

## **Out of the Shadows: Legislating for Hate Crime in Ireland**

The Irish State has yet to criminalise the hate element of crime, citing as reasons for its inaction:

- The sufficiency of a hate speech law which prohibits incitement to hatred;
- The adequacy of standard criminal offences to address hate crime;
- The adequacy of judicial discretion to treat any hate factor as an aggravating factor;
- The conviction, in relation to racist crime, that judges always aggravate a sentence where a hate element is proven.

Amanda Haynes and Jennifer Schweppe, co-Directors of the Hate and Hostility Research Group at the University of Limerick, with researcher James Carr, have just completed a nine month project to evaluate the treatment of the hate element of crimes under existing Irish law and the suitability of various options for legislative reform. The research was commissioned by the Irish Council for Civil Liberties and supported by the NGO Working Group on Hate Crime.

The purpose of this briefing document is to offer a brief outline of the research findings and the legislative proposals generated as a result of the research conducted by the Hate and Hostility Research Group at the University of Limerick.

### **Data Sources**

The findings of this Report are grounded in desk based research, in-depth qualitative interviews and a survey. The former included a comparative analysis of the form and operation of legislation in a number of common law jurisdictions, as well as the analysis of secondary data consisting of reports of hate crime received by Civil Society Organisations. This was followed by 77 qualitative interviews with 12 victims of hate crime, representatives of 22 Civil Society Organisations (CSOs), 22 criminal justice practitioners, 11 members of An Garda Síochána, 4 probation offices and a number of other relevant experts. A postal survey was completed by 36 barristers. Legislative proposals were critiqued in draft form by an expert workshop of leading international researchers in the area of hate crime hosted at the University of Sussex, and technical drafting advice was provided by a former Irish parliamentary draftsman.

### **Experiences of Victims: Direct and Indirect Impacts of Hate Crime**

Our initial task in this research was to evidence the need for hate crime legislation by establishing first, whether hate crimes occur in an Irish context, and second, whether

the international literature on the 'harms of hate' is reflected in the experiences of victims in Ireland.

In terms of the manifestation of the phenomenon, official data from the Central Statistics Office for 2013 show that there were 113 hate crimes recorded<sup>1</sup>: 94 of which were manifestations of racism and xenophobia; 2 of which were anti-Semitic; and 17 of which were homophobic. It is widely accepted, including by Garda interviewees, that these figures are in no way representative of the true levels of criminality in this context. For example, if we look at civil society reporting mechanisms, and even excluding incitement to hatred offences, the European Network Against Racism Ireland recorded 137 racist or religiously aggravated crimes in 2014 (including 40 assaults); the Gay and Lesbian Equality Network recorded a further 19 homophobic/transphobic crimes for a seven month period from December 2014 to June 2015 (including 11 assaults); and the Transgender Equality Network Ireland recorded an additional 22 transphobic crimes in 2014 (including 6 assaults, 3 sexual assaults and 1 aggravated sexual assault).

We spoke with 12 victims of hate crime across a range of identity groups, including disability (physical; intellectual/developmental); transgender; gender fluid; gay; lesbian; ethnic minorities including Traveller ethnicity; religious minorities; racialised minorities; and membership of an alternative subculture. They spoke about being assaulted, their property being damaged and being harassed: *"... the words knacker, Pavee and get out. ... Painted on my windows ... like I'd just rented the house and I had difficulties even renting the house because of being known ... I would be very open about my ethnicity and my identity, so I'd never hide it. So it's difficult enough to get the house and then to get the house and have graffiti smeared all over it. ... I started crying. I went back into the house. Closed the door and stood in the hall for a second and thought - ... I hope the child doesn't see this. All these things. Your reaction is about the child, the landlord all these different things and so you stand there for two or three minutes processing it and then you just have to get to work and scrubbing it off."*

The victims spoke of hostility being a fact of their everyday life: *"I have had so many of those incidents but you just learn to brush them off, I mean if I could count the number of times it would be ridiculous. Like, it is actually exhausting."* Many spoke of the mental health impacts of being a victim of hate crime. One stated: *"I just feel trapped. I feel like someone has an iron bar over me and is holding it down over me and that's what oppression feels like. It's horrible. It's absolutely deeply unempowering."* Another explained that they experienced hate crime as an attack on their inherent value as a human being: *"... theft you are going for the value of the object but this you are going for the value of the person and I think that makes a difference..."*

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<sup>1</sup> In 2014 this figure drops to 53 for the year.

We found that victims take responsibility for avoiding manifestations of hostility, including through self-checking and behaviour modification; limiting their use of public or commercial space; and in four out of twelve cases, moving out of their home. A family member of a victim with an intellectual/developmental disability who was assaulted by people from the local community, said of their home: *"I hate the place, I just want to leave and I want to get [family member] safe and away from there."*

A further characteristic of hate crime is what has been referred to as the 'ripple effect': that a hate crime committed against one member of an identity group reverberates through the community, impacting on it as a whole. Again, this international experience is reflected in Ireland, with CSOs across all identity groups speaking with us about the impact of hate crime on identity communities, and the manner in which such crimes 'send a message' to the community. One representative stated: *"... the absolute prevalence of violence and harassment against this community ... sends a message to an individual who experiences that, that they are somehow less equal, but also to a community more broadly that people expect this type of thing, you know, people expect to be harassed or experience some type of violence and in fact when you say you have, it's treated as something very normal."*

We hold that in a society which expounds principles of inclusivity and diversity, which was founded on the idea that all people should be cherished equally, and which has recently celebrated the welcoming and embracing of difference, these experiences are simply unacceptable. It is not the responsibility of victims to avoid being targets of hate crime; it is the responsibility of the legislature to send a clear message to society that this behaviour is not tolerated. It is then the responsibility of the criminal justice system to ensure that this message is operative and functional. By adopting our legislative proposals we are providing the tools that society needs to combat criminal expressions of hatred, hostility, prejudice, bias and contempt.

## **Evidencing the need for legislation**

While the position of the Irish state is to consistently argue that hate crime is currently being adequately addressed by the criminal justice system, we hold that this is not the case. Hate crime lives in the shadows of Irish criminal justice, and is systematically disappeared from the criminal justice process. It is important to note that no one organisation or policy is at fault in this process. It is a system-wide failure to recognise the harms of hate: this systematic blindness results in a 'disappearing' of the hate element of many crimes in the criminal justice process and a failure to provide victims with appropriate protection under the law. This occurs for a number of reasons:

- Although individual members of An Garda Síochána work to compensate for the legislative vacuum as regards hate crime, they are hampered in their efforts by a lack of dedicated tools, structures and supports;

- The term 'hate crime' is not part of the language of An Garda Síochána;
- Few members of An Garda Síochána have any training in hate crime, its recording, investigation or prosecution;
- Members of An Garda Síochána have little direction on the treatment of racist incidents, and no access to policy or directives relating to homophobic, transphobic or disablist hate crime among other manifestations;
- The hate element of a crime is not consistently acknowledged or recorded by An Garda Síochána (and in some cases, cannot be formally flagged);
- Consequently, and given that it is not core to many of the standard charges which are currently used to address victims' experiences, the hate element of a crime is not consistently investigated by An Garda Síochána;
- While individual members of An Garda Síochána make great efforts to use existing offences to draw attention to the hate element of a crime, none of the Gardaí we interviewed regarded existing offences as adequate to that task;
- Where the hate element of a crime is investigated, it is not always raised in court;
- In some cases, prosecutors feel precluded from raising the hate element of a crime in court;
- The solicitors and barristers we spoke to, consequently, had limited experience in either prosecuting or defending a hate crime;
- Where the hate element is raised in court, it is not always addressed.

Despite this systematic blindness, Garda and legal professional interviewees were broadly supportive of our proposals, and the vast majority agreed that legislation should be introduced to rectify the current lacuna. For CSOs in particular, the recognition of not only the fact that a crime occurred, but that this crime was bias-motivated was important: *"You need to reflect the crime for what it is. ... So for a victim of a hate crime sometimes the acknowledgment of what you've gone through is as important as the person being prosecuted ..."*

## Legislative Proposals

The Irish state has consistently stated to international organisations that standard criminal offences are sufficient to address the hate element of a crime; and that even if this was not the case, that introducing such offences would have broader ramifications for the criminal law. In designing our proposals, we have developed legislation which is both fit for practice in an Irish context and draws on international best practice.

The name of the Bill will be the *Criminal Law (Hate Crime) Amendment Bill 2015*.

## Naming Hate

While the term 'hate crime' is used in the name of the Bill, the offences shall be named using the term bias and the term bias shall be used throughout the legislation. International experts were wholly in favour of the term bias. Legal utility was our

utmost consideration in this decision. The term bias will be defined in the legislation as including hate, hostility, bias, prejudice and contempt.

### **Identity Groups Protected**

For the purpose of these dedicated offences the protected grounds will be drawn from the Victims' Directive. This strategy provides for a list of protected grounds which is more extensive than the nine grounds employed in equality legislation, is more closely aligned with commonly targeted groups than the nine grounds, is current, is endorsed by the European Union and is drawn from a directive which specifically references the rights of victims of hate crime.

The Victims' Directive list consists of race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, gender, gender expression, gender identity, sexual orientation, residence status or health.

We problematize the term 'race' and advocate that the national transposition of the Victims' Directive should consider excluding the term in favour of racialized identities or omit it entirely. Should this occur, we will reflect these changes in this legislation. We make one addition to the Victims' Directive list; we are required to specifically name the Roma and Traveller communities given the persistent refusal of the Irish State to recognise the Traveller community as an ethnic group. In the manner of the European Commission, the terms Roma is understood as inclusive of Roma, Sinti, Kale, Gypsies, Romanichels, Boyash, Ashkali, Yenish, Dom, Lom and Travellers.

Offenders can be charged with a dedicated offence where they are motivated by or demonstrate bias against a victim based on any of these grounds. It is not necessary that the victim identify with the identity against which the offender evidenced bias, only that the offender perceived them to be a member of that identity group. For example, an offender may be charged with a bias aggravated assault where they attacked a Sikh because they perceived him to be Muslim.

The dedicated offences will also be applicable where a victim is assaulted because they are in the company of, or otherwise associated with, a person against whom the offender evidences a bias.

### **Dedicated Offences**

New dedicated offences form the core of our legislative proposals. The decision to create new offences was informed by our research with barristers, solicitors and, in particular, members of An Garda Síochána, as well as by the experiences of other common law jurisdictions. We conclude that new offences have the greatest potential to address hate crime, because they provide for a system-wide response to the criminalisation of the hate element of crimes in a manner which enhanced sentencing

alone does not. The creation of new offences will create public and professional awareness of the criminalisation of the hate element of crime. They will require changes to the recording of crime, including permitting the recording of hate crime offences. They will permit charges to be brought which name the hate element of the crime and reflect its character. They will require that the hate element of crime is addressed in court. They will permit the identification of hate crime offenders, including repeat offenders, for the purposes of sentencing, Garda vetting and educative or restorative interventions. None of these outcomes are likely in the absence of dedicated offences.

The offences we propose to create have been selected because they represent the most common manifestations of hate crime across all identity categories, or they represent manifestations of hate crime which are especially prevalent among particular commonly targeted groups. These assessments are based upon police-recorded hate crime data in other jurisdictions, hate crime data recorded by Civil Society Organisations in Ireland, interviews with members of An Garda Síochána and the experiences of victims to whom we have spoken directly in the course of this research:

#### *Offences Against the Person*

- Bias aggravated murder
- Bias aggravated assault
- Bias aggravated assault causing harm
- Bias aggravated assault causing serious harm
- Bias aggravated harassment

#### *Property Offences*

- Bias aggravated theft
- Bias aggravated making gain or causing loss by deception
- Bias motivated damaging property
- Damaging property with a demonstration of bias
- Bias motivated threat to damage property
- Threat to damage property involving a demonstration of bias

#### *Sexual Offences*

- Bias aggravated rape
- Bias aggravated sexual assault
- Aggravated sexual assault aggravated by bias
- Bias aggravated 'rape under section 4'

#### *Public Order Offences*

- Bias motivated disorderly conduct in a public place
- Disorderly conduct in a public place with a demonstration of bias
- Bias motivated threatening abusive or insulting behaviour in a public place

- Threatening abusive or insulting behaviour in a public place with a demonstration of bias
- Bias motivated violent disorder
- Violent disorder with a demonstration of bias
- Bias motivated affray
- Affray with a demonstration of bias
- Bias motivated blackmail, extortion and demanding money with menaces
- Blackmail, extortion and demanding money with menaces with a demonstration of bias

Those offences which are bias motivated will require that the prosecution prove that the offender was wholly or partially motivated by bias when they targeted their victim. Merely demonstrating bias is not sufficient for the purposes of the majority of the offences. This requirement makes it more difficult for an offender to be convicted of a bias motivated offence than in England and Wales for example, where the demonstration of hate or hostility toward the victim will elevate an ordinary crime to a racist or religiously aggravated hate crime. However, the majority of legal professionals and members of An Garda Síochána to whom we spoke felt that they could prove motivation if this can be inferred from the circumstances of the crime, e.g. what was said, before during and afterwards, as in other jurisdictions. The prosecution would not have to prove that the offender was wholly motivated by bias, only that they were at least partially motivated by bias. This is particularly relevant where an offender's biases regarding a victim's identity leads them to target that person on the presumption that they are an 'easy target', for example.

Some of the offences we propose to create permit the prosecuting authority to choose whether to establish that the offender was wholly or partially motivated by bias or whether to seek to prove only that they demonstrated bias in the course of the offence. In most instances, it is likely that prosecutors will opt to prove demonstration only as this is less complicated than proving motivation. We have provided the option of proving demonstration only where speech or text (e.g. graffiti), the means by which bias is most commonly demonstrated, is usually the core of the offence.

We propose that the penalties associated with these dedicated offences will be the same as those associated with equivalent standard offences. We believe that the existing penalties provide sufficient room for the handing down of harsher penalties where this is appropriate.

### **Enhanced Sentencing**

Using enhanced sentencing provisions, we propose to encourage judges to reflect upon the hate element of a standard crime at the point of sentencing. It is not feasible within the Irish criminal justice system to require judges to hand down a harsher penalty where a hate element is present, but this provision will encourage them to at least give

consideration as to whether the presence of a hate element might merit a harsher penalty.

Enhanced sentencing does not offer any of the advantages of dedicated offences listed above. However, this provision provides a safety net for victims who experience hate crimes for which we have not created dedicated offences. During the course of a standard prosecution, where the hate element of the crime is established, (and the creation of dedicated offences should create a culture in which this becomes normalised over time), the judge will be required to consider whether a harsher penalty than normal should be imposed where the offender is convicted of the standard offence.

It is unlikely that we will be able to track either the application of enhanced sentences or offenders whose sentences are enhanced in this fashion, but this provision does provide an opportunity for judges to recognise the harms of hate in cases where no dedicated hate crime offence is applicable.

### **Next steps**

The Report accompanying the legislative proposals is the first phase in the outputs of this research project. Later outputs will examine issues including restorative justice options and international experiences.