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A LIFE FREE FROM FEAR

LEGISLATING FOR HATE CRIME IN IRELAND:
AN NGO PERSPECTIVE



UNIVERSITY of LIMERICK
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Emotions in Society

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EXECUTIVE SUMMARY

The aim of this Report is to progress the discussion of and generate an impetus for, legislative change in the area of hate crime in Ireland.

- This Report and its conclusions are informed by primary research with non-governmental organisations engaged in supporting communities which are targets of hate crime; as well as a systematic review of international literature regarding legislative options for tackling hate crime.
- The research findings highlight the inadequacy of Irish legislation with regard to combating hate crime.
- The authors understand hate crimes as a source of significant harm for victims, their communities and the social fabric of the nation. They highlight international expert opinion that the issue of hate crime is becoming ever more salient, and that periods of economic recession offer particularly fertile ground for this type of offence.
- In addition to presenting the experiences and perspectives of NGOs who deal on a regular basis with the challenge of hate crime, this Report provides an analysis of the efficacy of Irish legislation in combating hate crime. It explores a range of legislative options drawing upon international experiences.
- The findings highlight the need to achieve a balance between the expansiveness of protections and legal precision; between inclusivity and clarity. The authors highlight the difficulties integral to achieving a balance between rights and freedoms. It also acknowledges the possibility of creating a hierarchy of victims among those seeking protection.
- In presenting various legislative options, the authors examine the potential of introducing aggravated offences and sentence enhancement, as well as determining the victim groups that should be protected.
- The Report concludes by presenting a proposal for legislative change which it is hoped will promote widespread debate and an awareness of the impetus for change. This proposal is based on what the authors believe to be best international practice, and provides suggestions for evidence-based reform reflecting the submissions of NGOs.
- In addition to amendments to the Prohibition of Incitement to Hatred Act 1989, the Report proposes:
 - The creation of four new hostility based offences: assault aggravated by hostility; criminal damage aggravated by hostility; harassment aggravated by hostility; and public order aggravated by hostility; the 'aggravated' element of the offences being fulfilled where the offence is believed by the trier of fact to be wholly or partly motivated by hostility, prejudice, bias or hatred towards the victim on the basis of personal characteristics or perceived characteristics. In the context of sexual offences against individuals with disabilities, the Criminal Law (Sexual Offences) Act 1993 should be appropriately amended.
 - A sentence enhancement provision be introduced, such that where the court believes that any offence was wholly or partly motivated by hostility, prejudice bias or hatred, or where hostility, prejudice bias or hatred was demonstrated during the course of the offence, it shall treat that as an aggravating factor in sentencing. Additionally, it is suggested that a provision be introduced which provides that where a prosecution is taken which includes a prosecution under section 2 of the 1989 Act, the sentence imposed under the 1989 Act must be served consecutively to the sentence imposed for the primary offence.
 - The protected categories, or 'personal characteristics' should reflect, but not be confined by, those protected characteristics in Equality legislation, and be defined as 'Gender, Civil status, Family status, Age, Race, Religion, Disability, Sexual orientation, Membership of the Traveller Community or any other similar factor.'
 - The authors envisage that trans persons would be protected under the proposed wording, but also advocate the legal recognition of trans persons' affirmed gender.

FOREWORD

Sound public policy must always be grounded in a careful assessment that considers best practices in the appropriate context. Jennifer Schweppe, Amanda Haynes, and James Carr have here laid such foundations for Ireland's attempts to grapple with hate crime. This is a balanced and persuasive call for the country to introduce a legal framework that will bring it into line with international standards.

The absence of hate crime legislation in Ireland is a glaring anomaly in the European context, and indeed, across the West. Without it, Ireland stands virtually alone in its silence with respect to protecting vulnerable communities from the harms of this particular form of violence.

This sentiment is echoed by the voices shared in this Report. Those in the best position to know – representatives from NGOs that support affected communities – expressed grave concerns about the risks of violence against targeted groups and individuals. Failure to embed protections against this violence lends what I have referred to as 'permission to hate.' It signals the marginality of those most vulnerable to hate crime.

The Report is not simply a one-sided call for a particular legislative direction – although one is favoured. It is a carefully weighted assessment of the many permutations of motivations, offences, victims, and enforcement mechanisms. Drawing on current practice elsewhere, it lays out the distinct implications of these disparate types of legislation. In the final analysis, the existence of legislation is as important as the nature of that statutory response. This is a document around which communities can and should rally to ensure their future security.

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We would also like to thank the Research Cluster for Understanding Emotion in Society (CUES) at the University of Limerick for funding this project and ensuring that its results saw the light of day. We would also like to thank Dr Eimear Spain, Dr James Mayo and Dr Mark Walters for their insightful comments on earlier drafts of this Report,

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*Jennifer Schweppe, Amanda Haynes and James Carr
April 2014*

CHAPTER 1

INTRODUCTION



Rationale for the research

Legislating for hate crimes in Ireland is no longer optional for the Government but a necessity, in the opinion of the authors. The absence of hate crimes legislation from our statute books is glaring, and pressure is coming from both internal and external sources to rectify this situation. From an internal perspective, NGOs, academics and, increasingly, politicians vocalise the needs of affected communities. Externally, international organisations, most recently the European Commission Against Racism and Intolerance¹ continue to highlight and criticise the lacuna in Irish law on this issue. The passing of the EU Directive establishing minimum standards on the rights, support and protection of victims of crime has made this issue mandatory rather than optional.

That said, hate crime legislation cannot be introduced in a vacuum, with an expectation that the criminal law will be a panacea to this pervasive social problem. Similarly, it cannot be introduced with reference to a limited range of victim groups, or community interests. This research examines the experiences of NGOs across a number of community and voluntary organisations working with victims of hate crime, and probes their ideas regarding the need for legislative change. We argue that, by legislating for change on the basis of actual community needs, rather than perceptions of those needs, and by carefully examining the experience of other jurisdictions of hate crime, any resulting legislation will not only be in line with best international practice but will also provide what is best for our country and for victims of hate crimes in this jurisdiction.

Context of the research

The purpose of this research is not to evaluate existing legislation prohibiting what we refer to as the 'expression offences' the adequacy and efficacy of which have been examined elsewhere.² We note the context of the Act, and its advantages and limitations, but focus more broadly on the need for hate crimes legislation: that is, where an offence known to the criminal law, such as assault, is committed with a hate motivation or where hate or hostility are demonstrated during the course of an offence.

Summary of methodology

This Report is informed by empirical research with non-governmental organisations engaged in supporting communities which are targets of hate crime, and a systematic review of international literature regarding legislative options for tackling hate crime.

Empirical data was gathered via an online survey distributed to 14 NGOs who responded to a call for participants. Survey questions addressed the organisations' remit and client base, their experiences of supporting clients who have been subject to hate crime, and their perspectives on the adequacy of current hate crime legislation in Ireland. Questions were primarily open-ended and the resultant qualitative data were subject to thematic analysis. Participants were recruited through the purposive sampling of NGOs known to advocate for and support communities and individuals covered under the 9 grounds of Irish equality legislation,³ and by advertising widely for volunteers through distribution of an open call for participants via websites and email distribution lists of relevance to NGOs.

The introduction to the online survey defined hate crime for participants as:

... any criminal offence which is perceived, by the victim or any other person, to be motivated by a hostility or prejudice based on a person's real or perceived: race,⁴ religion, gender identity,⁵ sexual orientation, age, marital status, family status, membership of the Traveller Community, disability.⁶

In chapter 4, we acknowledge the difficulties with the term 'hate' and 'hate crime', but choose to employ these terms in this Report, as those through which the current debate is most commonly framed. For the purposes of identifying an operational definition of relevance to the Irish context, we have employed the grounds named in Ireland's equality

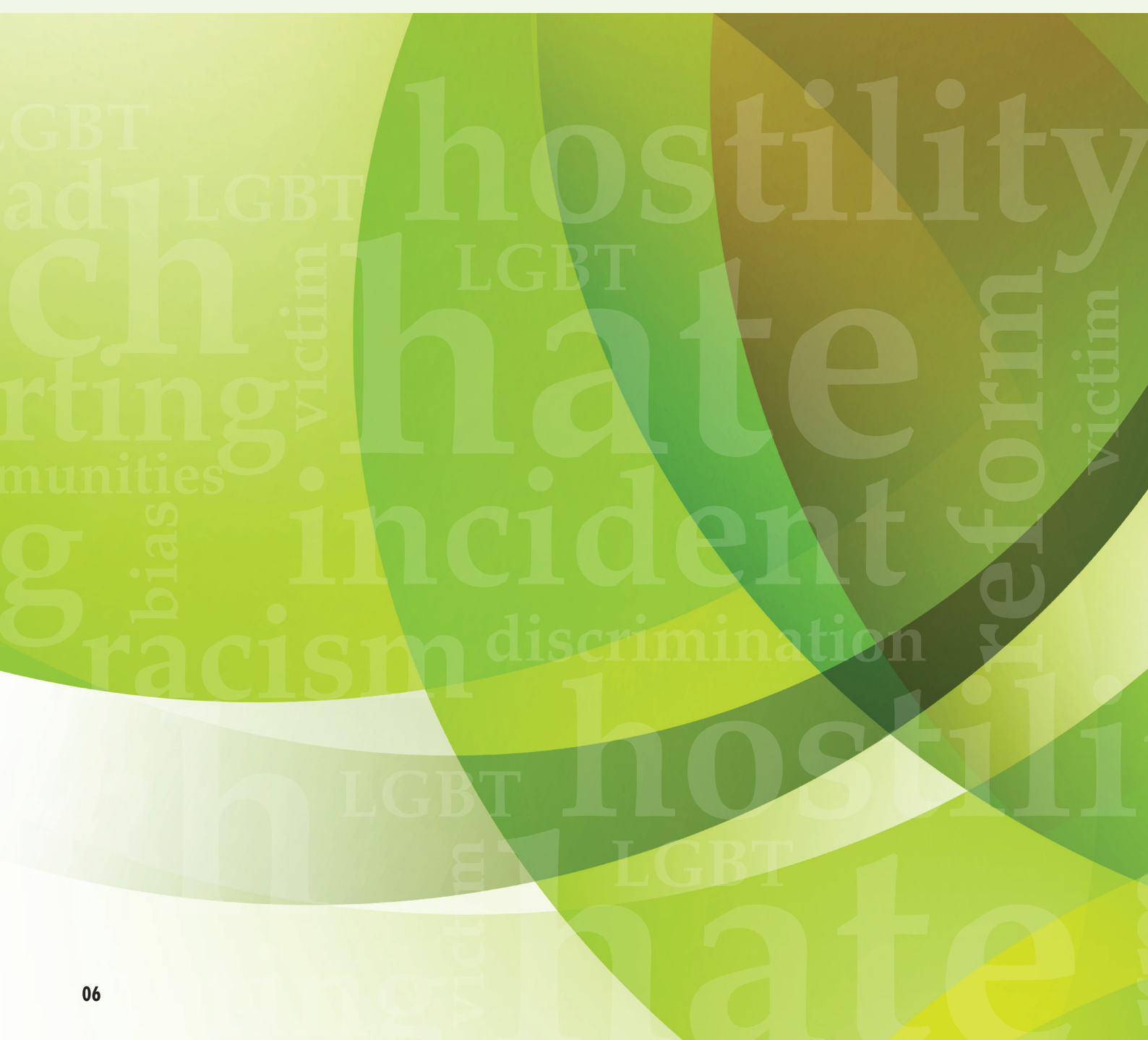
legislation. In chapter 5, however, we acknowledge that intensive discussion and consultation is required if groups are to be named in any emergent hate crime legislation and, indeed, the pitfalls associated with naming specific identity groups in general.

In responding to survey questions participants, in addition to addressing crimes which would amount to criminal offences under the definition provided, have chosen to introduce experiences of and perspectives on non-crime hate incidents. It is our contention that the salience of these non-crime expressions of hate to NGOs and their clients speaks to the existence of a continuum of criminalised and non-criminalised hate incidents both of which contribute to the exclusion of marginalised communities. In this we concur with Perry, who asserts that non-crime hate incidents have a very malign impact on both victims and society, with victims relating that ‘... by their very frequency and ubiquity, some of the most minor types of victimisation – name calling, verbal harassment, and so on – had the most damaging effects’.⁷ For those who are targeted, as stated clearly by the England and Wales Association of Chief Police Officers (ACPO), non-crime ‘[h]ate Incidents can feel like crimes’ and need official recognition if they are to be challenged.⁸ As ACPO observes, we need to both recognise and record hate incidents to not only acknowledge their impact, but also to prevent an escalation of hate incidents into hate crimes. Equally, this broad interpretation of the focus of this study speaks to the need to continuously review the range of acts which are defined as offences under the law and also to record non-crime hate incidents with a view to addressing them and their impacts through interventions available outside of the criminal justice system.

- ¹ European Commission Against Racism and Intolerance, *ECRI Report on Ireland: fourth monitoring cycle* (ECRI 2013) available at <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Ireland/IRL-CbC-IV-2013-001-ENG.pdf>
- ² Jennifer Scheppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008).
- ³ The nine protected grounds under Equality legislation are gender, civil status, family status, age, race, religion, disability, sexual orientation, and membership of the Traveller community.
- ⁴ The authors wish to make a clear statement that they regard race as a social construct and do not regard the use of the term as unproblematic.
- ⁵ The authors further note that an inclusive understanding of ‘gender’ is intended. The authors support the legal recognition of trans persons’ affirmed gender.
- ⁶ This definition is derived from that employed in England and Wales. See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266358/hate-crime-2013.pdf Home Office, Office for National Statistics and Ministry of Justice, *An Overview of Hate Crime in England and Wales* (2013), 11.
- ⁷ Barbara Perry, ‘There’s just places ya’ don’t wanna go”: the segregating impact of hate crime against Native Americans’ (2009) 12(4) *Contemporary Justice Review* 401, 402.
- ⁸ Association of Chief Police Officers, *Truevision: ‘What is Hate Crime?’* (ACPO 2013) available at http://Report-it.org.uk/what_is_hate_crime

CHAPTER 2

WHAT IS A 'HATE CRIME'?



History and development of hate crimes legislation internationally

There are some crimes which have been known for centuries: murder and theft, for example, are crimes as old as the legal systems which enforce them and are so well established that to question their existence seems almost ludicrous. Other offences are more modern, reflecting changes such as adaptations in societal views as to what is acceptable, or developments in technology - the notion of cybercrimes, for example, even as recently as the 1980s, would have been alien to most.

Hate crimes have a more modern pedigree, and come in two forms. The first, the 'expression offences', are those crimes where the use of threatening, abusive or insulting speech is criminalised - though of course it is not simply the use of such speech which renders the speech criminal: it must also be intended or, having regard to all the circumstances, likely, to stir up hatred.⁹ The second type of hate crime are those whereby an offence known to the criminal law is committed with a hateful prejudiced, bigoted or hostile motivation towards the victim, and where this motivation is clear, based on the language or actions used by the offender during the course of the offence taking place.¹⁰

What we call in this Report the 'expression offences' have a relatively modern pedigree, at least from a European perspective. While in the United States, attempts at prohibiting hate speech are met with the barrier of the First Amendment, in England and Wales, hate speech was first prohibited by the Race Relations Act 1965.¹¹ Section 6 of the Act made it an offence to incite racial hatred. However, under the section, it was necessary to prove intent to stir up hatred, and due to difficulties with its operation it was ultimately amended in the Public Order Act 1986.¹² This created new offences consisting of certain forms of behaviour which were intended to stir up racial hatred. For the most part they concern the display or publication of racially offensive material.

In Ireland, 'expression offences' are prohibited by the Prohibition of Incitement to Hatred Act 1989,¹³ but this Report focuses on a different type of hate crime which is a more recent phenomenon. While it was at least implicitly accepted that individuals have always committed crimes out of prejudice or hatred, it is only since the 1990s that

legislators worldwide have chosen to treat this type of crime any differently. First in the United States and more latterly in Canada and the United Kingdom, legislation has been introduced which punishes regular crimes (such as assault or criminal damage) which are committed with a 'hate' motivation differently. The introduction of such laws is not easy or without controversy. The reason that the introduction of such crimes is considered contentious is because the criminal law does not usually concern itself with the motivation of the offender. If a person robs food from a shop because their family is starving, and another robs food from the same shop to sell it to feed their heroin habit, they will both be convicted for the same offence. The reason for this is because the *motivation* of the offender is generally considered irrelevant to the law itself - although of course, when the judge *sentences* the two individuals, she will usually take the motivation of the offender into account (which means that in the example above, the first offender would probably get a lighter sentence than the second). Hate crimes, however, make the motivation of the offender *part of the offence*. This is why they are seen differently and treated differently to other types of offence, and why it is perhaps considered more contentious to introduce them.

The other reason why hate crime offences can be a source of dispute is that they generally protect specific victim groups to the exclusion of other individuals and groups who might also be the victims of hate crime.

Hate crime legislation has been introduced in a great many countries, and now it seems timely, if not overdue, that we ask whether we should introduce such crimes in Ireland.

Adequacy of the term

The term hate crime is used extensively by academics, in literature, by the media, by community groups and by victims themselves. We too use it in this Report as it is an established label within public discourse. However, when we look at what the constituent elements of a hate crime are, we quickly realise that few hate crimes are actually defined in terms of punishing *hatred* of a victim or their community.

Hate crimes legislation generally involves the punishment of bias, prejudice, malice, hostility or bigotry.

The reason for this is, quite simply, that 'hate', as an emotion, is more difficult to define, while bias, prejudice, hostility and bigotry are easier to delimit. For example, prejudice was defined by Allport as 'an aversive or hostile attitude toward a person who belongs to a group, simply because he belongs to that group, and is therefore presumed to have objectionable qualities ascribed to the group'.¹⁴ Concepts such as bias and bigotry can be similarly defined.

As a means of surmounting the problems posed by the ambiguity of the term 'hate', hate crime itself is mostly commonly defined by reference to the groups targeted. Royzman *et al* refer to a common definition of hate crimes: 'Criminal actions intended to harm or intimidate people because of their race, ethnicity, sexual orientation, religion, or other minority status',¹⁵ and give a definition of hate, which avoids characterising the nature of hate in favour of focusing on the status of the victimised community:

*'[H]ate means roughly that which motivates a deliberate act of physical violence or intimidation against a member of a minority group by virtue of him or her being a member of that group. In this view, classifying a criminal deed as one of 'hate' is compatible with a wide range of psychological states, anything from anger to boredom to fear'*¹⁶

Royzman *et al* argue that the significance of retaining the label of hate crime, despite its shortfalls, lies not in its description of the emotion or context of the crime; but instead, in that by using the term, we as a community are distancing ourselves from the viewpoints of the perpetrators of the attack. Hate here is not necessarily referring to any psychological definition of the term, but rather what is called the 'othering' involved in the crime. While the term 'prejudice' is probably more appropriate for what is being punished here, when we refer to hate crime, what is critical is that the prejudice is linked to the status of the victim, and the crime was committed against that victim because of their identification with a particular community or minority group.

Wherever the terms 'hate' or 'hate crime' are used in this Report, we intend them to be used in this broad context, to connote prejudice, bias, hostility and bigotry, or crimes committed with such motivation.

Significance and meaning to affected individuals, communities and society

While generally speaking, crimes are ranked in severity by assessing the objective gravity of the resulting harm, the impact on the victim and the societal harm of the offence (assault, assault causing harm, assault causing serious harm¹⁷), hate crimes are punished more harshly due to the prejudice of the offender, and the additional impact of the crime on the victim and the particular community with which the victim identifies. Quill observes that the term 'hate crime' is:

*... meant to distinguish criminal conduct motivated by prejudices from criminal conduct motivated by lust, jealousy, greed, politics, and so forth. Unlike theft, burglary, or assault, hate crime emphasizes the offender's attitudes, values, and character.*¹⁸

In the context of the English legislation criminalising racism, Baroness Hale eloquently stated:

*The mischiefs attacked by the aggravated versions of these offences are racism and xenophobia. Their essence is the denial of equal respect and dignity to people who are seen as somehow other. This is more deeply hurtful, damaging and disrespectful to the victims than the simple version of these offences. It is also more damaging to the community as a whole, by denying acceptance to members of certain groups not for their own sake but for the sake of something they can do nothing about.*¹⁹

With regard to the impact of hate crime on the individual, empirical research has demonstrated that such offences have even more grave emotional and psychological effects on victims than non-bias offences.²⁰ For example, the 20011/12 and 2012/13 Crime Surveys for England and Wales recorded that victims of hate crime are more than twice as likely to report fear, sleep disturbances, anxiety or panic attacks, feelings of vulnerability or loss of confidence, as victims of crime in general.²¹ Hate crime

victims may fear repeat offences where they were targeted because of difference which they cannot disguise and may equally suffer where their victimisation causes them to hide a characteristic which is fundamental to their selfhood:

*...somebody who is not really comfortable with their sexuality and who is attacked because of that, it completely shatters them, and often times sends them back into the closet, and that kind of leads to more psychological effects.*²²

The direct victim may be impacted also, not only by the act itself, but by the prejudice which informs it. Hate crimes communicate to victims the perpetrator's sense of the victim's fundamental otherness and their inferiority; exposure to such may impact upon an individual's sense of their status in society and, in some cases, their sense of self.²³

Hate crime is understood as a 'message crime', that is, its function is to send a message, not only to the direct victim, but also to the group, on the basis of whose membership they were targeted. As such, hate crime has multiple indirect victims, in addition to those directly victimised.

Perry and Alvi²⁴ have recently documented the in terrorem effects of hate crime. They find that members of a targeted identity group report many of the effects cited by direct victims, including feelings of fear, vulnerability and inferiority, and alter their behaviour in response to the crime. Noelle²⁵ concurs that distal victims may themselves experience the same kinds of effects as the direct victim, drawing on a case study of the impact of Mathew Shepard's murder in a homophobic attack:

*'... many participants evidenced clear shifts in their assumptions of benevolence of the world and of people. ... shock and denial reflected difficulty assimilating this event into fundamental assumptions. ... steps participants took to rebuild their assumptive worlds [included changing] ... what they wore or their mannerisms ... [a minority experienced] changes in self-worth, including internalized homophobia...'*²⁶

Perry regards hate crime as constituent of social relations of domination and subordination, seeing it as:

*... a mechanism of power and oppression, intended to reaffirm the precarious hierarchies that characterize a given social order. It is a means of marking both the Self and the Other in such a way as to re-establish their 'proper' relative positions, as given and reproduced by broader ideologies and patterns of social and political inequality.*²⁷

Given the manner in which hate crime can impact inter-group relations, its repercussions are held to extend far beyond the direct victim and indeed beyond the immediate time period following the incident.

*'Already a manifestation of divisions within society, it is argued that hate crime further exacerbates tensions, threatening the social fabric.'*²⁸

- ⁹ See, section 2 of Prohibition of Incitement to Hatred Act 1989.
- ¹⁰ Similarly, where prejudice, hostility or bigotry are demonstrated during the course of the offence, this is considered to elevate the offence to a hate crime in certain jurisdictions.
- ¹¹ However, as noted by the NCCRI *Prohibition of Incitement to Hatred Act 1989: A Review* (NCCRI 2001) available at <http://www.nccri.iesubmissions/01AugLegislation.pdf> one of the earliest recorded cases concerning incitement to hatred took place in 1732 in the case of *R v Osborne* (1732) 2 Swinast 503 where newspaper material was ruled to be seditious for allegations against Portuguese Jews that led to violence and disorder.
- ¹² Section 6 was replaced by section 70 of the Race Relations Act 1976 which inserted a new section 5A into the Public Order Act 1936 which itself was replaced by Part III of the Public Order Act 1986..
- ¹³ For a detailed analysis of the content and scope of the 1989 Act, see Jennifer Schweppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008) chapter 3.
- ¹⁴ Gordon W Allport *The Nature of Prejudice* (Cambridge 1954) 7.
- ¹⁵ Edward B Royzman, Clark McCauley and Paul Rozin, 'From Plato to Putnam: Four Ways to Think about Hate' in Robert Sternberg (ed), *The Psychology of Hate* (American Psychological Association 2005) 3, 9
- ¹⁶ Edward B Royzman, Clark McCauley and Paul Rozin, 'From Plato to Putnam: Four Ways to Think about Hate' in Robert Sternberg (ed), *The Psychology of Hate* (American Psychological Association 2005) 9-10.
- ¹⁷ Sections 2-4 Non Fatal Offences Against the Person Act 1997.
- ¹⁸ G F Quill, 'Motivation, Causation and Hate Crimes Sentence Enhancement: A Cautious Approach to Mind Reading and Incarceration' (2010) 58 *Drake Law Review* 181, 188.
- ¹⁹ *R v Rogers* [2007] UKHL 8; [2007] 2 AC 62 at [12]-[13].
- ²⁰ See for example Paul Iganski, 'Hate Crime Hurt More' (2001) 45 *American Behavioural Scientist*, 626; Paul Iganski, *Hate Crime and the City* (Policy Press 2008); Jack McDevitt, Jennifer Balboni, Luis Garcia and Joann Gu, 'Consequences for victims: A comparison of bias- and non-bias motivated assaults' (2001) 45 *American Behavioural Scientist* 697; Gregory M Herek, J Roy Gillis and Jeanine C Cogan, 'Psychological sequelae of hate crime victimization among lesbian, gay and bisexual adults' (1999) 67 *Journal of Consulting and Clinical Psychology* 945.
- ²¹ Home Office, Ministry for Justice and Office for National Statistics, *An Overview of Hate Crime in England and Wales* (2013).
- ²² Research participant cited in Paul Iganski, 'Hate Crime Hurt More' (2001) 45 *American Behavioural Scientist* 626, 629.
- ²³ Paul Iganski, 'Hate Crimes Hurt More' (2001) 45 *American Behavioural Scientist* 626.
- ²⁴ Barbara Perry and Shahid Alvi, 'We are all vulnerable': the in terrorem effects of hate crimes' (2012) 18 *International Review of Victimology* 57.
- ²⁵ Monique Noelle 'The ripple effect of the Matthew Shepard murder: impact on the assumptive worlds of members of the targeted group' (2002) 46 *American Behavioral Scientist* 27.
- ²⁶ *Ibid* 45-46.
- ²⁷ Barbara Perry, 'There's just places ya' don't wanna go': the segregating impact of hate crime against Native Americans' (2009) 12(4) *Contemporary Justice Review* 401, 403.
- ²⁸ Paul Iganski, 'Hate Crimes Hurt More' (2001) 45 *American Behavioural Scientist*, 626, 630-632; Office for Democratic Institutions and Human Rights, *Hate Crime Laws: A Practical Guide* (ODIHR 2009).

CHAPTER 3

HATE CRIMES IN AN IRISH CONTEXT



Introduction

Prior to examining our findings in relation to NGO experiences of hate crime and hate incidents, we will detail the current legal situation in Ireland in relation to hate crime, in order to determine if any issues highlighted represent fundamental failings in the legislation, or rather a failure in the processing and prosecution of hate crimes in this jurisdiction.

Criminalising hate speech: the Prohibition of Incitement to Hatred Act 1989

The context and content of the Prohibition of Incitement to Hatred Act 1989 have been well documented and examined elsewhere²⁹ but we will highlight some aspects of it here for background purposes. A prohibition on hate speech is found in section 2 of the Act which makes it an offence for a person to publish or distribute material if that material is 'threatening, abusive or insulting' and is either intended to, or is likely to, stir up hatred. Section 1 of the Act defines hatred as being against a group of persons in the State or elsewhere on account of their 'race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation' (sic).³⁰

The primary criticism of the Act has been in relation to its effectiveness: only a small number of convictions have been secured under the Act, and as Taylor observes, there is what he calls "'an expectations gap" and "a frustration gap" between community aspirations for [the] legislation and the reality of its limited application and implementation to date'.³¹ This gap, he argues, potentially 'undermines social cohesion, and a sense of the system working for all'.³²

As Schweppe and Walsh note, however, the Act is unique in many ways:

*'In effect the Act is criminalising the expression of words or behaviour aimed at persuading others to have feelings or opinions which are lawful in themselves. To that extent they constitute a significant departure from the common law of incitement and a more substantial intrusion by the criminal law into freedom of expression...'*³³

Schweppe and Walsh conclude that the Act strikes a very delicate balance between protecting freedom of expression while simultaneously criminalising the most extreme and dangerous forms of speech – that type of speech which

incites hatred in others. However, this balance is cold comfort to those hundreds of individuals in Ireland who suffer daily and ritual verbal abuse because of their personal characteristics and for whom this Act is ineffective. While the scope of the legislation cannot be broadened in a manner which criminalises all forms of abusive speech, we would reiterate the recommendations of Schweppe and Walsh here, who suggest key amendments to the 1989 Act. While they are written in the context of racially abusive language, they can be usefully broadened out to apply to hate speech and hate crime more generally:³⁴

- (1) There is a need for an offence of subjecting another person to threatening, abusive or insulting words about his race, with the result that the person feels threatened or fearful for his safety or for that of his companions or for his property;**³⁵
- (2) There is a need for an offence of incitement to discriminate on the ground of race;**
- (3) There is a case for introducing an offence of active participation in (as distinct from passive membership of) an organisation which promotes or incites discrimination on the ground of race.**³⁶

Schweppe and Walsh also discuss the applicability of the 1989 Act in the context of hate speech on the internet. They note that the requirement that an individual is incited to hate 'is no easy task to prove in the context of the World Wide Web.'³⁷ They conclude:

*'While it could be argued that the 1989 Act can be used to combat racist material on the internet, in order to comply with best international practice and standards, it is recommended that Ireland sign and ratify the [Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems]...'*³⁸

This would ensure that Ireland follows best international practice in this regard and would go some way to facilitating the prosecution of cyberhate. We would further suggest that the definition of 'hatred' in the Act be amended to include those characteristics protected under Equality legislation. While these amendments will not completely bridge the gap between expectation and reality identified by Taylor, we believe that they are urgently required to remedy the current failings in the legislation, given the inherent limi-

tations in the type of act targeted by the 1989 Act. However, any such amendments should not be considered as the only necessary legislative measure to combat hate crime.

Punishing hate crime: the current legal situation

Leaving aside the 'expression offences', internationally, there are two ways in which hate crime can be punished through the law. The first is by introducing new aggravated forms of existing offences, such as racially aggravated assault. Ireland does not currently have any such provisions in its legislation. The second key way in which hate crimes are punished internationally is through sentence enhancement. Here, legislation or judicial guidelines will require a sentencing court to enhance or aggravate the sentence where it is established by the prosecution that the crime was motivated by 'hate', or where 'hate' was demonstrated during the course of the commission of the offence. The sentencing system in Ireland is a discretionary one, with few limitations and even less guidance given to the Courts on sentencing issues. Courts are fiercely protective of this discretion, and have traditionally been slow to impose any structure or guidance on sentencing practices on lower courts. That said, it does seem that the Court of Criminal Appeal is beginning to introduce sentencing guidelines. As O'Malley observes, in March 2014, the Court of Criminal Appeal 'took a major step forward by indicating the appropriate sentence ranges for the offences in question.'³⁹ In three cases delivered on the same day¹² the Court issued guidance on how such offences should be sentenced, and placed an obligation on the Director of Public Prosecutions in this regard:

In this Court's view, there is now an obligation on the prosecution to draw to the attention of a sentencing judge any guidance, whether arising from an analysis carried out by this Court or from ISIS or otherwise, which touches on the ranges or bands of sentences which may be considered appropriate to any offence under consideration and the factors which are properly, at least in ordinary cases, to be taken into account ... In addition, it seems to this Court that it is incumbent on the prosecution to suggest, where such guidance is available, where the offence under consideration fits into the scheme of sentencing identified and why that is said to be the case. Finally, the prosecution

should indicate the extent to which it is accepted that factors urged in mitigation by the defence are appropriate and give at least a broad indication of the adjustment, if any, in the overall sentence which it is accepted ought to be considered appropriate in the light of such mitigation.⁴¹

Nonetheless, there are currently no guidelines in the context of hate motivated offences, and the Irish Sentencing Information System offers no advice as to how such offences have been sentenced in the past.

Irish courts have yet to find that where an attack appears to have been motivated or aggravated by hate, that fact should be treated as an aggravating factor. Indeed, they have explicitly stated that such a motivation is not one which must be treated as an aggravating factor in sentencing. That said, it remains at the discretion of each judge to determine the sentence of individual offenders, and generally speaking the motivation of the offender (possibly including a hate motivation) will be taken into account at this stage. The fact remains, however, that there is no *obligation* on the sentencing court to enhance a sentence due to a hate motivation, and given the dearth of information regarding the day to day operation of the district court, it is impossible to determine how these offences are being dealt with currently.⁴² There are two cases worth noting in this regard which may indicate that, if previous sentencing practice is used to establish sentencing guidelines, the issue will remain unresolved.

In *DPP v Jones and Derwin*⁴³ the Director of Public Prosecutions appealed the sentencing court's decision under section 2 of the *Criminal Justice Act 1993*⁴⁴ on the basis that it was unduly lenient.⁴⁵ The first defendant was charged with the manslaughter of a 30 year old Chinese national. Prior to the incident which resulted in the victim receiving his injuries, a number of racial insults were exchanged between Derwin and two Chinese men, one of whom, Zhao Liu Tao, was the victim. The Court was asked to consider that the sentences were unduly lenient on the basis of the need to condemn racially motivated attacks or attacks in which race plays any part. While the Court admitted that it did condemn such attacks, it went on to state that as the Director criticised only the 'context' in which the crime occurred (that is, the fact that it was racially aggravated), that context did not require a custodial sentence as a matter of principle, and further, that the sentence was 'fully in accordance with the principles of

sentencing'.⁴⁶ Thus, while Irish courts *can* choose to aggravate a sentence based on the hate motivation of the offender, there is no *requirement* for them to do so.

In *DPP v O'Driscoll and Moore*,⁴⁷ the defendants were charged with assault causing harm, but also charged under section 2 of the Prohibition of Incitement to Hatred Act 1989. Here, the defendants made racist remarks towards the victim during the course of the assault and also after the assault in the presence of An Garda Síochána. They were convicted under section 3 of the Non-Fatal Offences Against the Person Act 1997 for assault causing harm as well as under section 2 of the 1989 Act. Here, the Court sentenced the defendants on the more serious count of assault, with the 1989 prosecution being 'taken into account'. Thus, while hate speech is criminalised in Ireland, the courts did not take the opportunity to declare the hate motivation an aggravating factor in sentencing, despite the clear evidence presented in the case that the offence was motivated by hate. That said, it does seem that where a 'simple' offence is combined with a prosecution under the 1989 Act, court will at least take the incitement offence into account, and may increase the sentence where they feel it is appropriate to do so.

The EU context

Alongside the current deficiencies in the current legal regime, Ireland's membership of the European Union requires changes in our legal system. While the second of these does not directly relate to hate crime legislation, it is important to discuss in this context to determine the extent of our international obligations in this regard.

The 2008 EU Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law⁴⁸ requires member states to punish a range of 'expression offences'⁴⁹ and ancillary offences, but also to 'take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties'.⁵⁰ The deadline for transposition was 28 November 2010, Ireland has yet to introduce legislation to ensure compliance with the Decision. However, as this is merely a framework decision rather than a Directive, this failure is not legally significant.

A second, more recent EU Directive establishing minimum standards on the rights, support and protection of victims of crime⁵¹ sets out the protections which should be afforded to all victims. Article 22 of the Directive is significant in the context of hate crime. Article 22(1) states that, in assessing the needs of victims, an assessment must be carried out to determine if the victim has any particular 'protection needs' and the extent to which they would benefit from 'special measures' in the course of criminal proceedings 'due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation.' In this context, Article 22(2) states that the assessment should take the personal characteristics of the victim, the nature of the crime and the circumstances of the crime into account.

In addition, Article 22(3) states that particular attention should be paid to victims who 'have suffered a crime committed with a bias or discriminatory motive, which could notably be related to their personal characteristics'. It goes on to note that, in this regard, victims of hate crime 'shall be duly considered'.

In the context of criminal investigations, the 'particular attention' to be paid to victims includes the following measures which the Directive states in Article 23(2) should be made available to victims:

- (a) Interviews with the victim should be carried out in premises designed or adapted for that purpose;
- (b) Interviews with the victim should be carried out by or through professionals trained for that purpose;
- (c) All interviews with the victim should be conducted by the same persons unless this is contrary to the good administration of justice;
- (d) All interviews with victims of sexual violence, gender-based violence or violence in close relationships, unless conducted by a prosecutor or a judge, being conducted by a person of the same sex as the victim, if the victim so wishes, provided that the course of the criminal proceedings will not be prejudiced.

In the context of court proceedings, the Directive goes on to provide in Article 23(3) that the following measures should be made available to victims:

- (a) Measures to avoid visual contact between victims and offenders including during the giving of evidence, by appropriate means including the use of communication technology;
- (b) Measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of appropriate communication technology;
- (c) Measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence; and
- (d) Measures allowing a hearing to take place without the presence of the public.

The requirements under Article 23(2) would seem reasonably straightforward to implement. However, the requirements under Article 23(3) may be more problematic, particularly those requiring the use of communications technology in the lower courts.

Further, the Directive does not limit the application of hate crimes to particular groups of victims: rather, once a crime is committed with a bias or discriminatory motive related to their personal characteristics the question of specific protection arises. Thus, limiting the scope of the protection offered by the Directive to a limited category of victims seems unfeasible. While the Directive does not require legislation to be introduced which imposes a harsher penalty on the offender, nonetheless, it does require that such victims be treated in a particularly protective manner by the criminal justice system as a whole in the context of the investigation and prosecution of a hate crime. Finally, the Directive comes with a time limit: EU Member States have to implement the provisions into their national laws by 16 November 2015.

Do we need to criminalise hatred?

It is clear that the Irish legal system is largely incapable of punishing hate crimes adequately.

Not only is the 1989 Act in need of amendment, but a clear and strong statement needs to be made by the legislature ensuring that any crime which is committed out of a hate motivation is punished more severely. This 'message' aspect of hate crime legislation is well documented. As Perry observes:

*'... there may be some symbolic value to opting for legislation as a means of responding to ethnoviolence. Just as hate crime is an expressive act, so too is hate crime legislation. It sends a message to its intended audience(s) about what is not tolerated.'*⁵²

Walters also eloquently explains the various functions of hate crime legislation:

*'[H]ate crime legislation ... offers an important long-term role in shaping society's evolving attitudes towards race, sexual orientation and other minority group characteristics. The punishment of hate crime offenders as 'hate offenders' offers important censure, providing a form of publicly expressed denunciation of offenders' racist, anti-religious, homophobic, transphobic or disablist actions. Hence, a particularly compelling reason for criminalizing 'hate crime' is that it assists in shaping positive social mores by helping to create a social climate that rejects public displays of identity prejudice.'*⁵³

The creation of hate crime legislation also ensures that meaningful resources are allocated to criminal justice agencies who are now under a statutory obligation to address the issue.

While it could be argued that it is sufficient that judges have discretion to enhance the sentence of an offender where hate is either shown to have motivated the offence, or have been demonstrated during the course of the offence, it is clear that the current legislative regime in Ireland gives members of our society what Perry describes as 'permission to hate'.⁵⁴

In the Schweppe and Walsh Report from 2008, a number of key legislative changes were recommended, including amending the 1989 Act and the introduction of sentence enhancement provisions which would require courts to treat a hostile motivation as an aggravating factor in sentencing.⁵⁵ However, the Irish Government in its recent periodic Report on the International Covenant on Civil and Political rights indicated that even this minimalist approach would not be considered,⁵⁶ as it would have 'wider implications for the criminal law', choosing to rely on the traditional discretion afforded to the judiciary in sentencing matters.⁵⁷

Further, issues which were identified by Burney and Rose and relied upon the 2008 Schweppe and Walsh Report⁵⁸ such as the relatively low number of guilty pleas in the prosecution of aggravated offences in England and Wales have since been resolved,⁵⁹ and we believe that it is time, not only to take these changes into account, but to go further and to introduce aggravated offences.

Our recommendations will ensure that the Irish legislative position represents best international practice, as well as being evidenced-based. We would argue that hate crime legislation should be introduced in this jurisdiction for three main reasons:

- 1. Ireland is coming under increasing international pressure to ensure that its laws are compliant with European obligations in this regard. Further, the legal position in Ireland in this area is anomalous from an international perspective.**
- 2. Victims of hate crime and those working on their behalf have clearly indicated in this study and others⁶⁰ that hate incidents and hate crime are a serious source of social and individual harm in Ireland.**
- 3. The current response of the legal system is haphazard at best, with the response of Gardai, prosecutors and courts dependent on the individual actors involved in the case in the absence of a clear policy statement. For example, while the judiciary have discretion to impose harsher penalties where they perceive a crime to have been committed out of prejudice for the victim, there is no requirement for them to do so. Further, the manner in which hate crime and hate incidents are recorded by An Garda Síochána is unsystematic, where only a minority of victim groups are protected and the figures recorded by its PULSE system are unrepresentative of actual figures of hate incidents.⁶¹**

- ²⁹ Jennifer Scheppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008)
- ³⁰ The Act was quite progressive for its time, but contains some alarming internal inconsistencies in light of the political and legal situation then and now. For example, when the Act was passed, it was still a criminal offence for gay men (though not lesbians) to engage in consensual sexual behaviour. It was not until 1994 that this situation was rectified in the Criminal Law (Sexual Offences) Act 1993, following an unsuccessful challenge to the legislation in the Irish Supreme Court in *Norris v Attorney General* [1983] IESC 3 and a successful application to the European Court of Human Rights in *Norris v Ireland* 10581/83 (1988). Members of the Traveller Community, a historically marginalised group in Ireland, are protected by the legislation, but despite constant calls from the international community, they are still not recognised by the State as a distinct ethnic group. See for example, Committee of the Elimination of All Forms of Racial Discrimination *Concluding Observations: Ireland* (CERD/C/IRL/CO/3-4, 2011)
- ³¹ Seamus Taylor, *Responding to Racist Incidents and Crime: An Issues Paper for the Equality Authority* (Equality Authority 2011) para 5.2.21.
- ³² *Ibid.*
- ³³ Jennifer Scheppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008) 57
- ³⁴ Though Daly argues, “[The Report] eschews analysis of the prohibition of incitement to hatred based on religion and sexual orientation. Although this omission is explicitly recognised and it is held that much of the analysis of race is analogous to these other categories, failure to examine the impact of the protection afforded to all groups will necessarily render the assessment of the Act incomplete.” Tom Daly, ‘Reform of the Prohibition of Incitement to Hatred Act 1989 – Part 1’ [2007] 17(3) ICLJ 16. That said, we believe that the recommendation in relation to the 1989 Act can usefully be applied generally, particularly when considered in the context of broader legislative reform.
- ³⁵ For a more detailed discussion of these recommendations, see Jennifer Scheppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008) 186
- ³⁶ The authors observe that it is already an offence to be a ‘member of an organisation committed to acts of violence against groups on the ground of their race or to inciting others to hatred of such groups.’ *Ibid.* 187
- ³⁷ Jennifer Scheppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008) 154. They observe, “[T]he perceived borderless nature of the internet raises jurisdictional questions Secondly, a range of issues arises in relation to the liability of service providers and website hosts. Unlike written or spoken material, as ECRJ point out, “the diffused structure of the internet, its pervasiveness and the possibility it provides for anonymity, may render difficult the enforcement of provisions.” In short, as Rorive states, “the problem to regulate content on the Internet is at least twofold: the criminalisation of the content and the effective enforcement of the law.” *Ibid.*
- ³⁸ Jennifer Scheppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008) 161.
- ³⁹ Tom O’Malley, ‘A Quiet Revolution Occurred this Month: Sentencing Guidelines were Introduced’ *The Irish Times* (Dublin, 29 March 2014)
- ⁴⁰ *Director of Public Prosecutions v Ryan* [2014] IECCA 11; *Director of Public Prosecutions v Fitzgibbon* [2014] IECCA 12; *Director of Public Prosecutions v Z* [2014] IECCA 13 which respectively dealt with appropriate sentencing policy in the areas of illegal possession of firearms and ammunition; assault causing serious harm; and persistent sexual abuse of children.
- ⁴¹ *Director of Public Prosecutions v Z* [2014] IECCA 13 [2.7].
- ⁴² See generally, Claire Hamilton, ‘Sentencing in the District Court: Here Be Dragons’ (2005) 14(3) *Irish Criminal Law Journal* 9.
- ⁴³ UnReported Court of Criminal Appeal 1 November 2004 Hardiman J (ex tempore). For further details, see Jennifer Scheppe and Dermot Walsh, *Combating Racism and Xenophobia with the Criminal Law* (NCCRI, 2008) 108-110.
- ⁴⁴ Section 2(1) of the 1993 Act provides, “If it appears to the Director of Public Prosecutions that a sentence imposed by a court ... on conviction of a person on indictment was unduly lenient, he may apply to the Court of Criminal Appeal to review the sentence.”
- ⁴⁵ Derwin was sentenced to four years imprisonment suspended for three years, and Jones received a two year sentence which was suspended in its entirety.
- ⁴⁶ For further details, see Jennifer Scheppe and Dermot Walsh, *Combating Racism and Xenophobia with the Criminal Law* (NCCRI, 2008).
- ⁴⁷ For further details, see Jennifer Scheppe and Dermot Walsh, *Combating Racism and Xenophobia with the Criminal Law* (NCCRI, 2008).
- ⁴⁸ 2008/913/JHA of 28 November 2008
- ⁴⁹ Article 1 provides:
Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:
(a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;
(b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;
(c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;
(d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.
- ⁵⁰ Article 4 of the Framework Decision.
- ⁵¹ PE-CONS 37/12.
- ⁵² Barbara Perry, *In the Name of Hate: Understanding Hate Crime* (Routledge 2001) 229.
- ⁵³ Mark A Walters, ‘Conceptualising ‘Hostility’ for Hate Crime Law: Minding the ‘Minutae’ when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998’ (2013) *Oxford Journal of Legal Studies* (in press), 9.
- ⁵⁴ Barbara Perry, *In the Name of Hate: Understanding Hate Crime* (Routledge, 2001) chapter 7.
- ⁵⁵ See, Jennifer Scheppe and Dermot Walsh, *Combating Racism and Xenophobia with the Criminal Law* (NCCRI, 2008) chapter 9.
- ⁵⁶ The Report states, ‘In all the circumstances, there are no plans, at present, for amending the legislation in this area.’ UN Human Rights Committee (HRC), Consideration of Reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : 4th periodic Reports of States parties : Ireland , 12 November 2012, CCPR/C/IRL/4.
- ⁵⁷ *Ibid.* 661-666.
- ⁵⁸ Elizabeth Burney and Gerry Rose, *Racist Offences – how is the law working? The implementation of the legislation on racially aggravated offences in the Crime and Disorder Act 1998* (Home Office 2002).
- ⁵⁹ The Crown Prosecution Service Guidelines for prosecuting racist and religious crime now clearly state that a guilty plea can no longer be accepted in such cases for reasons of expediency. See, Crown Prosecution Service, *Racist and Religious Hate Crime: CPS Guidance* available at http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/#a10
- ⁶⁰ See BelonGTo *Addressing Homophobia: Guidelines for the Youth Sector* (BeLonGTo 2010) http://www.belongto.org/attachments/233_Homophobic_Bullying_Guide_lines_for_the_Youth_Work_Sector.pdf; Conor Coughlan, LGBT Hate Crime Report (Johnny 2006) Available at <http://www.glen.ie/attachments/5df931d1-d16b-498e-94d6-b5b593eaf597.PDF>; Bryan Fanning, Brian Killoran, Saorlaith Ni Bhroin and Geoff McEvoy, *Taking Racism Seriously: Migrants’ Experiences of Violence, Harassment and Anti-Social Behaviour in the Dublin Area* (Immigrant Council of Ireland 2010) Available at <http://www.immigrantcouncil.ie/research-publications/2010/499-taking-racism-seriously-migrants-experiences-of-violence-harassment-and-anti-social-behaviour-in-the-dublin-area>; Irish Network Against Racism *Shadow Reports* (ENAR Ireland 2013) Available at <http://enarireland.org/enar-ireland-shadow-reports/>;

CHAPTER 4

NGO PERSPECTIVES ON THE ADEQUACY OF CURRENT LEGISLATION: SURVEY FINDINGS



Profile of the respondents

A total of 14 organisations, including some of the key advocacy NGOs in Ireland, participated in this research. The participating organisations advocate for people with disabilities; ethnic and racialised minorities, including the Traveller Community; immigrants, refugees and asylum seekers; religious minorities; the LGBT (Lesbian, Gay, Bisexual and Trans) communities; and prisoners.

All but one of the participating NGOs (which represents members of a religious minority) hold that hate crime is a specific issue of concern for the individuals and groups for whom they advocate.

All 14 respondents stated that their organisation regards responding to hate crime as a priority area for action in Irish society.

The majority of NGO participants identified their clients' experiences of hate crime as being associated primarily with either racism against ethnic and racialised minorities, and migrants broadly, or homophobic and transphobic hate crime towards LGBT persons.

'Racist incidents are a daily occurrence for ethnic minorities including Travellers and migrants.' [ENAR Ireland].

'We work to combat racism and hate crimes as many of our clients would experience them' [NASC].

'Travellers have been subjected to hate speech for many years. The growth in use of the internet has resulted in hate speech becoming an extremely serious issue' [Irish Traveller Movement].

'Hate crimes are an issue of concern for LGBT people generally. The fear or apprehension of hate crimes or other forms of abuse causes members of the community to hide the orientation or relationships in public' [LGBT Lawyers' Association of Ireland].

People with intellectual disabilities were also identified as a target of hate crime.

'Hate crimes against people with disabilities is an issue throughout Europe and it should also be a priority area for Irish society' [Inclusion Ireland].

Of the 13 NGOs who identified hate crime as an issue for the individuals and groups for whom they advocate, all but one identified their clients as experiencing hate crime, not just on one but on multiple grounds.

As such, individuals who are targeted primarily because of their status as a person with a disability for example, may also experience hate crime because of their sexual orientation. Groups who are subjected to racist hate crime because they belong to racialised and ethnic minorities may also include individuals who are additionally targeted because they are members of a minority religion, or because of their gender identity. Across the 14 NGOs, all 9 grounds identified in Irish equality legislation – race, age, disability, civil status, religion, gender, sexual orientation, family status and membership of the Traveller Community – were mentioned as grounds on which clients experience hate crime. The most commonly cited grounds were race (identified by 8 NGOs), religion (7), sexual orientation (7), disability (5), gender (6) and membership of the Traveller Community (5).

'...our target groups experience multiple types of discrimination on a regular basis' [Sport Against Racism Ireland].

Significantly, research in Ireland and internationally clarifies that victimisation on multiple grounds is not just additive, in that each operates separately but in parallel; multiple grounds also intersect and interact, such that the manner in which racism manifests is shaped by one's religious identity or the expression of homophobia is shaped by one's gender.⁶²

The commonality and intersection of grounds on which people are targeted speaks to the existence of a shared basis for campaigning for stronger legislation among participating groups despite disparate core identities and interests.

While some groups evidenced a greater awareness of the broad multiplicity of grounds on which their members might be victimised, we argue that all groups can benefit from recognising the relevance of all 9 grounds to their clients, grounded in the heterogeneity of their constituent memberships.

At this juncture, it is important to note that some NGOs regarded the 9 grounds existent in Irish legislation to be non-exhaustive. Immigration status, politics and African identity were identified as further grounds on which people may be targeted, by each of three participating NGOs. Certainly, local and international research indicates that migrant status itself, regardless of racialised or ethnic identity is a target of hate and a particular source of vulnerability, given that the non-citizen status may make it more difficult for individuals to avail of the State's protection.⁶³

In legislating against hate crime, Ireland may choose either to name the specific grounds for which the existence of hate crime is recognised or to provide for a more open an inclusive definition. The merits and shortcomings of each approach will be detailed in Chapter 5.

Manifestations of hate

The types of hate incident identified by NGOs include physical violence, sexual abuse and verbal abuse and harassment.

'...violence is a very particular concern for transsexual and transgender people or for others who are non-gender conforming or perceived to be gay ...'
[LGBT Lawyers' Association of Ireland].

'75% of the racist incidents reported to us in 2011 involved racist violence and crime....'
[ENAR Ireland].

'Very significant evidence of high levels of verbal, physical and sexual harassment and violence experienced by LGBT people related to their being LGBT. This happens at school, at work and in the public sphere ... A key measure we use is whether a lesbian or gay couple would be and feel safe walking down the main street of any town in Ireland, hand in hand. And the answer is no in the vast majority of cases...'
[Gay and Lesbian Equality Network].

'People with an intellectual disability are particularly vulnerable to violence or the threat of violence. People in residential care are particularly at risk.... In 2011, hospitals and community healthcare facilities recorded over 80,000 adverse events. Almost 10,000 of these events involved incidents of violence, harassment, aggression or abuse against service users - including people with intellectual disabilities.... Figures published by the Central Statistics Office indicates sexual offence involving 'mentally impaired persons' is now at the rate of one crime per fortnight and has almost doubled over the past year CSO, 2012). Of the 184 survivors of sexual violence with disabilities who attended Rape Crisis Centres between 2008 and 2010, 47% had a learning disability (Rape Crisis Network, 2011). The Criminal Law (Sexual Offences) Act, 1993 does not adequately protect people with an intellectual disability from sexual abuse. The Prohibition of Incitement to Hatred Act, 1989 does not include disability as an aggravating factor. The exploration of violence against people with a disability as a hate crime should be addressed.' [Inclusion Ireland]

Hate speech, including online hate speech, was raised as a salient problem particularly for members of the Traveller Community. One organisation specifically identifies trafficking as a manifestation of hate:

'We feel that Trafficking is an issue that needs to be addressed under hate crime on a number of grounds including gender, ethnicity, status etc' [Integration and Support Unit].

Two organisations made reference to institutional forms of discrimination. One NGO specifically cited:

'...“pen and paper” hate towards Africans from officials of various work arena. There are official comments and discriminations directed towards Africans. Employment discrimination. ... Most Irish media are hostile to Africans and Africa. ... The growing attitude of seeing as [a] patriot a government official/party who introduces a policy or makes a comment that negatively affects non Irish living [in] Ireland should be confronted by Irish themselves. ...' [Africa Centre Ireland].

This also addresses itself to what might be called the strategic use of hate speech in the political arena, citing a need for greater accountability among public figures.

A third organisation references rights violations:

'Absolutely, we encounter violations of Human and Civil Rights almost every day' [Sport Against Racism Ireland].

Advocates also mentioned incidents of individual discrimination, including members of the public avoiding taxis driven by those whom they perceive as non-Irish.

The impact of hate crime

'Hate crimes have an extremely damaging effect on the ... group that they are perpetrated upon' [Irish Traveller Movement].

In line with the discussion presented in chapter 2, the impact of hate crime upon Ireland's minority communities was palpable in the responses provided to our queries.

That hate crime and the threat of hate crime violates individuals' basic sense of safety and security was clear.

'We must ensure that Ireland is a safe place to live, for all. As long as hate crimes persist, this will not be a reality' [ENAR Ireland].

'Members of the LGBT community frequently complain that they do not feel safe on all streets at different times of the day ...' [National LGBT Federation].

For a number of the NGOs, this sense of security is entwined with a fundamental right to live free from fear and that it is only with the absence of fear that people can experience freedom.

'Everyone has the right, including people with an intellectual disability, to a life free from the fear of violence exploitation and or abuse'
[Inclusion Ireland].

'We have a responsibility as a nation, as a State and as a society to take the necessary actions to prevent and address hate crime. We must send the message that hate/racist crime shall not be tolerated. There is evidence from other countries and generations to show that in economic crisis, there is a risk of an increase in hate crimes. At this time then, it is particularly important that we are equipped to address such crimes' [ENAR Ireland]

'The fear or apprehension of hate crimes or other forms of abuse causes members of the community to hide the orientation or relationships in public. Many couples avoid any expression of affection in public and even on the streets of our capital city, the sight of a same-sex couple holding hands is rare....'
[LGBT Lawyers' Association of Ireland].

'Creating an environment where LGBT people can fully participate in all aspects of Irish society is our goal, and a key element of this is safe and secure participation in the public space (as well as in private spaces - homes, schools, workplaces). Creating a culture of respect for diversity is key - it's important for individuals, for communities, for society and it's critically important for our economy'
[Gay and Lesbian Equality Network].

The implications of hate crime are however, not just for the individual, but impact a whole community. NGOs participating in this study recognised the widespread effects of hate crime, not just on the targeted community, but on the wider society.

'If we do not address the issues at an early stage we will fall into the same difficulties experienced by other countries e.g. race related riots reported in the UK, Germany & France'
[Integration and Support Unit].

The (in)adequacy of Irish hate crime legislation

It is notable that all 7 of the participating NGOs who have direct experience of supporting a client as they sought redress for a hate crime through the legal system,⁶⁴ regarded current Irish legislation as inadequate to the task of protecting their clients from hate crime.

Not one of the 14 participating NGOs held that current Irish legislation provides the individuals or groups for whom they advocate with sufficient protection from hate crime and 12 made definitive statements to the contrary.⁶⁵

The participating NGOs cited a variety of specific shortfalls in current Irish legislation, including incompleteness, prosecution rates and conviction rates.

Five participating NGOs raised the issue of loopholes in current Irish legislation with regards to the most common grounds on which people may be targeted. Three NGOs [Immigrant Council of Ireland, ENAR Ireland and Doras Luimní] argued that Irish legislation does not give sufficient recognition to racist crime and should include racist hatred either as an aggravating factor in sentencing and/or by introducing aggravated offences.

'ENAR Ireland is of the opinion that the Irish law does not sufficiently recognise racist crime in legislation. We have called on the Government to recognise racist crime in law and advocate for due consideration to be given to adopting a combined approach to addressing racist crime, including through aggravated sentencing and the introduction of aggravated offences. We also consider that there are substantial weaknesses in the Incitement to Hatred Act which need to be addressed. At a European level, we advocate for the effective transposition of the EU Framework Decision on Racism and Xenophobia' [ENAR Ireland].

A further two NGOs held that Irish legislation does not offer any protection from hate crime based on gender identity or expression.

'As a result, the most vulnerable members of the LGBT community are not protected by law. For such legislation to be effective transgender, transsexual and gender non-conforming people must be included. The legislation should also address the perception that a person has a given sexual orientation or gender identity' [LGBT Lawyers' Association of Ireland].

'In broad terms, the Incitement to Hatred Act is inadequate. While it was critically important at the time, 1989, to have sexual orientation included - at a time when gay men were still criminalised - it served and continues to serve as a symbolic Act only. It is not sufficient to address actual hate crimes targeting LGBT people' [Gay and Lesbian Equality Network].

A fifth noted that, in contrast to other jurisdictions, the Prohibition of Incitement to Hatred Act 1989 does not include disability as an aggravating factor.

'In the UK disability hate crime is regarded as an aggravating factor under the Criminal Justice Act 2003.' [Inclusion Ireland].

Another referred to the limitations of current legislation in relation to online hate speech:

Inadequate to tackling hate crime, especially online hate crimes [NASC].

A number of participating NGOs (Doras Luimní, LGBT Lawyer's Association, Irish Traveller Movement) cited shortfalls in the rates of prosecution and conviction of hate crimes under Irish legislation.

'... the legislation has rarely if ever been used. I am aware of only two prosecutions for racial abuse and none for hate crimes based on sexual orientation...'
[LGBT Lawyers' Association of Ireland].

Recording and reporting of hate crime

Many of the participating organisations saw the adequacy of current systems of reporting and recording of hate crime as integral to the efficacy of Irish legislation in this area. Although this research did not specifically ask about recording and reporting, this issue was raised by eight of the twelve participating NGOs. The majority of these specifically mentioned a need for improved reporting.

Individual NGOs expressed concern regarding both low rates of reporting and also regarding the current system of reporting.

'We know that racism and discrimination are significant problems in Ireland but many incidents of racism are not reported. ENAR Ireland has found that only one in six people report racist incidents to the Gardaí. It is important to report racism so that the authorities understand the extent of the problem and begin to take it more seriously'
[Doras Luimní]

Support was expressed for an independent system of reporting and a number of the NGOs are themselves involved in providing such a service.

Two of the NGOs specifically argued that the PULSE system used by An Garda Síochána to record crime contains some inadequacies.

'...although the Garda pulse system makes provision for the recording of homophobic crime it appears that this marker is used only infrequently. There is no provision for the recording of transphobic crimes...Many LGBT people have simply come to accept harassment and violence as being just something that happens to them in their daily lives rather than as crimes which should be reported...'
[LGBT Lawyers' Association of Ireland]

With further reference to the police service, one NGO specifically addressed the level of trust between the Gardaí and marginalised communities as an issue which impacts reporting:

'... although there is a Garda LGBT group (G-Force) it is known even through recent research conducted in Dublin City University that many Gardai are not out in their place of work. This in turn contributes to a climate wherein LGBT people are reluctant to report crimes against them. This is unsurprising in the context of older member of the community who can recall life prior to decriminalization, which occurred only as recently as 1993...In other jurisdictions including some regions of England and Wales, the [police] have taken measures as simple as placing pride stickers at visible points in the station indicating that LGBT victims of crime will be treated in a supportive environment.' [LGBT Lawyers' Association of Ireland].

While a number of NGOs mentioned working with the Gardai towards addressing hate crime, one argued that individual members of An Garda Síochána may, in some cases, be part of the problem, rather than part of the solution.

'Gardai are understaffed and undertrained in these areas, our experience (through client reports) is that they are reluctant to get involved or to follow up complaints. In a small number of incidents it was alleged that Gardai themselves were actually racist towards them. Clients felt that Gardai had stereotypes of certain groupings without foundation' [Integration and Support Unit].

These comments are borne out by research conducted in Ireland that further demonstrates inconsistent policing practice towards members of minority communities. Experiences of explicit racism or ethnic profiling at the hands of the state deter those who experience hate crime from making an official report.⁶⁷ Thus, many hate crimes go unreported. Faced with inadequate state action to counter racism, a collective of NGOs have developed a third party reporting mechanism (discussed further below) as a resource that victims and witnesses of racism can utilise to report racist incidents.⁶ A similar mechanism has also been initiated in the context of transphobic hate crime by the Transgender Equality Network Ireland (TENI).⁶⁸

NGO responses to hate crime

In the absence of what they would regard as an adequate official response to hate crime in Ireland, a number of the participating NGOs have become actively involved in addressing hate crime at a societal and/or individual level, in their own right.

'We have developed strong relationships with the Gardai over many years which has led to the development of Garda Liaison Officers to the LGBT community and other measures to provide direct support to LGBT people who experience hate crime (and other crimes). Our work tackling hate crimes is also incorporated into our work in Education - making schools safe and supportive for young LGBT people. Further we engage politically on measures to address hate crime, including exploring legislative responses'
[Gay and Lesbian Equality Network]

A number of the participating organisations, who advocate for the rights of migrants and/or whose activities are primarily focused on anti-racism, are actively involved in a co-ordinated campaign for the introduction of racially aggravated offences and sentencing.

'We have launched a petition, where people can call on Government to recognise racist crime in law ... having the legislative framework to address and prevent hate crime is key. We have also noticed a shift in reception to our arguments and are hopeful that things may change in the near enough future. That said, this issue has been examined for over a decade by NGOs and other stakeholders without any successful outcome'.
[ENAR Ireland]

Other NGOs have also adopted a lobbying approach, but to advocate for policy change.

'We have prepared a position paper on implementation of the National Disability Strategy. In this paper we identify violence against people with intellectual disabilities and inadequacy of certain legislation. We have recommended that exploration of violence against people with a disability as a hate crime should be addressed as part of the implementation plan for the National Disability Strategy'. [Inclusion Ireland]

Many of the NGOs actively encourage the reporting of hate incidents among their clientele. Again, those who are involved in anti-racism work and who advocate for migrants have, in some cases, embarked upon an awareness raising role by directly engaging in the recording of racist incidents as an alternative to reporting directly to the police service.

'We have set up a system for the independent monitoring of racist incidents. ...'.
[ENAR Ireland]

Across Ireland, a diverse range of NGOs currently participate in a co-ordinated civil society initiative to gather data on racist incidents.⁶⁹ The development of and widespread participation in such civil society initiatives is both an indicator of dissatisfaction with the official system of monitoring and a belief that independent monitoring is preferable.

'We know that racism and discrimination are significant problems in Ireland but many incidents of racism are not reported. ENAR Ireland has found that only one in six people report racist incidents to the Gardaí. It is important to report racism so that the authorities understand the extent of the problem and begin to take it more seriously. ...'
[Doras Luimní]

Conclusion

The NGOs participating in this study demonstrate an awareness of, and proactive engagement with, the issue of hate crime in Ireland. However, some are more limited than others as regards the resources they can bring to bear on the problem. This situation is magnified by the fact that, while a minority of organisations engaged in anti-racism work are acting in a co-ordinated fashion to bring about practical and legislative changes in this area, most NGOs participating in this study are acting independently. Given that our participants evidence a great deal of commonality as regards the perception of shortfalls in current hate crime legislation, as well as related reporting and recording mechanisms, there is a case for a collaborative approach to pursuing shared interests.

'We are also conscious of the need for us all to work in solidarity, where possible. We also need to work collectively'. [ENAR Ireland]

- ⁶¹ James Carr, 'Regulating Islamophobia: The Need for Collecting Disaggregated Data on Racism in Ireland' (2011) 31(4) *Journal of Muslim Minority Affairs* 574; The Integration Centre, Recording Racism in Ireland (Integration Centre 2011) Available at <http://www.integrationcentre.ie/getattachment/d70f7539-ce06-403d-98d7-da21f7d46426/Recording-Racism-in-Ireland.aspx>.
- ⁶² See for example Scott Poynting and Greg Noble, *Living with Racism: The experience and Reporting by Arab and Muslim Australians of discrimination, abuse and violence since 11 September* (Report to the Human Rights and Equal Opportunity Commission 2004)
- ⁶³ Bryan Fanning, Brian Killoran, Saorlaith Ní Bhroin and Geoff McEvoy, *Taking Racism Seriously: Migrants' Experiences of Violence, Harassment and Anti-Social Behaviour in the Dublin Area* (Immigrant Council of Ireland 2010) Available at <http://www.immigrantcouncil.ie/research-publications/2010/499-taking-racism-seriously-migrants-experiences-of-violence-harassment-and-anti-social-behaviour-in-the-dublin-area>
- ⁶⁴ A further two respondents were unsure if their organisation had such experience.
- ⁶⁵ In response to the question "Do you consider that current Irish legislation provides the individuals and/or groups for whom you advocate with sufficient protection from hate crime?" two NGOs responded 'Unsure' and 12 responded 'No'.
- ⁶⁶ James Carr and Amanda Haynes, 'A Clash of Racializations: The Policing of Race and of Anti-Muslim Racism in Ireland' *Critical Sociology*, published online 5 July 2013 Available at <http://crs.sagepub.com/content/early/2013/07/05/0896920513492805.abstract>; See also Bryan Fanning, Brian Killoran, Saorlaith Ní Bhroin and Geoff McEvoy, *Taking Racism Seriously: Migrants' Experiences of Violence, Harassment and Anti-Social Behaviour in the Dublin Area* (Immigrant Council of Ireland 2010) Available at <http://www.immigrantcouncil.ie/research-publications/2010/499-taking-racism-seriously-migrants-experiences-of-violence-harassment-and-anti-social-behaviour-in-the-dublin-area>
- ⁶⁷ Irish Network Against Racism (2013) iReport [online] available at <http://enarireland.org/iReport/>
- ⁶⁸ Transgender Equality Network Ireland Stad [online] available at <https://transequality.wufoo.eu/forms/stad-2014/> The first Report detailing the findings of this mechanism will be published after the completion of our Report, however, initial findings indicate that in 2013, there were 32 Reports made to TENI, of which 15 were classified as hate crimes. See, <http://teni.ie/page.aspx?contentid=771>
- ⁶⁹ Irish Network Against Racism (2013) iReport [online] available at <http://enarireland.org/iReport/> A similar mechanism has also been initiated in the context of transphobic hate crime by the Transgender Equality Network Ireland available at <https://transequality.wufoo.eu/forms/stad-2014/>

CHAPTER 5

LEGISLATING FOR HATE CRIME



Introduction

It is clear that NGOs working in Ireland perceive the current legal situation as inadequate on a number of grounds. From an international perspective, there are a number of legislative options Ireland could adopt. Before we can decide what form any legislation which criminalises hate should take, we need to ask a fundamental question: what do we want the legislation to achieve? There are a number of things that it can do. There are also a number of things it cannot do.

In the criminal law, you are either guilty or you are not guilty. Because of this, the law needs to be very precise in what it requires an individual to do before that individual can be found to be guilty. Being convicted of a criminal offence is a very serious matter: currently, it will stay on your record for life, and you may need to disclose it when you are applying for a job or moving to, or even visiting, another country. Being convicted of a hate crime carries with it even more stigma. For these and other reasons,⁷⁰ when we decide that a particular act should be a criminal offence, we need to be very clear exactly what it is that we want to criminalise, we need to be sure that the criminal law is capable of criminalising it, and we need to be very precise as to the language we use when framing the offence. The punishment of motivation is not something the criminal law is particularly used to dealing with, and any legislation which allows for this must be clear and precise.

Before we decide what approach is most appropriate in this jurisdiction, we might ask first, what we expect of the legislation.

Do we wish to punish only those offenders who are truly motivated by prejudice, or should the legislation also punish those individuals who may not have committed the crime from a bias motivation, but who, during the course of the offence demonstrate hostility to the victim by using offensive speech. What type of speech do we class as a hate crime, and what do we consider a hate incident?

Essentially, we need to decide what type of act should be covered by the law, and whether that act is suitable to be deemed a criminal offence before we decide how the legislation should be framed.

Analysis

Chapter 3 introduced the understanding that there are a number of ways in which hate can be criminalised. The first main option is to introduce aggravated versions of existing offences, such as assault, criminal damage and public order offences. This option has two further sub-options: first, to only criminalise the offender where it is proven that they were motivated by hate and second, to criminalise the offender in a broader category of circumstances, where hatred is demonstrated during the course of the offence.⁷¹

The second main option is to introduce a piece of legislation that allows for the crime to be prosecuted as normal, but where a hate motivation or demonstrated hatred is proven to have occurred, there will be a requirement on the court to aggravate, or increase, the sentence imposed on the offender.⁷²

We will discuss these options in turn, along with other issues which need to be addressed in the legislation.

In examining the legislative options, we look at Northern Ireland, England and Wales and Canada for comparative purposes. The legal system in these jurisdictions is similar to that in Ireland, and their experiences in legislating for hate crime are relevant in our context.

Option 1: Aggravated offences

When considering introducing aggravated versions of offences which are known to the criminal law, two quite different legislative options are in place in Canada, on the one hand, and England and Wales on the other. We use these two divergent examples as a means of highlighting potential legislative reform in this jurisdiction. The Canadian legislation is quite limited, requiring that the offence be

motivated by hostility.⁷³ Statute law in England and Wales is broader, requiring harsher punishment where the offence is motivated, or partly motivated, by hostility, or where hostility is *demonstrated* to the victim during the course of the offence. We will examine each of these options in turn, showing how the legislation has been implemented in these jurisdictions, and highlighting some of the advantages and disadvantages of each.

1A: Motivated by hostility

Section 718.2 of the Canadian Criminal Code provides that when sentencing, a court should consider a number of factors, and aggravate or mitigate the sentence accordingly. The first of these factors is relevant here: it provides that 'evidence that the *offence* was *motivated* by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor' should be taken into account in sentencing.⁷⁴ Importantly, this is not an aggravated offence, but it is relevant to our discussion as it restricts the operation of the sentence enhancement to only those offences which the sentencing court believes are motivated by bias, prejudice or hate.

What is significant to note here is that, in Canada, words spoken by the offender will not necessarily amount to proof of motive. In their admirably thorough analysis of case law applying section 718.2(a)(i), Lawrence and Verdun-Jones note that while *evidence* of motive can be sometimes difficult to establish, the courts will *infer* motive in certain contexts:⁷⁵

- Circumstances of the offence
 - Act itself is of a hateful manner (eg public incitement of hatred)
 - Date of the offence
 - Location of the offence
- Circumstances of the offender
 - Words spoken by the offender
 - Items in offender's possession
 - Conduct of offender
 - Group in which offender is a member
- Circumstances of the victim
 - Group in which victim is a member
 - Activities of the victim

The extent to which words spoken by the offender can lead to an inference of a hate motive in Canada is important to understand here. As Lawrence and Verdun-Jones observe:

*'The courts have generally declined to apply s. 718.2(a)(i) on the basis of [slurs spoken, or other disparaging remarks made during or after the commission of the offence.]... Whether the words spoken by an accused are uttered during or after the commission of the criminal act, the courts must take care to ensure that these words are indeed referable to motive and are not mere expressions of belief.'*⁷⁶

It is this latter distinction which is key: the mere holding or expression of bigoted beliefs is not sufficient to prove motive. In *R v Lelas*,⁷⁷ referring to the common law position, the court stated that offenders cannot be sentenced for repugnant beliefs: '[t]he charge is mischief, not the promotion of hatred, and save where the beliefs of the respondent *serve to explain his actions*, I do not propose to take them into account.'⁷⁸ These common law principles were applied in the context of section 718.2(a)(i) in *R v Wright*⁷⁹ where the Court stated:

*'In order for s. 718.2(a)(i) to be invoked, there must be proof beyond a reasonable doubt that the offence was motivated by one of the listed factors. The objective of that sub-section is to impose increased penalties on those who offend because of their beliefs, but not to impose such penalties for merely holding those beliefs.'*⁸⁰

The Canadian position is thus clear: while words can lead to an inference of motivation, there needs to be a causal link between words and actions, and the mere holding of or expression of bigoted beliefs is not sufficient to prove motive.

Lawrence and Verdun-Jones refer to one case where words led to an inference of motive. Here, the accused was an Aboriginal youth who attacked a Caucasian male. During the course of the attack, he and others acting with him stated, 'Native Syndicate does not fuck around' and 'This is what happens to white boys who come into the 'hood''. As stated in the case, here the words used served to *explain* the criminal act, and thus section 718.2(a)(i) was applicable. Where offensive words are used in the course of the criminal act, which do not *explain* the reason why the offender committed the act, but are simply offensive because of their content, there will be no way in which motivation can be inferred, and the sentence will not be aggravated under the section.

Option for reform

Hate crime legislation can restrict the application of the hate crime label to only those individuals who we can prove attacked the victim *because* of their bias towards the victim – that is, where the commission of the basic offence was motivated, or partly motivated, by bias. This is the approach favoured in Canada (though, again, only in the context of sentence enhancements), and it is certainly more difficult to prosecute and convict an individual under this legislation as it is hard to prove what ‘motivated’ an individual to commit a crime. In the same way that it is difficult to convict an individual under the 1989 Act, it may be similarly difficult to convict under this model.

However, while it may be more difficult to prosecute under this model, it could also be argued that this is a good thing: it is only those who are motivated by hate that should be considered ‘hate criminals’ and these people should be marked out from the rest of society. Legislation could be framed in such a way as to indicate the circumstances in which a ‘hate motivation’ could be inferred, using perhaps the Canadian experience as a guide. The circumstances in which a hate motivation will be inferred in the Canadian courts could also usefully be applied in an Irish context.

1B: Demonstration of or motivated by hostility

This second option is the approach that is taken in legislation which applies in England and Wales.⁸¹ Section 28 of the Crime and Disorder Act 1998 provides that an offence is racially aggravated if either:

- (1) 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
- (2) the offence is **motivated** (wholly or partly) by hostility towards members of a racial group based on their membership of that group.

While in Canada, the legislation is restricted to those offences where the base offence was motivated by bias, prejudice or hate, in England and Wales, mere demonstration of hostility towards the victim is sufficient to elevate the base offence to a racially aggravated one.

As Gadd and Dixon point out, the most immediate problem which faced the courts in England and Wales was the distinction between demonstrated hostility and hostile motivation, the two limbs of the offences under section 28(1).⁸² We will concentrate on the type of case that constitutes ‘demonstrated’ hostility, for comparative purposes.

*DPP v Woods*⁸³ was a prosecutor’s appeal by way of case stated. The respondent was convicted of racially aggravated assault under section 29 of the 1998 Act. His friend was refused entry to a public house by the victim, and proceeded to assault the victim by punching him to the head. It was found as a matter of fact that he had used the words ‘you black bastard’ during the course of the altercation.⁸⁴ As to the motivation of the offender, the conclusions of the justices as set out in the case stated are important:

‘We found the Respondent’s hostility to be borne out of his frustration and annoyance as a result of his companion being denied entry to the premises, and whilst he may have intended to cause offence by the words, this was not ‘hostility based on the victim’s membership (or presumed membership) of a racial group’. We believed that the Respondent’s frame of mind was such that he would have abused any person standing in [the victim’s] shoes by reference to an obvious physical characteristic had that individual happened to possess one.’⁸⁵

On the question as to whether any other motive could disengage the racial one, the appeal Court stated that the section

‘... is designed to extend to cases which may have a racially neutral gravamen but in the course of which there is demonstrated towards the victim hostility based on the victim’s membership of a racial group. Any contrary construction would emasculate section 28(1)(a).’

The fact that the judge found that the defendant would have abused anyone by reference to an obvious physical character—and just happened to do so on the basis of the victim’s skin colour—was the next, and perhaps most important issue discussed by the Court. On this, the court stated:

'If the respondent would have assaulted another person and called him, say, 'a fat bastard', that would not be an aggravated offence because Parliament has not found it necessary to provide additional protection to the overweight by the creation of an aggravated form of the offence by reference to that characteristic.'

The fact was, the Court held, that the type of abuse used in this context was in fact racial abuse, and thus the case fell to be considered under the 1998 Act. While there was no evidence that the offender was motivated by hostility, the fact that he used abusive language of a racial nature during the course of the offence led to a conviction under the Act.

The case of *DPP v Green*⁸⁶ examines further the relevance of motive in the context of prosecutions under the Act. When Green was arrested, she uttered a string of racially abusive language towards her arresting officers, making reference to their Pakistani heritage and skin colour.⁸⁷ However, Green's best friend was black - and gave evidence that she felt the respondent had no racist tendencies - and Green herself had children of mixed ethnic origin.

In the Magistrates Court, it was concluded that, due to the fact that the offender referred to the white skin colour of one of the arresting officers, and the respondent displayed the same kind of hostility towards the two police officers, the abuse was a 'continuation to her opposition to arrest' rather than a deliberate act of racial hostility.⁸⁸ Rafferty J on appeal declined to agree with this position. She stated that it is quite true that an offender may have any number of motivations which lead to hostilities, but 'that cannot diminish or undermine what is contemplated and expressed as "the additional wrong" of demonstrated racial hostility.'⁸⁹ Thus, even though there was no evidence that the defendant here was racist, or that her act was motivated by hostility, she was found guilty.

A recent case on this issue is *R v H(S)*.⁹⁰ The respondent approached a Nigerian employee of his local job centre, and verbally abused him. During the course of this verbal abuse, he referred to the employee as a 'monkey'⁹¹ and a 'black monkey'.⁹² The judge withdrew the count of section 31 racial hostility from the jury. The reason for this was, as he stated, that the prosecution had no possibility of persuading the jury 'that he said what he said was as a result of hostility towards the man because of his race as opposed to personal dislike or loss of temper or both'⁹³ or because of 'hostility towards

that individual rather than dislike or a desire to humiliate or insult.'⁹⁴ The reason given by the Court for this opinion was that the incident was 'short lived' and for this reason, the jury 'could not safely exclude the possibility that temper and/or personal dislike were the motivation for the use of such words if, indeed, they were uttered.'⁹⁵

On appeal, counsel made clear that the case concerned section 28(1)(a) hostility, and not section 28(1)(b) hostility. Leveson LJ notes that the same mistake was made by the trial judge in this case as had been made in *M* - that is, that the court slipped from demonstrated hostility to motivated hostility.⁹⁶ Leveson LJ found that the terms used by the respondent could not but generate a prima facie case of an 'outward manifestation of racial hostility.'⁹⁷ The question as to when vulgar abuse becomes racial hostility is one which should be left to the jury. In the present case, the Court found that there was indeed material on which the jury 'could properly conclude that [the] circumstances went beyond vulgar abuse into an outward manifestation of racial hostility.'⁹⁸

Option for reform

From this analysis of the case law, it seems that in England and Wales, the use of racially abusive language in the course of the commission of a criminal offence can elevate a normal offence to a racially aggravated one, almost regardless of the intention or motivation of the offender when using that language. The result of this is that it seems easier to secure a conviction under this legislation than it is to attain a sentence enhancement under the Canadian legislation. Which approach is appropriate to this jurisdiction is open for discussion.

The benefits to this approach are that it is relatively easy to prove that hostile language was used, and there is no need to investigate whether the offence was motivated by hostility or bigotry.

So the question is, if because someone uses hurtful language while they are committing an offence, does that mean that they should be convicted of a hate crime, labelled a racist and be punished more harshly?

If we think back to why we punish hate, it is because the offender has targeted an individual, not because of opportunity, but because of who they are perceived to be. If we punish an individual who commits a crime opportunistically but uses hateful speech, is that consistent with the underlying philosophy of the criminal law? A response to this argument might be that, no matter what the motivation of the offender, where the victim feels that they were the victim of a hate crime, and the community is in fear because of that, the motivation of the offender is irrelevant. But, as we have noted earlier, the criminal law does not, and can not, take the feelings of the victim into account when deciding what crime, if any, will be prosecuted.

From the perspective of the criminal law, before we can convict someone of a criminal offence, we have to show that they have a 'guilty mind', or the *mens rea* for that offence. It is not clear in the context of demonstrated hostility what the 'intention' is: is it to simply say the words regardless of their implications, or is it to demonstrate hostility? It might be considered an element of the *actus reus* (guilty act) of the offence: that the words spoken are part of the act in question. Similar issues arise here, however. Schweppe and Walsh highlight this problem in the context of the expression offences:

*'It is not acceptable to hold someone criminally liable for a serious offence unless they have a 'guilty mind' with respect to the prohibited conduct ... Much of the complexity [in the 1989 Act] stems from the need to include statutory defences to sift out those who did not realise that they were peddling hate or that their actions would have that effect. It is difficult to see how this complexity can be avoided without exposing to criminal liability persons who did not know and had no reason to suspect that their words or actions were peddling race hate. Criminalising persons in such circumstances would create constitutional difficulties in this jurisdiction and would offend against the common law principle that the criminal act should not be punished unless it was done with a criminal mind (mens rea).'*⁹⁹

However, these views are not unanimously held. Walters argues:

*'Whether in practice an offender can demonstrate racial hostility without any conscious awareness as to its racist nature is, on the face of it, far from convincing ... Indeed in most cases the fact that a racial slur has been expressed will create an inference that the offender is aware that such language, especially when used in a hostile context, will be perceived by others as being racist.'*¹⁰⁰

While it could be said that 'demonstrated hostility' approach has been used to great effect in England and Wales in criminalising hate, it could also be argued that the manner in which the legislation is used is overly broad. It is certainly easier to prosecute and convict someone of a hate crime there than in Canada, but is the legislation in England and Wales really targeting those who are motivated to commit crimes out of hatred, or those who simply use offensive speech during the course of a criminal act? We need to decide in this jurisdiction exactly what we want to punish. If we wish to have legislation which punishes anyone who uses hate speech during the course of a criminal act, though that speech may not be related to the act itself, then we use the demonstrated hostility model.

1C: Range of offences covered

If we agree that aggravated offences should be introduced into the criminal law, the next question is what range of offences should be so aggravated. As noted by Schweppe and Walsh, a whole range of criminal offences have been recorded as being committed with a race hate motivation, including 'discharging a firearm, sexual assault and drunkenness.'¹⁰¹ Further, the type of crime committed against the various victim groups varies enormously. For example, the Law Commission of England and Wales observes that in the context of disability hate crime, crimes of sexual offences, burglary, robbery and fraud and forgery are significant,¹⁰² which are not as statistically notable in the context of homophobic and transphobic hate crime¹⁰³ or racial and religious hate crime.¹⁰⁴ However, across all categories, three particular principal offences are carried out against victims more than others: offences against the person; criminal damage; and public order offences. Our survey shows that key offences perpetrated against community members in Ireland are physical violence, sexual abuse, verbal abuse and harassment.

Option for reform

There are two main options for reform. The first is to replicate an aggravated offence for all basic offences in the criminal code. The second is to legislate for those offences which are most commonly committed against the majority of victim groups: assault, harassment, criminal damage and public order offences.

As the Law Commission observes, however, if this approach is taken, 'in relation to disability, a significant proportion of wrongdoing (at least 38.2%) would be untouched.'¹⁰⁵ If this approach is taken, however, those wrongs committed against these particular victim groups could be dealt with separately in relevant legislation, by amending existing legislation such as the Criminal Law (Sexual Offences) Act 1993 to ensure that disabled individuals are appropriately protected. Any legislation can then be examined after a number of years to ensure that it is adequately protecting victims of hate crime.

Option 2: Sentence enhancement

The second major legislative option is to introduce legislation which provides for a sentence enhancement where it is established that the original crime was motivated by hostility, prejudice, bias or hatred, or where such hostility was demonstrated during the course of the offence.

To aggravate a sentence because of the motivation of the offender is not something which is terribly new to the criminal law: when sentencing any offender, the court will always take aggravating and mitigating factors into account. These can include such mitigating factors such as an early guilty plea; cooperation with the investigating authorities; or evidence of remorse. Aggravating factors can include factors such as there being a weapon involved during the course of the offence; whether the offence was premeditated; or whether

the offence was committed while the offender was released on bail. Again, legislation could provide that the sentence should be enhanced where a hate motive is proven, or where hatred is demonstrated during the course of the offence, and the legislation will be interpreted accordingly.

The sentence enhancement model is used in both Canada, as detailed above, and in Northern Ireland. Again, however, there are two distinct options available: first, to restrict the operation of sentence enhancements to only those crimes which are motivated by hostility; or second, to allow those instances in which hostility is demonstrated to result in a sentence enhancement. In one sense, this approach is more consistent with the general principles of the criminal law: the motivation of the offender is only taken into account during the sentencing stage of the offence. Its major drawback is the fact that the clear message associated with aggravated offences is not present.

Article 2 of the Criminal Justice (No 2) (Northern Ireland) Order 2004 provides that where an offence was aggravated by hostility, the court must treat that as an aggravating factor in sentencing which increases the seriousness of the offence, and must state in open court that that is the case.¹⁰⁶ Here the legislation takes the England and Wales approach, using both demonstrated hostility and motivated hostility. It provides that the offence is aggravated by hostility if:

... at the time of committing the offence, or immediately after doing so, the offender demonstrates towards the victim of the offence hostility based on:

- (i) The victim's membership¹⁰⁷ (or presumed¹⁰⁸ membership) of a racial group;¹⁰⁹
- (ii) The victim's membership (or presumed membership) of a religious group;¹¹⁰
- (iii) The victim's membership (or presumed membership) of a sexual orientation group;¹¹¹
- (iv) A disability¹¹² or presumed disability of the victim.¹¹³

The legislation goes on to provide that if 'the offence is motivated (wholly or partly) by hostility' towards any of the above, the offence will also be one aggravated by hostility. Article 2(4) goes on to provide that it is immaterial whether the hostility is based to any extent on any other factor.¹¹⁴ It would appear that since the legislation was introduced, there have only been 13 occasions when the prosecutor has brought the legislation to the attention of the court, and from those, only one occasion in which the Judge imposed an enhanced sentence.¹¹⁵

Option for reform

This approach is certainly more consistent with the criminal law, which usually only concerns itself with the motivation of an offender at sentencing stage. If this approach were taken, courts could be required to at least consider the hostile motivation of the offender, or the fact that hostility was demonstrated during the course of the offence to the offender, during the sentencing stage. Further, whilst these offenders will be punished more severely for demonstrating hatred during the course of committing the offence, they will not be labelled a 'hate criminal' and the criminal law will not treat them as such.

However, this approach may be perceived to have two key weaknesses. First, unless legislation requires it, there may be no *obligation* on the court to increase the sentence of the offender due to the circumstances in which the offence took place. Second, for an array of reasons (as set out in the Northern Ireland study¹¹⁶) prosecutors may be reluctant to bring this additional element of the offence to the attention of the court, or introduce it during the course of the prosecution, and there will be no obligation on them to do so. Finally, the 'message' element of hate crime legislation may be lost: without a clear legislative statement that hate motivated offences are to be treated more harshly we may be diluting the message that they are unacceptable.

Who are the victims?

As we have seen, depending on the jurisdiction, the groups protected by hate crime legislation vary enormously. Across the United Kingdom, generally the protected categories are race, religion, disability, sexual orientation and transgender status. If we examine hate crime legislation across a broader category of jurisdictions, it is clear that the range of victims of hate crime is much greater.

A list of protected classes across a wide range of hate crime legislation in the United States includes: age; citizenship; class; colour; disability; economic status; ethnicity; family responsibility; gender; matriculation; membership of labour organisation; marital status; national origin; personal appearance; political orientation or affiliation; race; religion; sex; sexual orientation; and social status.

Garland and Chakraborti¹¹⁷ note that across the OSCE (Organisation for Security and Co-operation in Europe) and the EU, the most commonly named grounds are ethnicity, nationality, race, religion and sexual orientation (the latter less comprehensively). Disability and transgender status are frequently omitted from protection.

So how do we decide which categories of victims should be included in hate crime legislation in this country? There are a few ways that we could do this. The first is to replicate those groups which exist in legislation applying in the United Kingdom.

One immediate problem with this is that one of the most marginalised minorities in Irish society, the Traveller Community, would not automatically be included. Further, The Law Commission of England and Wales has observed that the current limitations on victim categories may be unacceptable in that jurisdiction.¹¹⁸

A second approach would be to simply use the same categories as currently exist in the *Prohibition of Incitement to Hatred Act 1989*. However, this also has shortfalls as it would not protect the trans community, amongst others.

In the United States, Frederick Lawrence tried to resolve this issue. He proposed a two-stage process.¹¹⁹ The first question

asks whether victims self-identify as members of an identity group. The second stage, then requires the legislature to determine which of these self-identifying groups should be included in the bias crimes statute. The groups identified in this manner, he states, 'are the characteristics that implicate social fissure lines, divisions that run deep in the social history of a culture.'¹²⁰ In the context of the United States, for example, he highlights race and racial discrimination: 'the greatest American dilemma has its roots in slavery, the greatest American tragedy.'¹²¹ He further observes that 'race, color, ethnicity, religion and national origin' are all examples of such national social fissure lines.¹²² While this approach has merits, it lacks a normative, or objective, basis, and allows politicians to discriminate, for valid or less meritorious reasons, between victim groups. It also potentially requires politicians to be purely reactive in their approach to hate crime legislation, without the capacity to proactively protect new vulnerable groups.

That said, the approach does have some merit: in Ireland, there are groups which we can immediately identify as, historically, being targets of abuse and discrimination. Such groups would include members of the Traveller Community, single mothers, people who do not associate with the dominant faith (i.e., Catholicism), and members of the LGB community. More recently, we might include the categories of race¹²³, national origin, trans people and ethnic origin. The authors would regard this list as still incomplete however.

Moreover, any list would, arguably, become outdated over time.

This reflects Perry's statement that the definition of crime itself is relative, and historically and culturally contingent – what is considered a hate crime today could be 'standard operating procedure' in another time or place.¹²⁴

Further, the process can often be reactive rather than proactive. This problem is best explained by reference to the Sophie Lancaster case in England. Sophie was a Goth, who was murdered in an attack on her and her boyfriend. The trial judge in her murder case believed she and her boyfriend were targeted 'solely because their appearance was different' and labelled the murder a hate crime.¹²⁵ Sophie and

her boyfriend, Robert Maltby (who survived the attack) had been targets of abuse before the fatal attack and it was quite clear that the perpetrators of the offence were motivated by prejudice against the Goth community when attacking their victims.¹²⁶ Garland notes that the trial judge stated, '[T]his was a hate crime against these completely harmless people targeted because their appearance was different to yours.'¹²⁷ The problem of course, is that 'Goths' or 'music fans' or even the more generic category of 'appearance' are not protected in UK hate crime legislation, and so the attackers were not convicted of a hate crime.

That said, there are also arguments against being over-inclusive in terms of those characteristics which are protected. Taylor, for example, argues that women (that is, presumably, an element of the gender characteristic) should not be included as a protected characteristic for a number of reasons. While acknowledging that violence against women is a serious issue, both involving 'very serious forms of targeted violence' and having a basis 'in unequal power relationships and a direct relationship to pervasive sexism', he goes on to argue that rather than being a minority group, women are in fact in the majority. Further, he observes that there are very few jurisdictions which protect women in this manner in hate crime legislation.

We would argue, however, that where an individual is targeted solely because of their gender, including gender variance, there is no justification in law for excluding them from the protection of hate crime legislation.¹²⁸ While women can be characterised as a minority as a consequence of their historical disadvantage relative to men, it is not necessary that the targeted group be a minority, or, for only minority groups to be protected by legislation: Chakraborti¹²⁹ observes that if we accept this position, it would mean that members of majority groups could not be protected, no matter how persuasive the evidence that an attack was based on prejudice or hate.¹³⁰

By focusing on the motivation of the offender in attacking the victim, we believe that it is possible to ensure that all potential victims are protected by legislation without expanding the scope of the legislation in a manner which proves to be unwieldy.

Rather than limiting those groups to be protected under legislation, an alternative presented by Garland and Chakraborti¹³¹ is that of 'using an individual rather than a group-based human rights approach', which would be inclusive of all victims of hate crime. They propose that the offence is framed by reference to 'targeted victimisation' rather than specific groups or grounds, such that any individual who is victimised as a result of their identity is protected.¹³² They note that such an approach would prevent the exclusion from legal protection of minority groups whose stigmatised status may be less widely recognised as a result of lesser political capital, such as the homeless. Equally, when framed in this manner, they argue that legislation would be less static and therefore less subject to outdated. Finally, this framing would allow for the protection of members of dominant social groups under hate crime legislation, although the desirability of such a provision is debated in literature where hate crimes are understood as constituent of relations of power which maintain the dominant position of some groups in society and the subordinate position of others.¹³⁴ They highlight in particular, the potential offered by the ODHIR's (Office for Democratic and Human Rights of the Organisation for Security and Co-operation in Europe) definition of hate crime, which describes it as 'pre-conceived negative opinions, intolerance or hatred directed at a particular group [which] must share a common characteristic that is immutable or fundamental, such as⁶⁵ race, ethnicity, language, religion, nationality, sexual orientation.'¹³⁵ This approach certainly has merits, and

our recommendations go some way to ensuring that an inclusive, rather than exclusive approach is taken in the legislation.

Option for reform

A viable alternative to setting out a rather arbitrarily selected category of protected groups, as is the case in England and Wales, is that the jury (or judge) should be able to determine whether a bias crime was committed against the victim on the basis of a 'defining characteristic' or 'personal characteristic', as in the ODHIR's definition of hate crime. This approach would allow courts broad discretion in determining whether a bias crime occurred in a particular instance, thus allowing crimes against groups which are not protected by legislation, such as the homeless and Goths be addressed by the legislation. If the true purpose of a bias crime statute is to seek to deter crimes which are motivated by bias against a group, then this approach has much merit.

We have observed during the course of our research that hate crimes are committed against a wide category of groups in Ireland, and particularly highlight the fact that those groups protected by Equality legislation are not only discriminated against according to the terms of that Act, but also that hate crimes are committed against them. In Ireland, equality legislation deals with discrimination on nine grounds:

- Gender
- Civil status (i.e., marital status or civil partnership status)
- Family status
- Age
- Race
- Religion
- Disability
- Sexual orientation
- Membership of the Traveller community.¹³⁶

As in the ODHIR's definition of hate crime, legislation could be developed in such a way as to protect those characteristics included in equality legislation as indicative characteristics, or presumptive characteristics, but allow the jury or trier of fact to include other characteristics where it deems it appropriate, including an 'other similar factor' element. Using this approach,

the legislation would include all nine protected categories in the Equality Act, but include 'any other similar factor' as a tenth protected category. This approach provides an objective element to the legislation, allowing the judge or jury to determine whether, after considering all aspects of the case, a hate crime was in fact committed,

without being hamstrung by a politicised and narrow hierarchy of named victims.¹³⁷

If this jurisdiction is to adopt the approach of naming those victim groups which are to be included in legislation, this process will require careful consideration given its association with the creation of a hierarchy of victims. The Prohibition of Incitement to Hatred Act 1989 should also be amended such that both statutes are framed in a similar manner in this regard.

In some cases, individuals may be targeted because they are misidentified as a member of a particular group. For this reason,

the perception by the offender that the victim has a particular characteristic, as well as the actual presence of such a characteristic should be included in the legislation.¹³⁸

Cybercrime

Our research shows that the use of hate speech on the internet is an important issue for those individuals supported by the NGOs that took part in our survey. While it can be argued that the 1989 Act is sufficiently broad for the purposes of covering hate speech on the internet, Schweppe and Walsh note that, it is next to impossible to show that anyone was 'incited' to hate on the basis of opinions published on the internet. Their suggested amendment to the Act to allow for a prosecution where an individual feels threatened or fearful for his safety or for that of his companions or property might go some way to dealing with this issue. They further note:

*'While it could be argued that the 1989 Act can be used to combat racist material on the internet, in order to comply with best international practice and standards, it is recommended that Ireland sign and ratify the [Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems] and introduce measures to eliminate the dissemination of threats which are of a racist or xenophobic nature.'*¹³⁹

Given the complexity of this issue, as well as the international context, of combating hate speech online, we adopt this recommendation.

Option for reform

The manner in which the Additional Protocol is transposed into Irish legislation is open to discussion. Daly presents two options: first, that the obligations expressed in the Additional Protocol could be fulfilled by adapting the relevant provisions of the UK Malicious Communications Act 1988; or second, that the 1989 Act be amended to prohibit the 'intentional publication, through a computer system, of material which advocates, promotes or incites violence (and in limited cases, discrimination)' against protected groups.¹⁴⁰ He does, however, recognise, as we do, that the protection offered by the Additional Protocol is limited, being as there are, 'safe havens to host and carry content deemed to be illegal by the Additional Protocol'.¹⁴¹

Ancillary requirements

While introducing legislation to criminalise hatred sends a very strong message to society that hate crime will not be tolerated, and ensures that the most serious of offenders are prosecuted and convicted, nonetheless we firmly and strongly believe that we cannot introduce this legislation in a vacuum.

We believe that to effectively combat hatred in society, public education and civil society initiatives should be introduced as policy measures. Not all hate incidents will be criminalised, yet as we have highlighted throughout this Report, non-crime incidents have significant repercussions for victims, communities and society. For this reason too we believe that there are a series of other requirements which must be introduced or developed in tandem with legislation to allow for hate speech and hate crime to be effectively dealt with in Ireland.¹⁴²

While it is not within the remit of this Report to discuss the full range of public and civil society initiatives which may serve to counter hate crime, we discuss some of those non-legislative ancillary measures which may bolster the effectiveness of the justice system's response to hate crime below.

Policing

Schweppe and Walsh observed in 2008 that while members of An Garda Síochána were reasonably well aware of the provisions of the 1989 Act, they are unaware of the levels of proof required to secure a conviction, believing that once a 1989 prosecution is not possible the hate motivation cannot be presented in court. Further, ordinary members are not aware of the definition of hate incidents used by the organisation, nor how to use it.¹⁴³ Writing in 2011, Taylor further observes that, from a community perspective, Gardaí are still not seen to respond seriously to reported racist incidents which has two main effects: first, minority ethnic communities feel that their experiences of racist incidents are not being offered appropriate seriousness by the Gardaí; and second, this has led to a perceived wider lack of confidence in the Gardaí – a concern that for comparable offences, minority ethnic suspects are generally treated more harshly, more likely to be charged and receive stiffer penalties.¹⁴⁴ Research conducted on anti-Muslim racism in Ireland has demonstrated that members of minority communities may be reluctant to report to members of An Garda Síochána on the

basis of previous interactions.¹⁴⁵ Informed by negative experiences, instead of reporting a crime to the Gardaí, participants took it upon themselves to manage their experience or enlist the aid of an NGO.¹⁴⁶

The above section foregrounds the related issues of clarity and consistency, and moreover, the role of training in improving Garda performance when interfacing with those who have experienced hate crime. In terms of clarity, international research demonstrates the importance of police officers being able to recognise hate offences and the diverse bases upon which persons may be targeted for such activity.¹⁶⁵ It is vital that members of An Garda Síochána have a clear understanding of what constitutes a hate offence, how it is defined and the various groupings protected by the legislation. This understanding, provided through effective training could offset the current uncertainty demonstrated by members of the service when engaging with victims of hate crime or hate incidents, and prosecuting hate offences. It is vital that effective and consistent policies and procedures are followed by members of the Gardaí when interfacing with members of minority communities and their concerns, especially if trust is to be built and hate crime in its multifarious forms is to be challenged.¹⁶⁶

Recording and reporting

If hate crime is to be addressed effectively, either through legislative or non-legislative means, accurate, comprehensive and timely data is essential. In an Irish context, the official recording of hate crime is fundamentally hampered by the lack of effective legislation, which impacts on the impetus of individual Gardaí to record hate motivations where these will not impact on prosecution or sentencing.¹⁴⁷ This may be one factor in the disparity between official figures on recorded racism in Ireland and those published by NGOs.¹⁴⁸ Perry asserts, across Europe, '...disparities in police training in the identification of hate crime, and the frequent resistance to recognize the phenomenon...'¹⁴⁹ also directly impact on the recording of hate crime. This in part can be overcome by the manner in which police have to record a hate crime/incident. Although not unproblematic, it is mandatory for police in Sweden, regardless of the crime, to indicate on their crime recording system whether or not the event had a hate motivation.¹⁵⁰ The model deployed to record racist incidents in the UK also places a requirement on officers to record 'all Reports of incidents, whether from victims, witnesses or third parties...crime related or not, [which] will result in the registration of an incident Report by the police'.¹⁵¹ The ability to record non-crime incidents is particularly important in terms of the data it can provide.

In Ireland, no such mandatory mechanism is in place in An Garda Síochána resulting in inconsistencies in the recording of hate crime. While An Garda Síochána can capture some hate incidents, it does so in the narrative of the report only and thus is unwieldy in terms of producing data in the form of rates of occurrence.¹⁵² Recently published research demonstrates a lack of awareness, and by implication, training, of how a hate crime/incident is to be recorded on the PULSE system. Indeed 'many [Gardaí] do not understand that it is the responsibility of the Gardaí to record the number of racist incidents that occur'.¹⁵³

Writing in 2010, Perry notes that '... the evidence suggests that few EU nations have succeeded in developing effective strategies for gathering the necessary data – indeed, some have not made a concerted effort to do so.'⁸⁵ Ireland fares poorly when compared to other EU Member States when it comes to being able to systematically identify, and record diverse forms of hate crime. Ireland is ranked among those having 'limited data...few incidents and a narrow range of bias motivations are recorded. The Netherlands, Sweden, Finland and the UK form the four States classed as having 'comprehensive data'. At a minimum, all of these States capture and publish data on hate crime under the categories of 'racism/xenophobia'; 'Anti-Semitism'; 'Sexual Orientation'; 'Religious Intolerance'; 'Islamophobia'; 'Disability'; and 'Gender Identity'.¹⁵⁵

There is dialectical relationship between recording and reporting, such that developments in one impact the other. Certainly, improved recording, where it contributes to more effective responses on the part of the state, will encourage reporting, as indeed may the heightened awareness which informs efforts to improve recording. Conversely, the belief that one's experience will not be taken seriously, recorded or acted upon discourages reporting.¹⁵⁶

'I called them immediately...the community Garda rang four days [later] and within the time they were supposed to come down to me. I spoke to a community Gard and she said to me, 'For God's sake do you not get on with anyone down there?'...That's what I was told... so that was in 2009 and the last time I let my children out to play....'¹⁵⁷

In some cases the act of reporting itself may be a source of (anticipated and actual) further victimisation where the victim fears the police because of negative experiences with the police force in question or other police forces in the past. In an Irish context, some victims of anti-Muslim racism have described prior encounters wherein individual members of the police showed the same prejudices which motivated the original offence.¹⁵⁸ More generally, research conducted by the European Union Agency for Fundamental Rights¹⁵⁹ found that almost 60 percent of Sub-Saharan Africans in Ireland had been subjected to police stop and search procedures in the preceding 12 months.

For victims of hate crime, the decision to report requires an act of faith – that reporting will prove worthwhile and that the experience of reporting itself will not exacerbate the harm already caused to them.

As well as the bureaucratic and legislative supports required for effective recording, training which instils an ethos of professionalism and sensitivity in encounters with members of marginalised groups is necessary. Policing practices which perpetuate criminal profiling on the basis of identity group membership, it is argued, are likely to undermine any achievements in this area.

Alongside legislative change, reporting and recording mechanisms should be adapted to reflect the new statutory position. The importance of recording hate incidents should be reflected in the new recording system, and the connection between hate incidents and hate crimes recognised.

Alternatives to retributive justice

Finally, it is worth noting Perry's assertion that, at least with regard to individual offenders, imprisonment and generally harsher sentences are unlikely to achieve reform.¹⁶⁰

*'While they may not be appropriate to all manner of offences, a discussion of the potential of education, mediation and restorative justice approaches is warranted.'*¹⁶⁰

The Law Commission of England and Wales observe that 'improved education and an end to offensive and discriminatory media representation' might well address the nature and scale of disability hate crime more effectively than criminal legislation.¹⁶²

It is important to remember that the criminal law is just a single tool that can be used to combat hate crime in society, and as the bluntest tool, should be used as a measure of last resort.

- ⁷⁰ Such as constitutional principles such as the principle of legality and the rule against retroactivity, and the general framework of the criminal law which requires an *actus reus* and *mens rea* for a criminal act.
- ⁷¹ Again, we use the term ‘hate’ and ‘hatred’ here to connote a wide range of motives. The 1989 Act uses the phrase ‘threatening, abusive or insulting words or behaviour’. Further, internationally, there are various forms of ‘hatred’ that are used in legislation. ODHHR use hate-related prejudice defined as preconceived *negative opinions, intolerance or hatred* directed at a particular group. Legislation in England and Wales uses *hostility*. The Scottish executive uses *malice or ill-will*, and ACPO uses *prejudice or hate*. (See John Garland and Neil Chakraborti ‘Divided by a Common concept: Assessing the implications of different conceptualizations of hate crime in the European Union’ (2012) 9(1) *European Journal of Criminology* 38.
- ⁷² *Ibid.*
- ⁷³ While the Canadian legislation only applies in the context of aggravated sentencing, it is worth noting how the ‘motivation’ requirement operates in practice at this stage.
- ⁷⁴ While, strictly speaking, this is a sentence enhancement statute, it is worth noting here, given the manner in which the legislation is framed, and the way that it has been interpreted by the courts.
- ⁷⁵ Michelle S. Lawrence and Simon N. Verdun-Jones, ‘Sentencing Hate: An Examination of the Application of s.718.2(a)(i) of the *Criminal Code* on the Sentencing of Hate-Motivated Offences’ (2011) 57 *Criminal Law Quarterly* 28.
- ⁷⁶ Michelle S. Lawrence and Simon N. Verdun Jones, ‘Sentencing Hate: An Examination of the Application of s.718.2(a)(i) of the *Criminal Code* on the Sentencing of Hate-Motivated Offences’ (2011) 57 *Criminal Law Quarterly* 28, 43.
- ⁷⁷ *R v Lelas* (1990) 58 CCC (3d) 568
- ⁷⁸ *R v Lelas* (1990) 58 CCC (3d) 568, 574 (emphasis added)
- ⁷⁹ *R v Wright* (2002) 273 WAC 371.
- ⁸⁰ *R v Wright* (2002) 273 WAC 371, para 10.
- ⁸¹ For a detailed analysis of the operation of the legislation, see Law Commission *Hate Crime: The Case for Extending the Existing Offences* (LC CP 213—2013).
- ⁸² David Gadd and Bill Dixon, *Losing the Race: Thinking Psychosocially about Racially Motivated Crime* (Karnac 2011) 86.
- ⁸³ [2002] EWHC 85; [2002] WL 45110.
- ⁸⁴ *Ibid.* [5].
- ⁸⁵ *Ibid.* [6].
- ⁸⁶ [2004] EWHC 1225; [2004] WL 1074457.
- ⁸⁷ *Ibid.* [3].
- ⁸⁸ *Ibid.* [7].
- ⁸⁹ *Ibid.* [16].
- ⁹⁰ [2010] EWCA Crim 1931; [2011] 1 Cr App R 14. The background to the case is somewhat unusual, though not directly relevant here: the judge in the case, from the outset, believed that the entire process was a waste of time, and that the case should never have been brought. Such remarks were not, however, made in the presence of the jury.
- ⁹¹ *Ibid.* [7].
- ⁹² *Ibid.* [10].
- ⁹³ *Ibid.* [16].
- ⁹⁴ *Ibid.* [17].
- ⁹⁵ *Ibid.* [22].
- ⁹⁶ *Ibid.* [26]-[27], referring to *DPP v M.*
- ⁹⁷ *Ibid.* [28].
- ⁹⁸ *Ibid.* [29].
- ⁹⁹ Jennifer Schweppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008) 166.
- ¹⁰⁰ Mark A Walters, ‘Conceptualising ‘Hostility’ for Hate Crime Law: Minding the ‘Minutae’ when Interpreting Section 28(1)(a) of the Crime and Disorder Act 1998’ (2013) *Oxford Journal of Legal Studies* (in press), 21.
- ¹⁰¹ *Ibid.* 77.
- ¹⁰² Law Commission *Hate Crime: The Case for Extending the Existing Offences A Consultation Paper* (LC-CP 213) 62. Importantly, the Law Commission advises that caution be exercised when referring to the data which is taken from the Crown Prosecution Service for two key reasons: first, that the definition of “hate crime” adopted by the CPS is wider than the scope of the offences as set out in the Crime and Disorder Act 1998; and second, that not all offences against the person and public order offences are basic offences listed in the 1998 Act. *Ibid.* 63.
- ¹⁰³ 02.%; 0.6%; 1.7%; 0.1% respectively. *Ibid.*
- ¹⁰⁴ 0.2%; 0.5%; 0.8%; 0.1% respectively. *Ibid.*
- ¹⁰⁵ Law Commission *Hate Crime: The Case for Extending the Existing Offences A Consultation Paper* (LC-CP 213) 76.
- ¹⁰⁶ The Canadian legislation is different in this regard, stating that the Court *should* rather than *must* treat the circumstances of the offence as an aggravating factor.
- ¹⁰⁷ “Membership” includes association with members of that group, Art 2(5).
- ¹⁰⁸ “Presumed” means presumed by the offender, Art 2(5).
- ¹⁰⁹ “Racial group” means means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person’s racial group refer to any racial group into which he falls. See Art 2(5) and Art 5, Race Relations (Northern Ireland) Order 1997 (SI 1997/869, NI 6).
- ¹¹⁰ “Religious group” means a group of persons defined by reference to a religious belief or lack of religious belief.
- ¹¹¹ “Sexual orientation group” means a group of persons defined by reference to sexual orientation. While transgender persons would not usually fall within this category, the Northern Ireland Criminal Justice Inspectorate considers hate crimes against transgender persons to fall within the ambit of the legislation. See, Criminal Justice Inspection Northern Ireland *Hate Crime: A follow-up inspection of hate crime by the criminal justice system in Northern Ireland* (CJINI 2010).
- ¹¹² Disability for the purposes of the legislation means any physical or mental impairment, Art 2(5).
- ¹¹³ Article 2, Criminal Justice (No 2) (Northern Ireland) Order 2004 (SI 2004/1991, NI 15)
- ¹¹⁴ The Order also makes provision for an increase in the maximum penalties available for certain offences. These offences are, inter alia: malicious wounding or grievous bodily harm, increased from 5 years to 7 years; assault occasioning actual bodily harm, increased from 5 years to 7 years; common assault increased from 12 months and/or £5,000 fine on summary conviction to maximum of 2 years and/or unlimited fine on conviction on indictment; criminal damage increased from 10 years maximum to 14 years maximum; putting in fear of violence increased from 5 years to 7 years.
- ¹¹⁵ Criminal Justice Inspection Northern Ireland *Hate Crime: A follow-up inspection of hate crime by the criminal justice system in Northern Ireland* (CJINI 2010) 7.
- ¹¹⁶ Criminal Justice Inspection Northern Ireland *Hate Crime: A follow-up inspection of hate crime by the criminal justice system in Northern Ireland* (CJINI 2010)
- ¹¹⁷ John Garland and Neil Chakraborti, ‘Divided by a Common Concept? Assessing the implications of different hate crime in the European Union’ (2012) 9(1) *European Journal of Criminology* 38, 45.
- ¹¹⁸ See, Law Commission *Hate Crime: The Case for Extending the Existing Offences* (LC CP 213—2013) 81.
- ¹¹⁹ Frederick M Lawrence, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press, 1999) 12.
- ¹²⁰ Frederick M Lawrence, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press, 1999) 12.
- ¹²¹ *Ibid.*

- 122 Ibid.
- 123 Note that the authors, in using the term race, do not regard it as a biological fact. Racialisation and racism are however manifest social facts.
- 124 Barbara Perry, *In the Name of Hate: Understanding Hate Crime* (Routledge, 2001). An example of such a protected class might include people living with HIV or the AIDS Virus who, in the 1980s and early 1990s may well have been seen as deserving of protection under the legislation, but are relatively less "othered" today.
- 125 Jon Garland, 'The Victimisation of Goths and the Boundaries of Hate Crime' in Neil Chakraborti (ed.), *Hate Crime: Concepts, Policy, Future Directions* (Willan 2010) 41.
- 126 Ibid 47.
- 127 Ibid 46.
- 128 See further, Elizabeth Pendo, 'Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act' (1994) 17 *Harvard Women's Law Journal* 157.
- 129 Neil Chakraborti, 'Crimes Against the "Other": Conceptual, Operational, and Empirical Challenges for Hate Studies' (2010) 8 *Journal of Hate Studies* 9
- 130 Ibid 18.
- 131 John Garland and Neil Chakraborti, 'Divided by a Common Concept? Assessing the implications of different hate crime in the European Union' (2012) 9(1) *European Journal of Criminology* 38.
- 132 Ibid 40.
- 133 See, for example, Barbara Perry, 'The Sociology of Hate: Theoretical Approaches' in Brian Levin (ed) *Hate Crimes Volume 1: Understanding and Defining Hate Crime* (Praeger 2009).
- 134 Emphasis added.
- 135 Office for Democratic Institutions and Human Rights, *Preventing and Responding to Hate Crimes: A Resource Guide for NGOs in the OSCE Region* (ODIHR 2009) Available at <http://www.osce.org/odhr/39821?download=true>.
- 136 The Employment Equality Acts 1998-2011 and Equal Status Acts 2000-2011.
- 137 For an in-depth examination of this approach, including its implementation in Canada and some ways of avoiding its narrow interpretation in that jurisdiction, see Jennifer Scheppe, 'Defining Characteristics and Politicising Victims: A Legal Perspective' (2012) 10(1) *Journal of Hate Studies* 173.
- 138 Protection from hate crime arising from association with, or perceived association with, members of an identified group, is an additional issue of concern which merits separate consideration.
- 139 Jennifer Scheppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008) 161.
- 140 Tom Daly, 'Reform of the Prohibition of Incitement to Hatred Act 1989 – Part II' (2007) 17(4) *ICJL* 15.
- 141 Tom Daly, 'Reform of the Prohibition of Incitement to Hatred Act 1989 – Part II' (2007) 17(4) *ICJL* 15. He further argues that such legislative reform should not render Internet Service Providers criminally liable for the hosting of such material without the required intent, nor require that they monitor conduct to avoid criminal liability. Ibid.
- 142 See also, Jennifer Scheppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008) 181-183.
- 143 Jennifer Scheppe and Dermot Walsh, *Combating Racism and Xenophobia through the Criminal Law* (NCCRI 2008) 1812.
- 144 Seamus Taylor, *Responding to Racist Incidents and Crime: An Issues Paper for the Equality Authority* (Equality Authority 2011), para 5.3.8
- 145 James Carr and Amanda Haynes, 'A Clash of Racializations: The Policing of Race and of Anti-Muslim Racism in Ireland' *Critical Sociology*, published online 5 July 2013 Available at <http://crs.sagepub.com/content/early/2013/07/05/0896920513492805.abstract>
- 146 Ibid.
- 147 Bryan Fanning, Brian Killoran, Saorlaith Ni Bhroin and Geoff McEvoy, *Taking Racism Seriously: Migrants' Experiences of Violence, Harassment and Anti-Social Behaviour in the Dublin Area* (Immigrant Council of Ireland 2010) 6 Available at <http://www.immigrantcouncil.ie/research-publications/2010/499-taking-racism-seriously-migrants-experiences-of-violence-harassment-and-anti-social-behaviour-in-the-dublin-area>
- 148 Helena Clarke, *Recording Racism in Ireland* (The Integration Centre 2013).
- 149 Barbara Perry, 'Counting - and Countering – Hate Crime in Europe' (2010) 18 *Criminal Law and Criminal Justice* 349, 352.
- 150 Brå, *Hate Crimes 2010: Statistics relating to offences Reported to the police with an identified hate crime motive* (Brå 2011) Available at: <http://www.red-network.eu/resources/toolip/doc/2012/01/14/hate-crimes-in-sweden-2010.pdf>
- 151 National Policing Improvement Agency *The National Standard for Incident Recording* (NPIA 2011) Available at <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/crime-research/countnsir11?view=Binary>
- 152 Helena Clarke, *Recording Racism in Ireland* (The Integration Centre 2013).
- 153 Ibid
- 154 Barbara Perry, 'Counting - and Countering – Hate Crime in Europe' (2010) 18 *Criminal Law and Criminal Justice* 349, 350.
- 155 European Union Agency for Fundamental Rights *Making Hate Crime Visible in the European Union: Acknowledging Victim's Rights* (FRA 2012) Available at http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf
- 156 Bryan Fanning, Brian Killoran, Saorlaith Ni Bhroin and Geoff McEvoy, *Taking Racism Seriously: Migrants' Experiences of Violence, Harassment and Anti-Social Behaviour in the Dublin Area* (Immigrant Council of Ireland 2010) Available at <http://www.immigrantcouncil.ie/research-publications/2010/499-taking-racism-seriously-migrants-experiences-of-violence-harassment-and-anti-social-behaviour-in-the-dublin-area>
- 157 Alia, research participant interviewed in 2012, cited in James Carr and Amanda Haynes, 'A Clash of Racializations: The Policing of Race and of Anti-Muslim Racism in Ireland' *Critical Sociology*, published online 5 July 2013 Available at <http://crs.sagepub.com/content/early/2013/07/05/0896920513492805.abstract>
- 158 James Carr and Amanda Haynes, 'A Clash of Racializations: The Policing of Race and of Anti-Muslim Racism in Ireland' *Critical Sociology*, published online 5 July 2013 Available at <http://crs.sagepub.com/content/early/2013/07/05/0896920513492805.abstract>
- 159 European Union Agency for Fundamental Rights *EU-MIDIS: European Union Minorities and Discrimination Survey – Main Results Report* (FRA 2009) 76. Available at http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2009/pub-eu-midis-main-results_en.htm
- 160 Barbara Perry, 'Counting - and Countering – Hate Crime in Europe' (2010) 18 *Criminal Law and Criminal Justice* 349, 362-364.
- 161 See further, Walters, Mark (2014) Restorative approaches to working with hate crime offenders. In: Responding to hate crime: the case for connecting policy and research. The Policy Press, Bristol, pp. 247-261. (In Press); Mark Walters and Carolyn Hoyle 'Exploring the everyday world of hate victimization through community mediation' (2012) 18(1) *International Review of Victimology* 7; Mark Walters and Carolyn Hoyle 'Healing harms and engendering tolerance: the promise of restorative justice for hate crime' in Neil Chakraborti (ed) *Hate Crime: Concepts, policy, future directions* (Willan Publishing 2010).
- 162 Law Commission, *Hate Crime: The Case for Extending the Existing Offences – A Consultation Paper* (CP213 – 2013) 76.
- 163 Laura Peutere, *Hate Crimes Reported to the Police in Finland, 2008: Reports of the Police College of Finland 85/2009* (Reports of the Police College of Finland 2009) Available at: [http://www.poliisiammatikorkeakoulu.fi/poliisi/poliisiooppilaitos/home.nsf/files/raportti_85_en/\\$file/raportti_85_en.pdf](http://www.poliisiammatikorkeakoulu.fi/poliisi/poliisiooppilaitos/home.nsf/files/raportti_85_en/$file/raportti_85_en.pdf)
- 164 Dermot P.J. Walsh, *Human Rights and Policing in Ireland: Law, policy and practice* (Clarus 2008)

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS



Introduction

This Report was initiated because of the authors' conviction that the time is ripe for the introduction of a new statute which brings our criminal code in line with best international practice in respect of hate crime. It is our conviction that consultation regarding the formulation of this Act should be widespread. In particular, we have sought to highlight and include the perspectives of NGOs who currently, and in the absence of adequate legislative protection, constitute the front line against hate incidents.

The core aim of this Report is to contribute to progressing the discussion and to provide an impetus for legislative change. As such, we have presented the reader with a range of legislative options drawing upon international experiences as well as analysis of the Irish legal context. We reiterate the importance of research and consultation to ensuring that legislative change is informed by actual community needs, rather than perceived needs. Having benefitted from NGO perspectives on hate crime in Ireland, it behoves us to contribute to the debate we propose by presenting our conclusions as to the most appropriate direction for legislative change.

Proposal for reform

We propose that legislation be introduced as a matter of urgency. The Act should create four new hostility based offences: assault aggravated by hostility; harassment aggravated by hostility; criminal damage aggravated by hostility; and public order aggravated by hostility.¹⁶⁴ The 'aggravated' element of the offences should be defined as occurring where the offence is believed by the trier of fact to be wholly or partly motivated by hostility, prejudice, bias or hatred towards the victim on the basis of their personal characteristics or their perceived characteristics' at the end of this sentence. Importantly, these offences will be limited to those crimes which are *motivated* by hostility. In the context of sexual offences against disabled individuals, the Criminal Law (Sexual Offences) Act 1993 should be appropriately amended.

Alongside these offences, a sentence enhancement provision should be introduced, whereby the Act should provide that where the court believes that any offence was wholly or partly motivated by hostility, prejudice bias or hatred, or where hostility, prejudice, bias or hatred were *demonstrated* during the course of the offence, it shall treat that as an aggravating factor in sentencing. For this element, the demonstrated hostility element is included. Additionally, legislation should provide that where a prosecution is taken which includes a prosecution under section 2 of the 1989 Act, the sentence imposed under the 1989 Act must be served consecutively to the sentence imposed for the primary offence.

The protected categories, or 'personal characteristics' should be defined in the legislation as 'Gender, Civil status, Family status, Age, Race, Religion, Disability, Sexual orientation, Membership of the Traveller Community or *any other similar factor*.'

The Act should also include amendments to the 1989 Act as set out in this Report including:

- (1) Introducing an offence of subjecting another person to threatening, abusive or insulting words about his or her personal characteristics or perceived characteristics, with the result that the person feels threatened or fearful for his safety or for that of his companions or for his property;
- (2) Introducing an offence of incitement to discriminate on the ground of an individual's personal characteristics or perceived characteristics;
- (3) Introducing an offence of active participation in (as distinct from passive membership of) an organisation which promotes or incites discrimination on the ground of her personal characteristics.
- (4) Ireland should sign and ratify the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.
- (5) The definition of 'hatred' in the Act should be amended to include those characteristics or perceived characteristics protected under Equality legislation, along with the 'other similar factor' category.'

We conclude finally, by looking to the future and our hope that this Report will contribute to the gathering impetus for better protection of the dignity, security and safety of all of those vulnerable to and victimized by hate crime in Ireland:

*'To the extent that difference is socially constructed, it can also be reconstructed. In other words, as a society, we can redefine the ways in which difference 'matters'. We can strive for a just and democratic society in which the full spectrum of diversity addressed here is re-evaluated in a positive and celebratory light.'*¹⁶³

¹⁶³ Barbara Perry, "There's just places ya' don't wanna go": the segregating impact of hate crime against Native Americans' (2009) 12(4) *Contemporary Justice Review* 401, 414.

¹⁶⁴ These offences should mirror the existing principal offences as exist in current legislation.



