action to deal with or prevent a breach of the peace.

# Appendix F

## Draft Revised Guidelines

### 1. Introduction

**1.1** These Guidelines are produced in compliance with Section 5 of the *Peaceful Assemblies (Northern Ireland) Act 2004*. This requires the *Commission for Peaceful Assembly* to issue Guidelines as to the exercise of its functions under Section 8 of that Act. Those functions include considering:

- Whether to subject a public assembly to conditions;
- Whether to amend or revoke conditions which have been imposed; and
- What conditions should be imposed.

**1.2** The Code of Conduct and the Procedural Rules (also produced under the *Public Assemblies Act*), as well as the Risk Assessment section in the statutory notification forms, are to be read in conjunction with this document.

**1.3** These Guidelines are based on the fundamental premise that the right to freedom of peaceful assembly, as outlined in both the European Convention on Human Rights (ECHR) and the United Nations International Covenant on Civil and Political Rights (ICCPR), is foundational in any democratic society, is to be enjoyed equally by all, and is not to be interpreted restrictively. Article 11(1) ECHR provides that:

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

**1.4** The European Court of Human Rights has held that this right covers both static meetings and public processions. It is not, however, an absolute right, and its exercise can be limited for the purposes outlined in Article 11(2) ECHR:

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

**1.5** Section 11 of the *Peaceful Assemblies Act* empowers the Secretary of State to restrict or prohibit public assemblies on grounds of national security. Section 8(6) of the Act therefore provides that the Commission shall have regard to the remaining factors in Article 11(2), namely:

- (a) the interests of public safety;
- (b) the prevention of public disorder or crime;
- (c) the protection of health or morals; and
- (d) the protection of the rights and freedoms of others.

**1.6** This document explains how each of these factors will be interpreted, and thus provides the Commission with a means of testing the validity of any claims which parties may make concerning the protection of their Convention rights. These Guidelines are vital in understanding the Commission's role in helping create a society in which parades and protests can take place without conflict.

- 1.7** In doing so, the Guidelines are designed to promote consistency in decision making, and they will be strictly interpreted and applied. Notwithstanding, the weighting of the factors will necessarily be a matter for the Commission's discretion and judgement. Factual and circumstantial differences between individual cases will inevitably mean that the statutory criteria sometimes have different connotations at different times, or in relation to different parades or protests, or in different locations.
- 1.8** Furthermore, just as human needs can sometimes be satisfied in different ways, fundamental rights and freedoms – while not of themselves negotiable – can often be given effect in more than one way. The Commission exhorts parties to disputes concerning the exercise of the right to freedom of peaceful assembly to exhaust every possible means of finding a voluntary arrangement which accommodates the relevant interests of all involved. Such efforts to reach agreement should examine how the rights at stake can best be recognised in the particular context. In this regard, the *Assemblies Conciliation Agency* can provide advice and support.

## **2. 'Peaceful assembly'**

- 2.1** The Commission emphasizes that only '*peaceful assembly*' is protected by the ECHR. European case law has held that '*peaceful assembly*' includes behaviour which may annoy or give offence to persons opposed to the ideas or claims being promoted, but excludes that which actually obstructs the activities of others, or where the participants have violent intentions. This applies to both public processions themselves, and those who legitimately object to notified parades. It means, though (as stated by the European Court in *Plattform Ärzte für das Leben v Austria* (1988)), that the right to counter-demonstrate should not extend to inhibiting the right to demonstrate.
- 2.2** In determining whether or not the organisers have peaceful intentions, the Commission will consider:
- (a) the declared purpose of the assembly to the extent that this might imply obstructive, intimidating or violent behaviour, or paramilitary connotations;
  - (b) the past conduct of the notified participant bands, clubs, lodges or other groups (including their conduct in events in other areas and their compliance with previous determinations);
  - (c) an assurance of peaceful conduct given by the organiser on behalf of all notified participants. Where this is called into question by implicative evidence in (b), and particularly where assurances were also given in those instances, corroborating factors *such as* those listed in (d) will be sought;
  - (d) efforts made by the event organiser to ensure that it proceeds without causing violence or unreasonable obstruction, *possibly* including:
    - i) a preparedness to address legitimate concerns which have been communicated to the organiser (including those raised by the Commission's monitors);
    - ii) the provision of an adequate number of suitably trained stewards/marshals;
    - iii) the submission of an event specific risk assessment;
    - iv) a preparedness to co-operate with the police in relation to the planning of the event;
    - v) the provision of a named guarantor for the behaviour of those on parade;
    - vi) the willingness of the organiser to post a bond of up to a maximum of £500 where any participants in the notified event have previously been responsible for gross breaches of the Code of Conduct or Commission determinations.

- 2.3 The Commission emphasizes that Article 11 ECHR protects only *peaceful* assembly. Thus, taking the factors listed in paragraph 2.2 into account, the Commission will examine the proposed event against the following categories of behaviour.

Peaceful:

- (a) *‘Technical’ breaches of the legislation* (such as a parade or protest which has not fully complied with the statutory notice requirements);
- (b) *Low-level disorder which is neither violent nor explicitly sectarian* (for instance, the consumption of alcohol at an event, or disorderly behaviour);

Not peaceful:

- (c) *Behaviour which is obstructive, intimidating or violent* (such as the use of words or behaviour likely to stir up hatred or arouse fear, riotous behaviour in a public place, provocative conduct at a public meeting or procession, obstructive sitting, carrying an offensive weapon in a public place, putting people in fear of violence, or abusive behaviour towards a person taking part in a lawful public procession).
- (d) *Behaviour involving the display of paramilitary symbols or the wearing of paramilitary uniforms, even in what is otherwise an entirely disciplined and apparently ‘peaceful’ parade* (such as wearing a uniform in a public place or at public meeting, wearing an item of clothing, or wearing, carrying or displaying an article in such a way or in such circumstances as to arouse reasonable suspicion that he/she is a member or supporter of a proscribed organisation).

- 2.4 The Commission considers that events in the first category *may* be deemed ‘peaceful’, although the organiser will be subject to criminal prosecution for infringement of the statutory procedures. Similarly, in (b), a degree of drunken or rowdy conduct *may* be left to the police to pursue by way of subsequent prosecution, prior restrictions being disproportionate to the risk posed. The two final categories, however, raise an entirely different level of concern and encompass the type of behaviour envisaged by both section 17 of the *Bill of Rights Chapter of the South African Constitution* (which excludes from the definition of peaceful assembly (i) propaganda for war, (ii) incitement of imminent violence, and (iii) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm), and Article 20(2) of the *International Covenant on Civil and Political Rights* (which states that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”). Where the Commission is satisfied of the probability that behaviour in categories (c) and (d) will occur, the event will not be protected under Article 11.

### **3 The necessity of restrictions in a democratic society**

- 3.1 The European Court of Human Rights has stated that in order for restrictions on the exercise of the right to freedom of peaceful assembly to be deemed ‘necessary’, any such restrictions must correspond to ‘a pressing social need’ and must be ‘proportionate’ to the aim being pursued by the authorities. Article 17 ECHR will also be taken into consideration when assessing the ‘necessity’ of any restrictions. This provides that:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

3.2 In assessing whether there is ‘a pressing social need’, the Commission notes that in the context of Northern Ireland’s divided society, route or location restrictions on parades or protests have symbolic significance in that they imply that the particular area ‘belongs’ to ‘the other’ community. The Commission believes that all public space in Northern Ireland should be shared space. The Commission therefore has a duty to have regard to the impact of its decisions on the potential for increasing communal segregation.

3.3 The Commission will also have regard to the concept of tolerance which is well established in international human rights law. Relevant provisions include:

- The International Covenant on Economic, Social and Cultural Rights, Article 11;
- The International Convention on the Elimination of All Forms of Racial Discrimination, Article 7;
- The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, para. 5.2;
- The European Framework Convention on the Protection of National Minorities, Article 6.

3.4 Similarly, the judgements of the European Court of Human Rights in *Plattform Ärzte für das Leben v Austria* (1988) and *Stankov and the United Macedonian Organisation, Ilinden v Bulgaria* (2001) suggest that members of the public should be expected to tolerate public displays, or the expression of views, which they might find offensive. The Commission believes that those who call for others to be tolerant, must themselves demonstrate tolerance. The *Quigley Report*, at para. 15.31, stated:

In the exercise of their right to freedom of peaceful assembly, all have a right to have their honour respected and their dignity recognised and must themselves respect and honour and recognise the dignity of others.

3.5 In assessing the proportionality of restrictions, the Commission notes that the reasons adduced must be relevant and sufficient, and based on an acceptable assessment of the relevant facts.

3.6 Therefore, in addition to the factors outlined under ‘peaceful assembly’ at paragraph 2.2 above, the Commission will also consider the following factors when assessing the ‘necessity’ of any restrictions:

- (a) The importance of the particular route and/or other aspects of the event in serving the purpose of the event;
- (b) The importance of the purpose of the limitation;
- (c) The nature and extent of the limitation;
- (d) The relation between the limitation and its purpose (for example, route restrictions might be deemed proportionate where a significant section of the parade route was left unaffected, yet the impact on the rights and freedoms of others is greatly reduced);
- (e) The availability and effectiveness of less restrictive means to achieve the purpose of the limitation (for example, the risk of minor incidents of disorder being more appropriately dealt with by way of subsequent prosecution);
- (f) The impact of any restrictions on the potential for increased communal separation;
- (g) The degree of *mutual tolerance* demonstrated by parties to the dispute;
- (h) Whether the event is aimed at the destruction or limitation of the rights and freedoms of others to a greater extent than is provided for in the Convention;
- (i) Further factors identified through independent research on the parades issue.

## **4. Public Safety**

- 4.1 While there is a significant overlap between public safety considerations and those concerning the maintenance of public order, public safety is a much broader concept. To this end, the Commission will consider the preparedness of the parade or protest organiser to address public safety issues arising as a result of their event. The Commission will consider the following factors (where applicable) when assessing the ‘public safety’ implications of a public assembly:
- (a) The size of the notified event and the suitability of the proposed route in accommodating it;
  - (b) The presence of any roadworks or similar obstructions (including crowd control barriers);
  - (c) The proximity of the event to moving vehicular traffic, particularly at busy road junctions;
  - (d) The availability of suitable drop-off and parking areas for coaches;
  - (e) The provision of adequate First Aid facilities;
  - (f) The provision of adequate toilet facilities to cater for event participants and followers;
  - (g) Access and egress for emergency services during the event;
  - (h) Arrangements for pedestrian crossing points in parades;
  - (i) The adequate provision of trained marshals;
  - (j) Evidence of a risk assessment having been conducted by the event organiser;
  - (k) Evidence of contingency planning by the event organiser;
  - (l) Liaison between the event organiser and the police;
  - (m) Any additional factors identified by local community safety audits.

## **5. The Prevention of Public Disorder or Crime**

- 5.1 In assessing the potential for disorder, the Commission will focus primarily upon the intentions and past behaviour of the event participants and its followers, rather than on the surrounding circumstances. A summary of any advice or evidence concerning the likelihood of public disorder which is received from, amongst others, the Commission’s monitors, the event organiser him/herself (by way of a completed risk assessment) and the PSNI, will be made available to parties during the informal hearing, and will also be outlined in any subsequent determination issued by the Commission.
- 5.2 The Commission acknowledges that it is not always possible to reliably forecast the occurrence or source of public disorder given the dynamic interaction within and between crowds, and between crowds and the police. Nonetheless, the Commission believes that the claims of those who are committed to peaceful demonstration or protest should be given greater weight than the claims of those who resort to or threaten violence of any kind.
- 5.3 Furthermore, the Commission will *not* take into account the potential for widespread disorder across Northern Ireland. This properly falls within the review jurisdiction of the Secretary of State as a matter of ‘national security’.

## **6. The Protection of Health or Morals**

- 6.1 The Commission believes that where the nature of the event, or the behaviour associated with it, is so grievous as to inflict psychological harm upon those living in its proximity, the event will already have been disqualified from protection under Article 11 ECHR as it will not be deemed ‘peaceful’ (see paragraph 2.3 above). If such events continue to take place, there should be no delay in the prosecution of those involved (for offences such as the use of words or behaviour likely to stir up hatred or arouse fear under the *Public Order (NI) Order 1987*, or putting people



in fear of violence under the *Protection from Harassment (NI) Order 1997*). Nonetheless, the Commission will consider the cumulative impact of a number of events in any given area when deciding whether or not to impose restrictions for the purpose of protecting health. The Commission believes that no individual should have to tolerate or be forced to endure public assemblies which are intentionally intimidatory.

- 6.2 Furthermore, the Commission can envisage a situation where, because of the outbreak of disease (such as the recent Foot and Mouth epidemic), the holding of any type of public assembly might pose a health risk. The Commission is confident that in such circumstances those proposing to hold an event would themselves reconsider the wisdom of doing so. However, the Commission will also invite representations on the health implications of holding public events should such circumstances arise, and will seek to act swiftly in the interests of public health.

## **7. The Protection of the Rights and Freedoms of Others**

- 7.1 The Commission has a legal duty to uphold the rights of those who live, work, shop, trade and carry on business in the locality affected by parade or protest. All public events, no matter how small, cause some disruption, if only by temporarily curtailing the flow of traffic. However, that is an inevitable feature of public events which is not, by itself, sufficient to require that people should be constrained from exercising the right to freedom of peaceful assembly. Where the Commission restricts a parade or protest for the purpose of protecting the rights and freedoms of others, the Commission's determination will state:

- the nature of any valid rights claims made,
- how, in the particular context, these rights might be infringed (outlining the specific factors considered), and
- how, precisely, the Commission's decision mitigates against any such infringement (the necessity of the restrictions).

- 7.2 Furthermore, just as those who parade are required to demonstrate consideration of the rights and freedoms of others (see paragraphs 3.3-3.4 above), those who claim such rights will themselves be required to demonstrate toleration of the expression of views and practices which are different to their own. Given this need for tolerance in a democratic society, a high threshold will need to be overcome before it can be established that a public assembly will unreasonably infringe the rights and freedoms of others.

- 7.3 The rights that might be claimed include the right to privacy (protected by Article 8, ECHR) and the right to peaceful enjoyment of one's possessions (protected by Article 1 of Protocol 1, ECHR). Having explained above how the Commission will assess the validity of any claim concerning the right to peacefully assemble, the remaining paragraphs outline how the Commission will test the validity of any such counter claims.

### *The Right to Private and Family Life (Article 8)*

- 7.4 'Private life' covers the physical and moral integrity of the person. Moreover, the right to private and family life has been held (in *X and Y v The Netherlands* (1985)) not merely to compel the State to abstain from arbitrary interference with the individual, but also to include a positive obligation to ensure *effective* respect for private or family life, which may extend even in the sphere of relations between individuals. In *G and E v Norway* (1983), the European Commission of Human Rights concluded that "[t]he Convention does not guarantee any specific rights to

minorities, but disrespect of the particular life style of minorities may raise an issue under Article 8.”

7.5 The Commission is keen to ensure that its Guidelines and determinations accurately reflect the situation ‘on the ground’. Thus, where it is claimed that a right to privacy is affected by the exercise of the right to freedom of peaceful assembly, the Commission will seek to determine whether privacy is really the issue at stake. In doing so, it will apply the three stage test suggested by Professor David Feldman:

- 1) Is the interest really related to privacy?
- 2) How significant is the interest to the maintenance of a justifiable claim to privacy, both generally and in the particular circumstances of the case? And
- 3) How serious is the infringement of the interest?

7.6 Professor Feldman emphasizes that ‘[t]he first question must be capable of being answered “yes” before the other two questions can arise’. In this light, the Commission believes that where the interest can more easily be aligned with the need to protect residents and business owners from harassment or fearing violence, the Commission’s consideration of ‘peaceful assembly’, ‘necessary in a democratic society’ and ‘the prevention of disorder or crime’ provide a more suitable means of addressing such concerns.

7.7 Questions two and three are matters of degree, and the Commission will consider the following factors:

- The notified time of day or night;
- The numbers notified to take part and the anticipated number of followers;
- Past experience of the manner in which previous parades have been conducted;
- The estimated duration of the parade;
- Whether any disruption is likely to be caused by the event itself or by any associated protest activity or police action;
- The anticipated level of noise caused by bands;
- The date of the particular event, and whether, for example, this is a public holiday;
- The extent to which the route comprises mainly residential or commercial property;
- The cumulative impact of parades on the private lives of residents;
- Any steps taken by the parade organiser to address valid privacy interests.

#### *Peaceful enjoyment of one’s possessions (Article 1, Protocol 1)*

7.8 The right to peacefully enjoy one’s possessions has been strictly construed by the European institutions so as to offer protection only to proprietary interests. Furthermore, the difficulty of making a direct causal connection between parades (let alone any individual parade) and, for example, the loss of revenue from tourism is clear. So too, are the difficulties of penalising event organisers because the prevailing political climate might discourage outside investment or tourism. It is also notable that ‘the economic well-being of the country’ is not one of the legitimate aims contained in Article 11(2), while it is enshrined in Article 8(2).

7.9 The Commission notes the trickle-down effect of public order considerations. We hope that the legislative and human rights framework can succeed in creating a de-escalatory spiral with regard to the potential for disorder, and that this in itself will mitigate against any negative impact of parades and protests on retail or service industries.

7.10 Notwithstanding, the Commission will consider the following factors when deciding whether a public assembly will unreasonably affect the right to peaceful enjoyment of one’s possessions:

- The notified time of the event;
- Its estimated duration;
- The numbers notified to take part and the anticipated number of followers;
- The extent to which the route comprises mainly residential or commercial property;
- The nature and purpose of the parade;
- The date of the particular event, and whether, for example, this is a public holiday;
- The anticipated restriction of normal commercial activity caused by the notified event;
- Whether the location of the event is a village, town or city;
- The estimated cumulative impact of parades on the commercial life of area;
- The estimated cumulative impact of parades on property prices in the area.

# Appendix G

## DRAFT RISK ASSESSMENT

### CONTENTS

	Page
<b>1. Introduction</b>	
<b>2. Risk Assessment Procedure</b>	
<b>3. Risk Assessment</b>	
<b>Section A – Public safety</b>	
<b>Section B – Public order</b>	
<b>Section C – Health issues</b>	
<b>Section D – The rights and freedoms of others</b>	
<b>4. Conclusions</b>	
<b>5. Appendices</b>	
<b>Appendix A – List of Participant Organisations</b>	
<b>Appendix B – Stewards Briefing (including no. of stewards)</b>	
<b>Appendix B – Area Map</b>	
<b>Appendix C – Event Programme</b>	
<b>Appendix D – Organisers Code of Conduct</b>	

## 1 Introduction

This document assesses the activities associated with [event] and identifies risks to participants, supporters and others who may be in its vicinity. It outlines the key areas of risk and the actions which should be taken to minimize them. It is anticipated that it will be revisited on an ongoing basis.

Hazards and risks which are not eliminated must be controlled, and the control measures (be they physical or procedural) must be communicated to those who will work or otherwise come into contact with the hazards. The following definitions apply:

Hazard = Something that may cause harm.

Risk = The likelihood that harm will occur and the severity of that harm.

## 2 Risk Assessment Procedure

- i) *Identify the hazards associated with each aspect of the event.*
- ii) *Identify to whom the hazard exists. Decide who might be indirectly or directly affected by the hazard. Use:*

CP = Counter-event participant  
GP = General Public  
M = Event monitor  
P = Event participant  
PO = Police Officer  
R = Resident  
S = Event steward

- iii) *Determine the primary risk using the matrix below.*

		H	M	L
Severity	H	3	3	2
	M	3	2	1
	L	2	1	1

### Likelihood

#### Severity

H = Fatality - major injury causing long term disability.  
M = Injury - an illness causing short term disability.  
L = Other injury or illness

#### Likelihood

H = Certain or near certain.  
M = Reasonably likely

L = Very seldom or never

### **Risk Rating**

3 = High risk  
2 = Medium risk  
1 = Low risk

- iv) *Consider control measures to remove or minimise risk.*
- v) *Communicate risks and control measures as appropriate. Document this process.*
- vi) *Re-evaluate risk.*

The assessment will be laid out in tabular format using the following headings:

- Hazard and effect
- To whom
- Severity
- Likelihood
- Total
- Action to minimise risk
- Residual risk

Potential hazards might include:

- A Public Safety** - Conflict with moving traffic (vehicle/pedestrian impact, stewards suffering verbal/physical conflict with drivers)
  - Road works
  - Insufficient stewards
  - Unsupervised juveniles
  - Disabled participants/supporters
  - Catering (fire)
  - Litter/waste
  - Route/location specific hazards (congestion etc)
  - Major incident (e.g. bomb scare)
- B Public Order** - Hangers on
  - Hi-jacking of event by paramilitary organisation
  - Potential for violent protest (increased where sensitive locations)
  - Confrontation with the police
- C Health issues** - Weather conditions (sunburn, heat exhaustion, hypothermia etc.)
  - Pre-existing medical conditions (particularly elderly participants)
  - Exhaustion or fatigue
  - Injury
  - Welfare facilities (e.g. clearly located toilets)
  - Catering (Food poisoning)

**D Rights and freedoms of others**

- Crossing points for General Public
- Noise levels associated with event
- Restricted access to places of worship
- Access for emergency services
- Detrimental impact on commercial life

# Appendix H

## Outline of the pre-parade procedure recommended by the *Quigley Review*

Notification of parades by 1<sup>st</sup> October, or 6 months in advance of parade (whichever comes first). Possibility of later notification if reasons are outside the organiser's control, but this concession to be rigorously policed (chpt.17). Organiser to sign a document formally undertaking responsibility for compliance with Code of Conduct and to complete a risk assessment "as thoroughgoing as the scale and complexity of the event and the potential attendant risks require" (para. 23.10).

Objections lodged and registered with the 'Rights Panel' within one month of the parade being notified. Objections also communicated to the parade organiser.

### Period of Facilitation

**PARADES FACILITATION AGENCY**  
(Directly managed by "Regulatory machinery" and governed by a Code of Conduct).

**AGREEMENT REACHED:**  
*'Settlement without judgement'*  
Agreement committed to paper, and considered as a binding determination.

### NO AGREEMENT REACHED:

Chief Facilitation Officer reports to Rights Panel on the:

- ◆ success or failure of the facilitation process; and the extent to which parties:
- ◆ had acted in good faith towards each other;
- ◆ had participated in a manner that was designed to resolve the issues involved.

Proceeds to 'Judgement' by Rights Panel.

**Informal Hearing before Rights Panel** (modelled on North Lanarkshire Council - see para. 16.34). Parties to the dispute are obliged to present their case. Police also present to comment and answer questions.

*Rights Panel considers the impact of the notified parade upon the rights and freedoms of others, and upon health and morals. Rights Panel also appears to consider the public order/safety threat from those on parade (based, inter alia, on Monitors' reports, past compliance with Code of Conduct and police input at hearing).*

**RIGHTS PANEL**  
(Accountable to Ombudsman and Courts).

**Risk of disorder from those on parade.**

**Parade will have a detrimental impact on the rights and freedoms of others, or upon health and morals.**

**Parade will not have a detrimental impact on the rights and freedoms of others, or upon health and morals.**

At least 28 days before a parade → (para.17.7)

**DETERMINATION**  
**Parade prohibited.** Not a 'peaceful assembly', and therefore does not attract the protection of Art. 11(1).

**DETERMINATION**  
**Parade restricted** by conditions, proportional to the aim being pursued and corresponding to revised Guidelines (see para 15.16).

**DETERMINATION**  
**Parade allowed** to proceed without restriction.

Notification of protest in respect of a determination is to be lodged within 14 days of the determination being issued. Concessions as per normal notification process (see above). In the exceptional circumstances of a determination being issued less than 14 days before parade, the Rights Panel will fix a date for lodgement of notice (para.17.6).

**POLICE**  
(accountable to Policing Board, Police Ombudsman and Courts).

Police consider the public safety implications of implementing the determination of the Rights Panel. Possible further restriction of parade/protest.  
***Police CANNOT overturn conditions imposed by the determination of the Rights Panel*** (para. 20.17).

Police consider the public safety implications of implementing the determination of the Rights Panel. Possible restriction of parade/protest.

**SECRETARY OF STATE**

Reserve power to review the decision by the police (regarding implementation of the determination) on public order, public safety or national security grounds. (para. 20.13(ii)).  
***Secretary of State CANNOT review the determination of the Rights Panel (only the Courts can do so).***